



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J1982/2013

In the matter between:

NUMSA obo MEMBERS

Applicant

And

MURRAY AND ROBERTS PROJECTS

First Respondent

MEDUPI FABRICATION (PTY) LTD

Second Respondent

Heard: 16 May 2014

Delivered: 23 May 2014

RULING - PRELIMINARY POINTS

TLHOTLHALEMAJE, AJ

INTRODUCTION AND BACKGROUND:

- [1] The main application as launched by the Applicants in this matter on 5 September 2013 pertained to the provisions of section 189A (13) of the Labour Relations Act ("The LRA"). That application was heard by the Honourable Van Niekerk J on 10 October 2013. An order was made on 21 November 2013 in the following terms:

- 1) 'The application in terms of s189A (13) is referred to the trial roll in terms of Rule 7(7) (b) for hearing of oral evidence in relation to the disputes of fact on the papers, and in particular the question whether the applicants' members had completed the task/job for which they were engaged.
- 2) The application in terms of s189A (13) and the referral to oral evidence is postponed *sine die*.
- 3) The Registrar is directed to enrol the application in terms of s189A (13) for hearing simultaneously with any action that the applicant may institute in relation to the substantive fairness of the termination of employment of its members. Should the applicant not institute action in this Court in relation to the substantive fairness of the dismissals, the applicant may enrol the application in terms of s189A (13) on the trial roll as contemplated by paragraph 1 above.
- 4) The costs of the s189A (13) are reserved.'

[2] Subsequent to that order, the Respondents had raised several preliminary points which the parties had agreed needed to be disposed of before the trial commenced on 26 May 2014. By way of background, the second Respondent has terminated the employment contract of a number of NUMSA members in accordance with what is referred to as 'demobilisation'. This term derives from the parties' collective agreement known as the 'Project Labour Agreement' ('The PLA'). NUMSA's contention was that the termination of these contracts was based on the Respondents' operational requirements, and that to this end, the provisions of section 189 and 189A of the LRA found application. NUMSA further held the view that the Respondents did not comply with these provisions, and it was therefor entitled to an order under the provisions of section 189A (13) of the LRA. NUMSA in its application, also disputed the fact that the tasks for which its members were employed had been completed at the time the terminations were effected. The Respondents' view on the other hand is that it was entitled to terminate the contracts by following the

provisions of the PLA, and that the provisions of sections 189 and 189A of the LRA found no application.

THE PRELIMINARY POINTS:

Are the preliminary issues res judicata?

[3] The Applicants' contention is that the preliminary issues which the Respondents seek to raise are *res judicata* as the application before Van Niekerk J was considered on the merits, and that the principal factual issues in dispute on the merits were referred to oral evidence. Seven preliminary points were raised by the Respondents, viz;

- (a) The jurisdiction of this court. In this regard the Respondents' contention was the PLA and a collective agreement of 16 August 2013 operated to exclude jurisdiction of this Court. It was contended that both agreements contemplated that disputes in relation to dismissals should be resolved by way of arbitration procedures provided in these agreements.
- (b) NUMSA was barred from bringing this application as it had failed to do so within the prescribed time limits under section 189A (17) of the LRA. Despite this issue having been decided by Van Niekerk J in his judgment, the Respondents' view was that it should be revisited as Van Niekerk J's approach was incorrect.
- (c) Mis-joinder of the two Respondents.
- (d) The Non-joinder of other parties to the PLA as the main application is concerned with the application and interpretation of the PLA.
- (e) Waiver, in that NUMSA, having referred a dispute to the CCMA on 2 July 2013, had subsequently agreed to conciliation in terms of section 150 of the LRA.

(f) Applicants not properly cited. In this regard, it was contended that the list of members was not attached to the Applicants' Notice of Motion.

(g) A supplementary affidavit which the Applicants sought to introduce, and to which the Respondents were opposed.

[4] For a plea of *res judicata* to succeed, the requirements to be met were summarised in *Patterson v Minister of Safety and Security and Another*¹ as follows:

- (a) there has already been a prior judgment;
- (b) in which the parties were the same; and
- (c) the same point was in issue;²
- (d) The prior judgment must have been final or constitute a decision which has a final effect between the parties based on the merits of the point in issue.³
- (e) No issue can be raised whether the prior judgment was correct or not. Every judgment is presumed correct and can only be challenged on appeal.⁴

[5] A determination as to whether the plea of *res judicata* on the preliminary points the Respondents seek to raise needs a consideration of the issues that were before Van Niekerk J and those that he had disposed of, if any in his judgment.

[6] The sole preliminary point that Van Niekerk J dealt with in his judgment pertained to the alleged lateness of the application. For the sake of completeness, it is apposite to restate in full what the learned Judge had to say in this regard.

“Section 189A (17) provides that an application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to

¹ (4673/2005) [2013] ZAWCHC 73 (8 May 2013)

² see *Jacobson v Havinga t/a Havingas* 2001 (2) SA 177 (TPD) at 179E-F

³ see *Rail Commuters' Action Group and Others v Transnet Ltd and Others* 2006 (6) SA 68 (CPD) at 74F-H

⁴ see *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (AD) at 564C-E

terminate the employee's services or, if notice is not given, the day on which the employee is dismissed'. The letter on which MRP relies as comprising notice to the union of the demobilisation refers to the termination of the contracts of 'some of our employees who are members of NUMSA' during July 2013. The trigger in s189A (17) is the issuing of notice of intention to terminate employment, i.e. the giving contractual notice, or, in the absence of notice, the date of dismissal. The terms of the letter dated 24 June 2013 does not constitute notice to terminate an employee's services; it is no more than a notice to the effect that the employment of a number of as yet unidentified employees would be terminated at some future date. It was only on 1 September 2013 that individual employees were notified that their employment had been terminated, and that their last day at work would be 2 September 2012. Given that the present application was filed on 5 September 2013, in my view, the application was served within the time limit contemplated by section 189A (17)⁵ (My emphasis)

[7] Having stated the above, the learned Judge had then proceeded to deal with the material facts in dispute, that ended with a conclusion for referral for oral evidence. The Respondent in contending that the preliminary points were not *res judicata* had submitted that Van Niekerk J did not deal with the merits solely. It was nevertheless conceded that the learned Judge had ruled on one of the preliminary points, and in particular, the non-compliance with the time bar in section 189 A (17). In the light of this concession, I fail to understand the persistence that this Court should revisit the issue surrounding the time limits provided in section 189A (17).

[8] If Judge Van Niekerk had not issued a ruling on the preliminary issue pertaining to the time limits, there would have been no reason on his part to have continued to deal with the other aspects of the application in that he would have had no jurisdiction to do so, as there would have been no proper application before him. The issue pertaining to the time limits as raised before Van Niekerk J pertained to whether there was a need for the Applicants to file an application for condonation, and to the extent that he had found that there was no need for such an application, this disposed of that issue. Once a court

⁵ Para 3 of the judgment

establishes that an application is properly before it, it therefor assumes jurisdiction over the dispute, i.e. the subject matter of the application. That issue in my view cannot be resuscitated in the same proceedings unless a proper application for leave to appeal is launched in that regard. A ruling as to the jurisdiction of the Court is final unless attacked through appeal proceedings. To this end, the issue in regards to the time limits is *res judicata*, and this conclusion disposes of the second preliminary issue raised by the Respondents.

- [9] As to whether the judgment of Van Niekerk J disposed of the merits of the application to exclude the other preliminary issues raised is another matter altogether. What is clear from the judgment is that all the factual issues in dispute on the merits of the case were referred to oral evidence. In regards to the first preliminary point raised as to whether the jurisdiction of the Court is ousted by the provisions of the PLA, Van Niekerk J stated the following:

“In my view, for present purposes, little purpose would be served in determining whether s189A has been ousted, or in making any of the orders contemplated by s189A (13). The prior and primary issue at stake in these proceedings relates more closely to what has sometimes been referred to as ‘the need to retrench, i.e. whether the jobs/tasks that are subject of the LCDs signed by the union members have in fact been completed. Once this question is answered, and only if it is found that the jobs/tasks remain uncompleted, can there be any enquiry into the application of s189 and what might constitute fair procedure for the purposes of that section”⁶

- [10] From the above, it is apparent that Van Niekerk J declined to make any determination as to whether section 189A, upon which this application was predicated, was applicable. In his view, the issue could not be determined without the factual merits of the merits being determined. He had therefor not made any findings on the jurisdiction of the court insofar as the issue of the proper forum is concerned.

- [11] The Respondents’ main contention was that the dispute should be referred for arbitration with the recognition of an imperative to respect and enforce

⁶ At para 16

arbitration agreement⁷. In regards to the jurisdiction of the court, the starting point is the provisions of section 157 (1) of the LRA which provides:

“Subject to the Constitution and section 173, except where this Act provides otherwise, the Labour Court has exclusive jurisdiction (My emphasis) in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court”.

[12] It was not in dispute that jurisdiction is determined on the basis of the pleadings, and that the applicant’s pleadings are determinative where the jurisdiction of the court is challenged⁸. In interpreting *Gcaba*, Wallis AJA (as he then was) in *South African Maritime Safety Authority v McKenzie*⁹ stated the following:

“Once more, as in other cases that have come before this court, the plea, so far as it purports to raise a jurisdictional challenge, is misdirected. As the Constitutional Court has reiterated in *Gcaba v Minister of Safety & Security & Others*, the question in such a case is whether the court has jurisdiction over the pleaded claim and not whether it has jurisdiction over some other claim that has not been pleaded, but could possibly arise from the same facts. In this case the particulars of claim could not have made it clearer that Mr McKenzie’s claim is for damages for breach of contract.”¹⁰

[13] From the above authorities, it is apparent that whether the applicant is entitled to the relief it seeks, is a different question. Thus what needs to be considered is whether based on the applicant’s pleadings the court is enjoined to entertain the matter. In this case, the Applicants application is brought in terms of section 189A (13) of the LRA which provides;

“If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order-

- (a) Compelling the employer to comply with a fair procedure;
- (b) Interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;

⁷ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) at para 219

⁸ *Gcaba v Minister of Safety and Security and others* 2010 (1) SA 238 (CC)

⁹ 2010 (3)15 SA 601 (SCA)

¹⁰ At para 7

- (c) Directing the employer to reinstate an employee until it has complied with a fair procedure;
- (d) Make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.”

[14] NUMSA’s case has always been that the termination of the contracts of employment of its members was for operational requirements, and that sections 189 and 189A of the LRA should apply. The Respondents’ contention in the alternative as indicated in paragraph 6 of the heads of argument is that there has been substantial compliance with sections 189 and 189A of the LRA. To the extent that NUMSA has stated its case to fall within the purview of the provisions of section 189 and 189A, and further to the extent that this court has exclusive jurisdiction of matters under section 189A (13), it cannot be correct that the provisions of the PLA or the agreement of 16 August 2013 oust the jurisdiction of this court. Furthermore, the provisions of section 157(5)¹¹ cannot find application to the extent that section 157 (1) makes reference to ‘*exclusive jurisdiction*’.

[15] As I understood the arguments, the process of identifying LDC’s for termination is referred to in the PLA. To the extent that the provisions of section 189 A (13) refer to ‘non-compliance with a fair procedure’, and further to the extent that NUMSA is of the view that a fair procedures has not been complied with, it is indeed entitled to approach the court in terms of that provision. As to whether NUMSA’s case in terms of the provisions of section 189A (13) is sustainable is a matter which Van Niekerk J had determined should be referred for oral evidence.

Misjoinder and joinder:

[16] The Respondents contention in this regard was that the relief that was claimed against the First Respondent (MRP) had nothing to do with the relief claimed against the Second Respondent, and that similarly, the relief claimed against the Second Respondent had nothing to do with the relief claimed

¹¹ Section 157 (5) provides that;
 ‘Except as provided in section 158 (2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration’

against MRP. This argument was premised on the contention that two separate and distinct sets of employment relationships existed between the individual applicants and MRP and the Second Respondent. It was argued that though similar, it is not the same questions of fact or law which are to be determined in respect of the relief claimed against the two respondents.

- [17] NUMSA held the view that the cause of action and the relief sought in respect of both respondents was identical as both operated on the Medupi site, were parties to the PLA, had entered into LDC's with the applicants pursuant thereto, and sought to demobilise the employees at the same site.
- [18] As I understood from Van Niekerk J's judgment, MRP had planned to commence the demobilisation process consequent upon the completed tasks, and had communicated with NUMSA indicating its intentions in that regard. It was MRP that had issued notices to employees about the demobilisation process. Van Niekerk J had pointed out that the factual circumstances relevant to the Second Respondent were not materially different¹². To the extent that there was a factual dispute pertaining to the terminations of the contracts effected by both Respondents, those disputes have been referred for oral evidence, and there is thus no merit in the argument that the two Respondents should not have been joined.
- [19] With regards to the issue of non-joinder, the Respondents' contention was that the provisions of the PLA that they rely on in the application were relied upon by other employers, and that this application concerned the application and interpretation of the PLA.
- [20] NUMSA denied that this application turned on the application and interpretation of a collective agreement, and contended that it was plainly a dispute between employees and their employers as to the proper termination of employment contracts. In this regard, it was contended that the other parties to the PLA have no interest in this matter.

¹² At para 9

[21] I took issue with Adv. Van der Merwe on behalf of the Respondents over the need to join other parties that have no interest in this matter as to the reason they should be dragged to court. In *Amalgamated Engineering Union v Department of Labour*¹³, the principle that a third party must be joined "if he is shown to have a direct and substantial interest in the subject matter of the litigation" was re-emphasied. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject matter which may be affected prejudicially by the judgment of the court in the proceedings concerned. Furthermore, the principle that a joinder is only necessary depending on the nature of the relief sought is well-established¹⁴.

[22] I am of the view that a case has not been made out to show what substantial interest the other parties to the PLA has to these proceedings other than the contention that this matter concerns an interpretation and/or application of the PLA, which does not really appear to be the case in view of the provisions of the LRA under which the application was brought. On the facts as pleaded, this approach cannot be correct in that the main factual disputes as referred to oral evidence are clear. Furthermore, relief is sought against the two Respondents in this matter and not against the other parties to the PLA including unions. To this end, a case has not been made out to join these other parties.

Waiver:

[23] The Respondents' contention was that NUMSA referred a dispute in terms of section 189A to the CCMA, on 2 July 2013, and that in the course of that referral, the parties had agreed to conciliation in terms of section 150 of the LRA. It was contended that by doing so, NUMSA had abandoned the first referral, and that it could thus not revive an abandoned referral.

[24] The first difficulty that the Respondents have with this preliminary point is that it is at this stage raised belatedly. Once Van Niekerk J had determined that the section 189 A(13) application was properly before the court, this disposed

¹³ 1949 (3) SA 637 (A)

¹⁴ *Gordon v Department of Health: Kwazulu-Natal* 2008 (6) SA 522 (SCA);

of any issues as to whether the court could deal with the merits of the matter, other than those already dealt with in this judgment. There is further no case made out that NUMSA expressed an unequivocal intention to abandon its rights in terms of section 189A (13). If this point was strenuously raised before Van Niekerk J, along with the issues surrounding the alleged non-compliance with the provisions of section 189A (17), a determination in that regard would have been made. However, to the extent that this hurdle was passed by reference to the fact that there was compliance with the provisions of section 189A (17), I can find no substance in this point as raised by the Respondents, more specifically since as pointed out on behalf of the NUMSA, a section 23 constitutional right cannot be waived on the facts.

The citation of the parties:

- [25] The Respondents contention in this regard was that the Notice of Motion that was served on them did not have a list of members annexed to it. In my view, this omission cannot amount to a material defect to the extent that the matter cannot be heard or dismissed. Such matters can be dealt with in pre-trial conferences, and the only dispute that can arise from such a process may be in regards to issues of mandate, which the court may be called upon to decide. Be that as it may be, it is my view that these issues should be dealt with in terms of a pre-trial conference, including the exchange of further particulars.

The supplementary affidavit not properly before the Court:

- [26] The Respondents complained that NUMSA sought to introduce a supplementary founding affidavit which they opposed, on the basis that leave to deliver this affidavit has not been granted by the Court. Even if this issue was raised before Van Niekerk J, it appears from his judgment¹⁵ that the learned Judge had made reference to that supplementary affidavit in pointing out what NUMSA had placed in dispute. To the extent that Van Niekerk J made reference to the supplementary affidavit, there is no other conclusion to be reached other than that it is taken that it is properly before the court. If any

¹⁵ At para 10

prejudice has been suffered by the Respondents as a consequence of this supplementary affidavit, nothing prevented them from seeking leave of the court to file a response to it.

- [27] With regard to costs, considerations of law and fairness dictate that in view of the nature of the preliminary points raised, costs should follow the results. However in view of the fact that the matter is set down for trial where the main factual disputes are to be determined it is deemed appropriate to determine any costs order in the cause.

ORDER:

- i. The preliminary points raised by the Respondents are dismissed.
- ii. The parties are directed to complete a pre-trial minute which copies should be presented in court on 26 May 2014 when the trial commences.
- iii. The pre-trial mentioned above should deal with all outstanding matters, including complete compliance with requests by either party for any further particulars.
- iv. Any outstanding matters as at the time of the commencement of trial will be dealt with then and be subject to this Court's further directives and ruling.
- v. The costs of this application shall be in the cause.



TLHOTLHALEMAJE, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv. H Van Der Merwe

Instructed by : Fluxmans INC

For the First Respondent: Adv. T Ngcukaitobi with Adv. J Raizon

Instructed by: Ruth Edmonds Attorneys

LABOUR COURT