THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J1506/15

AUSA	**First Applicant**
NUMSA	**Second Applicant**
SAAT MANAGEMENT EMPLOYEES	**Third Applicant**
SATAWU SAAT	**Fourth Applicant**
SOLIDARITY	**Fifth Applicant**

and

SAA SOC LTD	**First Respondent**
SAA TECHNICAL SOC LTD	**Second Respondent**
NTM	**Third Respondent**
UASA	**Fourth Respondent**
SACCA	**Fifth Respondent**
SAA MANAGEMENT EMPLOYEES	**Sixth Respondent**
CCMA	**Seventh Respondent**

Heard: 6 August 2015

Delivered: 17 August 2015

Summary: Section 189A(13) application to interdict large-scale retrenchment – employer concluding collective agreement with unions representing majority of employees and extending it in terms of s 23(1)(d) – agreement binding on non-party employees and settling any dispute covered by the agreement – application dismissed

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JUDGMENT

MYBURGH, AJ

Introduction

[1] This is an application in terms of section 189A(13) of the LRA[1] to, *inter alia*, interdict SAA[2] and SAAT[3] (jointly referred to as "the companies") from proceeding with a large-scale retrenchment exercise pending compliance with a fair procedure. The matter was heard on 6 August 2015. After the hearing the applicants delivered supplementary heads of argument, which the companies replied to on 11 August 2015.

[2] The essential question in this matter is whether a retrenchment agreement concluded with unions representing the majority of employees in the workplace, and extended in terms of section 23(1)(d), serves to, in effect, settle any dispute that non-union members and minority union members have about the retrenchment process.

Essential facts

[3] The companies need little introduction – SAA is the national carrier, and SAAT (a subsidiary of SAA) provides it with technical services. SAA's financial woes are a matter of public record. In the 2013/14 financial year, it made a loss of R2.6 billion. The retrenchment exercise that this application relates to involves an attempt by SAA to save R350 million per annum in the cost of employment, which may involve the cutting of a vast number of jobs.

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[1] Labour Relations Act 66 of 1995. All references to sections herein are to the LRA.

[2] The first respondent.

[3] The second respondent.

[4] Union membership figures at the companies are as follows. SAA employs 4265 employees, of whom just short of 80% belong to either NTM,[4] SACCA[5] or UASA[6] (these being the three unions recognised by SAA). The only other union that has membership at SAA is NUMSA,[7] but it only has 78 members (less than 2%) and is unrecognised. Turning to SAAT, it employs 2485 employees, of whom some 77% belong to the two recognised unions – AUSA[8] and SATAWU.[9] The other unions that have membership at SAAT, but who are unrecognised, are NTM, NUMSA and Solidarity.[10]

[5] With reference to the above, it stands to be noted at the outset that the applicants in this matter consist of the union grouping at SAAT (excluding NTM) together with SAAT management employees. The only applicant who has any presence at SAA is NUMSA.

[6] On 22 April 2015, a notice in terms of section 189(3) was issued. Two CCMA facilitators were appointed, and a facilitated consultation process was thereupon undertaken in terms of section 189A(7). Although a dispute had arisen early on in the process in this regard, on 2 June 2015, the parties reached agreement that the section 189(3) notice also applied to SAAT and that a single facilitation process (and not a separate process in respect of each company) would be undertaken involving both SAA and SAAT. Things proceeded on this basis.

[7] During the consultation process, the companies consulted with the seven registered unions referred to above, and two management representative bodies.[11] Although the 60-day period provided for in section 189A(7) elapsed

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[4] The third respondent.

[5] The fifth respondent.

[6] The fourth respondent.

[7] The second applicant.

[8] The first applicant.

[9] The fourth applicant.

[10] The fifth applicant.

[11] SAAT management employees (the third applicant) and SAA management employees (the sixth respondent).

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on 20 June 2015, the consultation process was extended on a number of occasions – first to 9 July 2015, then to 22 July 2015, and thereupon to 22 August 2015. To date, over the course of some 3 ½ months, the parties have conducted nine facilitated consultation sessions, and 45 private consultation sessions.

[8] On 24 July 2015, SAA entered into a collective agreement with NTM, UASA and SACCA (who jointly represent some 80% of employees in the SAA workplace) and SAA management employees (through their representatives) ("the retrenchment agreement"). The agreement relates only to SAA, and not to SAAT. In terms of the agreement, the parties reached consensus on: the existence of an economic rationale for the retrenchment (and recorded that the issue had been consulted over); selection criteria; the termination date of effected employees (recorded as being either 30 September 2015 or 30 November 2015); severance pay; the timing of dismissals and notice months; assistance and support for retrenched employees; the issue of re-employment; an e*x gratia* payment; training; vacancies; and the engagement by SAA with various bodies to provide further assistance or support to retrenched employees. The retrenchment agreement also records that the parties would continue to consult over the proposed organisational structure.

[9] Importantly, the retrenchment agreement reflects that it is extended to non-party employees[12] in terms of section 23(1)(d) – this on the basis that the unions who are party to the agreement jointly have majority representation throughout the SAA workplace. In addition to making reference to section 23(1)(d), the agreement also records that the agreement is one contemplated in terms of regulation 10 of the Facilitation Regulations ("regulation 10").[13]

[10] On 5 August 2015, the parties to the retrenchment agreement concluded a further collective agreement, which deals with the one outstanding issue that

[12] A term which I use as shorthand herein for non-union and minority union members.

[13] Regulation 10 reads as follows under the heading "agreement": "If employees who are likely to be affected by the proposed dismissal are represented in a facilitation by more than one consulting party, an agreement must be concluded by the consulting parties representing the majority of the employees concerned, for purposes of section 189A(2) of the Act and these Regulations."

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the parties had reserved for consultation in the retrenchment agreement, namely the organisational structure ("the OS agreement"). Again, the agreement does not relate to SAAT. The agreement records that consensus has been reached on most of the organisational structures (which appear to be designed on a divisional / departmental basis). As with the retrenchment agreement, this agreement was also extended to non-party employees in terms of section 23(1)(d), with the agreement also making reference to the fact that the agreement was one contemplated in regulation 10.

[11] As things stand, SAA is now in the process of undertaking a spill-and-fill exercise provided for in the retrenchment and OS agreements, which will result in unsuccessful applicants ultimately being retrenched. Consultations in relation to SAAT are apparently ongoing.

[12] The above by way of overview, it is necessary to focus on certain events relied upon by the applicants that occurred in the immediate run up to the conclusion of the retrenchment agreement, and on the related chronology of events.

a. On 7 July 2015, the applicants brought a formal application for the disclosure of information in the CCMA. (The application was not supported by any of the consulting parties at SAA, save for NUMSA.)

b. On 10 July 2015, the parties met with the CEO of SAA ("the CEO"), with his counterpart at SAAT also having been present. According to the applicants: (i) the CEO expressed a commitment to provide all required information (subject to the signature of an appropriate non-disclosure agreement); and (ii) the upshot of the meeting was that it was agreed that the facilitation session scheduled for the following day would be utilised for the purposes of engaging over the economic rationale for the retrenchment and alternatives to dismissal. (Up to this point, the parties appear to have been engaged in a parallel process of consultation concerning the consequences of any decision to retrench, i.e. selection criteria, timing, severance pay, etc.)

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c. On 11 July 2015, the facilitation session was undertaken (this having been the eighth such session). According to the applicants, the companies reneged on the agreement reached at the meeting with the CEO. This by insisting that the application for disclosure (which relates predominantly to information relating to the economic rationale) be dealt with formally on an opposed basis, and that the parties proceed in the interim to consult on a parallel basis over issues relating to the consequences of a decision to retrench. The session adjourned on the basis that the companies would file their answering affidavit in the disclosure application by 15 July 2015. (Although there is a dispute of fact (or at least interpretation) about what transpired at the meeting with the CEO and at this facilitation session, it is not necessary to resolve it for present purposes.)

d. On 22 July 2015, the companies filed their answering affidavit in the disclosure application (although the annexures were only filed the following day). The applicants are critical of the position adopted by the companies in this affidavit – it being to the effect that the companies are not prepared to provide all the requested information (this, according to the applicants, being contrary to what was agreed with the CEO) and that the applicants have failed to sign non-disclosure agreements.

e. On 23 July 2015, the companies agreed to extend the consultation process to 22 August 2015, and proposed five further consultation sessions.

f. Also on 23 July 2015, the companies advised the applicants of a further consultation meeting scheduled for the following day from 14h00-16h00, with the agenda being the companies' "economic and structural needs" and "proposed structures". NUMSA declined to attend the meeting (on the basis that it was unavailable at short notice), and objected to the meeting being held in its absence and in the absence of the facilitators. For its part, AUSA undertook to attend the meeting (on

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a without prejudice basis). But it took up the position, which NUMSA supported, that it did not make sense to engage over the agenda items, until such time as the disclosure application had been decided (as the requested information was required in order for the unions to engage in meaningful consultations).

g. On the morning of 24 July 2015, a consultation was conducted in the absence of the applicants over the conclusion of the retrenchment agreement.

h. Although the scheduled afternoon session took place, and was attended by AUSA, no mention was made of the conclusion of the retrenchment agreement.

i. At 16h44 on 24 July 2015, the applicants were emailed a copy of the retrenchment agreement. (The applicants describe it as "a purported collective agreement between the respondents resolving all issues relevant to [SAA's] workplace and restructuring initiatives".)

j. On 29 July 2015, the applicants launched the application herein – the conclusion of the retrenchment agreement having been the catalyst therefor.

k. At the time of hearing this application, the CCMA had yet to rule on the disclosure application.

The relief sought by the applicants

[13] At the hearing of this matter, the applicants handed up an amended notice of motion, and during the course of argument pared-down the relief sought to the following:

a. a declarator that the companies "did not comply with a fair procedure pursuant to the issuing of the section [189(3)] notice dated 22 April 2015" (prayer 2 of the amended notice of motion);

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b. an order that SAA "not give effect to the purported [retrenchment] agreement … and that to the extent necessary the said … agreement be set aside" (prayer 3.1 of the amended notice of motion);

c. an order that the companies "engage with the applicants in meaningful joint-consensus seeking consultations, at least until 22 August 2015 as per the undertaking previously given … but in any event until such time as the objectives of the [LRA] have reasonably been obtained" (prayer 3.3 of the amended notice of motion); and

d. an order that pending compliance with the aforesaid orders, the companies "be interdicted and restrained from terminating any contracts of employment pursuant to the section [189(3)] notice issued on 22 April 2015 and that [they] be interdicted and restrained from implementing any steps towards attaining the dismissal of employees" (prayer 4 of the amended notice of motion).

[14] It will be noted from the above that while the relief described in para (b) above relates to SAA alone, the balance of the relief sought is sought against both SAA and SAAT.

The issue of urgency and other preliminary points raised by the companies

[15] Mr Sibeko SC (who appeared for the companies) contested the issue of urgency in oral argument and contended that there had been an undue delay in instituting this application. In circumstances where the applicants are impliedly entitled in terms of section 189A(13) to bring this application on an urgent basis, and where they did so within five days of the conclusion of the retrenchment agreement, I am of the view that this matter is urgent, and that it ought to be enrolled and determined as one of urgency.

[16] In addition to the issue of urgency, the companies raised a series of preliminary points, some of which fell away as a result of the applicants having pared-down the relief that they seek in this matter. There are two points which remain.

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[17] The first is that, according to the companies, it is not competent for this court, in terms of section 189A(13), to grant the relief sought in prayer 3.1 of the amended notice of motion, and that the issue stands to be determined by the CCMA in terms of section 24(2). I do not consider there to be merit in this point. The CCMA does not have the jurisdiction in terms of section 24(2) to pronounce on the legality (i.e. validity) or otherwise of a collective agreement,[14] and cannot thus set aside a collective agreement. This court, on the other hand, has the power to do so, in terms of its wide-ranging powers set out in section 158(1)(a). Significantly, although section 189A(13) does not expressly provide for the granting of such relief, section 189A(14) provides that "[s]ubject to this section, the Labour Court may make any appropriate order referred to in section 158(1)(a)". If an order setting aside a collective agreement is required in order to give effect to one of the orders that this court is expressly empowered to grant in terms of section 189A(13), then it would seem to me that this court is empowered to grant such an order. (This is, of course, not to say that such an order should be granted in the circumstances of this matter, with this being an issue going to the merits, which is dealt with below.)

[18] The second preliminary point that remains is that the relief sought by the applicants in prayers 2 and 3.3 involves the grant of a blanket order and lacks specificity. As this point is bound up with the merits, it is dealt with below in that context.

The parties' submissions on the merits: a summary

[19] Mr Ngcukaitobi (who appeared for the applicants) submitted that the retrenchment exercise suffered from the following main procedural flaws warranting the intervention of this court:

[14] *NUMSA & Others v Highveld Steel & Vanadium Corporation Ltd* [2002] 1 BLLR 13 (LAC) at paras 19-20. See also Brassey *Commentary on the Labour Relations Act* (RS 2, 2006) at A3-44, who says this about the reach of the phrase "interpretation of application" in section 24(2): "… its compass is very wide. What is not covered, however, is a dispute over the existence of the agreement as a legal instrument – over whether, in other words, the agreement was concluded and is legal and valid."

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a. Firstly, the companies had failed to disclose a considerable amount of relevant information (pertaining particularly to the economic rationale issue), with their refusal to provide the information on the grounds of it allegedly being irrelevant or confidential being incorrect or unwarranted. In the absence of the information requested by the applicants, the companies had prevented them from engaging in a meaningful process of consultation, and had violated the legal duty to follow a fair process.

b. Secondly, further to the meeting with the CEO the previous day, the companies "changed the rules of the game" at the facilitated consultation session held on 11 July 2015, in that they refused to consider the issue of the economic rationale by providing the information relevant to that issue. This violated the duty to consult in good faith.

c. Thirdly, the manner in which the companies conducted themselves with regard to the disclosure application also violated the duty to consult. The retrenchment agreement was entered into a day or two after the companies filed their answering affidavit in the disclosure application, and at a time when the applicants were still due to file a replying affidavit and when the determination of the application by the facilitators was pending. To conclude the retrenchment agreement in these circumstances was an act of bad faith.

d. Fourthly, the retrenchment agreement was concluded in violation of the agreement that there would be a single facilitation process involving all the unions (and representative bodies) and both companies. The contention thus being that it was impermissible and "cavalier" for an agreement to have been reached with SAA alone (and without involving the applicants), and that a change of tack resulted in procedural unfairness.

[20] Regarding the issue of the extension of the retrenchment agreement, according to Mr Ngcukaitobi, section 23(1)(d) (or regulation 10) could not serve as a basis

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to bind non-party employees to the retrenchment agreement in this matter, for the following reasons:

a. Where an all-comers consultation model had been agreed to, an employer cannot change tack when it suits it to a majoritarian model. The companies were bound by their own election in respect of the model (or method) of consultation.

b. The retrenchment agreement impermissibly served to: (i) deprive non-party employees of the individual rights afforded them by the LRA to a fair procedure;[15] (ii) deprive minority unions of their statutory entitlement to consultation in terms of section 189(1)(b)(ii) and thus frustrate their ability to engage in meaningful consultations; and (iii) "obliterate" the right to access to information.[16] Put differently, the purpose of the retrenchment agreement was to evade the operation of sections 189 and 189A, which cannot be countenanced.

c. The only rights that are expressly afforded to majority unions (or coalitions) under section 189A is the right to request facilitation by the CCMA in terms of section 189A(3), with the section (overall) not contemplating the conclusion of a retrenchment agreement with the majority and extension of it to the minority.

d. While the right to strike can be limited by a collective agreement extended to non-parties,[17] there exists no comparative section binding non-parties to a retrenchment agreement.

e. Regarding regulation 10, it could not be used as a legal basis for the extension of the retrenchment agreement, because it only allows an employer and a union/s representing the majority to enter into an agreement "for the purposes of section 189A(2)", which does not extend to the conclusion of a retrenchment agreement. What it means

[15] See sections 185(a) and 188(1)(b), read with sections 189 and 189A.

[16] This insofar as the settlement agreement, in effect, settles the disclosure dispute *vis-à-vis* SAA.

[17] See sections 65(1)(a) and 65(3)(a)(i).

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(so it was argued) is no more than that the majority may agree to vary the time periods for facilitation or consultation, as per section 189A(2)(c).

[21] Turning now to Mr Sibeko's submissions, predictably he placed reliance on the leading judgment of this court on section 23(1)(d), *Chamber of Mines of South Africa v Association of Mineworkers and Construction Union and others* [2014] 9 BLLR 895 (LC) (per Van Niekerk J). According to Mr Sibeko, the retrenchment agreement was validly entered into by the parties and extended, with the result that the retrenchment at SAA has, in effect, been settled. The applicants thus have no cause of action in relation thereto.

[22] In relation to the position at SAAT, Mr Sibeko submitted that the process of consultation there was ongoing. The disclosure application should run its course, and matters should be taken from there (this in circumstances where the section 189A process has been extended to 22 August 2015). Although Mr Sibeko did not wish to be drawn into the issue, he did not discount the possibility of a retrenchment agreement being entered into, and extended at SAAT. (Indeed, in the "headcount rationalisation update" issued by the companies on 6 August 2015, it is recorded that management was "hopeful" that a similar agreement could be concluded in respect of SAAT shortly.)

[23] In the companies' supplementary heads of argument, it is submitted that SAAT was entitled to bring the consultation process to an end, but that, in any event, the parties are still due to consult on the economic rationale, alternatives to dismissal and the selection criteria. Judged holistically, SAAT submitted that the process followed was fair.

SAA: evaluation and findings

[24] As a point of departure, it warrants mention that the applicants themselves accept (subject to their challenge to the validity of the extension) that the retrenchment agreement (read with the OS agreement) effectively resolves the entire retrenchment at SAA, and that the agreement is legally binding on the parties thereto.

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[25] In the light of this and the parties' submissions, three questions stand to be determined. The first question is whether, as a matter of legal principle, a retrenchment agreement can validly be extended to non-party employees in terms of section 23(1)(d). If the answer is in the affirmative, then the second question is whether, on the peculiar facts of this matter, it was permissible to do so. If the answer is also in the affirmative, then the third and final question is whether this puts paid to the applicants' claim in relation to SAA.

[26] To begin with the first question, in two judgments this court has answered it in the affirmative. The first is *Tsetsana v Blyvooruitzicht Gold Mining Co Ltd* [1999] 4 BLLR 404 (LC), where Jammy AJ held:

> "The applicant's contention that he is not bound by the terms of agreements concluded by a trade union of which he is not a member, is without substance or foundation. The retrenchment agreement of August 1997 is unquestionably a collective agreement which binds, *inter alia*, employees who, although not members of a registered trade union which is a party to it, are employed in the workplace to which it applies and in which that trade union enjoys majority representation of the employees there employed."[18]

[27] The second is *Sigwali & others v Libanon (A division of Kloof Gold Mine Ltd)* [2000] 2 BLLR 216 (LC), where Ngwenya AJ held:

> "*In casu*, it is common cause that NUM represented the majority of the employees in respondent's business. It is not disputed that the agreement identifies the employees affected by it with sufficient particularity. Even if it was disputed, it is my view that the agreement clearly identifies the employees as set out in section 23(1)(d)(i). Consequently in my view the agreement concluded between the NUM and respondent binds not only those employees who are members of the NUM but also non-members as contemplated above."[19]

[28] While it may appear objectionable that section 23(1)(d) can be used in this way, so as to deprive individuals (and thus their unions) of the right to

[18] At para 22.

[19] At para 15.

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challenge the fairness of a retrenchment process, the section permits *all* collective agreements to be extended in terms thereof – and is not limited in its scope to only agreements that do not involve a deprivation of rights. Indeed, most collective agreements extended in terms of section 23(1)(d) involve depriving non-party employees of some or other right – for example, the right to strike.

[29] The fact that this is permissible is underscored by section 189(1)(a), which has been interpreted as meaning that an employer and a majority union can enter into a collective agreement upfront to the effect that, in the case of a retrenchment exercise, the employer will only consult with the majority union.[20] Where it then does so, any retrenchment agreement concluded with the majority union will then bind non-union and minority union members. The LAC put this as follows in *Aunde South Africa (Pty) Ltd v NUMSA* [2011] 10 BLLR 945 (LAC):

> "Where an employer consults in terms of agreed procedures with the recognised representative trade union[21] in terms of a collective agreement which requires the employer to consult with it over retrenchment, such an employer has no obligation in law to consult with any other union or any individual employee over the retrenchment. If such a consultation exercise culminated in a collective agreement that complies with the requirements of a valid collective agreement, all employees including those who are not members of the representative trade union that consulted with the employer are bound by the terms of such collective agreement irrespective of whether they were party to the consultation process or not."[22]

[30] The conclusion of a retrenchment agreement further to a process of consultation and its extension in terms of section 23(1)(d) has the same effect, and is unobjectionable. As held in *Chamber of Mines (supra)*, section 23(1)(d) is amongst numerous sections in the LRA which encapsulate the

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[20] *Sikhosana & others v Sasol Synthetic Fuels* [2000] 1 BLLR 101 (LC) at 108A-G.

[21] Although the LAC did not say as much, it is clear that it had in mind a majority union.

[22] At para 32.

legislative policy choice of majoritarianism.[23] That choice is based on the legislature's assumption that it would best serve the primary objects of the LRA of labour peace and orderly collective bargaining. The conclusion of a retrenchment agreement with a majority union (or coalition) and extension to non-party employees accords with this.

[31] Regarding the applicants' submissions that section 189A does not contemplate the extension of a retrenchment agreement concluded with the majority consulting party, and that while the right to strike can be limited by a collective agreement extended to non-parties, there exists no comparative section binding non-parties to retrenchment agreements, I do not agree with either of them. Sections 189 and 189A constitute a legislative process designed to get the parties to attempt to reach consensus, which will, if successful, typically result in the conclusion of a collective agreement. Such a collective agreement – like all collective agreements – is then capable of being extended in terms of section 23(1)(d) (if the requirements are met). If the employees covered by the retrenchment agreement sought to strike over the retrenchment, the collective agreement would (like any other comparable one) serve as a basis for the strike being unprotected in terms of (at least) section 65(3)(a)(i).

[32] Regarding the applicants' attack on SAA's reliance on regulation 10, this is not an issue that I need decide. Irrespective of the scope of the regulation, I have found that, as a matter of legal principle, a retrenchment agreement can be extended to non-party employees in terms of section 23(1)(d).

[33] Turning to <u>the second question</u>, the main thrust of the applicants' case on this issue is that the companies were bound by their election to follow an all-comers model of consultation involving a single facilitation process, and could not change tack. In support of this contention, the applicants rely on a judgment of this court in which it was found that where the employer elects to consult with a union and separately with non-union members (on an individual

[23] See also *Kem-Lin Fashions CC v Brunton & another* [2001] 1 BLLR 25 (LAC) at para 19, and *Mzeku v Volkswagen SA (Pty) Ltd & others* [2001] 8 BLLR 857 (LAC) at paras 55 and 67.

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basis), it is obliged to do so.[24] The applicants also rely on judgments of the LAC, in which the retrenchment of NUMSA members was found unfair where the employer stopped consulting with NUMSA over the retrenchment in circumstances where UASA had obtained majority representation, but where the employer failed to conclude either a section 189(1)(a) agreement or a retrenchment agreement with UASA (that might then have been extended to NUMSA members).[25] To my mind, these judgments are of no assistance to the applicants. Amongst other things, neither of them dealt with the conclusion of a retrenchment agreement, and an extension of the agreement in terms of section 23(1)(d).

[34] The applicants also rely on this finding by the Constitutional Court: "When exercising an election, the law does not allow a party to blow hot and cold. A right of election, once exercised, is irrevocable particularly when the *volte face* is prejudicial or is unfair to another."[26] In my view, this again fails to take account of what transpired in this matter. While it is so that the parties agreed that there would be a single facilitation process involving all-comers, I can find no evidence to suggest that the companies (or the unions for that matter) thereby waived their rights to conclude a retrenchment agreement on a per company basis, and to extend any such agreement in terms of section 23(1)(d). It would also be difficult to infer this, because notwithstanding the single facilitation process, the obligation to comply with sections 189 and 189A rests with each separate (statutory) employer, and any retrenchment agreement and extension thereof would have to be in the name of that employer.

[35] The parties thereupon engaged in a dynamic process of consultation over a period of some 3 ½ months. The process did not produce an agreement at both SAA and SAAT, but it did produce consensus within SAA over the retrenchment with everyone, except NUMSA. Different to NUMSA, the

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[24] *SACCAWU & Another v Amalgamated Retailers (Pty) Limited* [2002] 1 BLLR 95 (LC) at para 26 (cited with approval in *Oosthuizen v Telkom SA Ltd* [2007] 11 BLLR 1013 (LAC) at paras 31-32 of the judgment of McCall AJA).

[25] *Aunde South Africa (Pty) Ltd v NUMSA* [2011] 10 BLLR 945 (LAC).

[26] *Equity Aviation Services (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1129 (CC) at para 54.

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consenting employee parties were not in dispute with SAA over the disclosure of information. The consenting parties then concluded the retrenchment agreement on 24 July 2015, which was extended in terms of section 23(1)(d), in circumstances where the three recognised unions had 80% representation within the SAA workplace. Amongst other things, this served to settle the disclosure dispute *vis-à-vis* SAA, as is typically the case with any extension to a dissenting minority. Seen thus, this was not a case of SAA having undergone a *volte face* to the prejudice of NUMSA and the employee consulting parties at SAAT. Instead, it is a case of labour law at work.

[36] Allied to the above, insofar as the applicants contend that where an employer commences consultations with a number of unions (as occurred in this matter), it is bound by that election and cannot "change tack" by concluding an agreement with a majority union coalition (as occurred in this matter), this is clearly wrong. The fallacy, of course, lies in the fact that section 189(1)(c)[27] compels the employer to consult with all unions whose members are likely to be affected by the retrenchment, with it not being a matter in respect of which the employer makes an election. If the applicants were correct in their contention, this would mean that an employer could never settle a retrenchment, unless all the unions agreed, which is at odds with the legislative policy choice of majoritarianism (and section 23(1)(d)).

[37] As mentioned above, the applicants also contend that the retrenchment agreement ought not to be upheld beyond the parties thereto, because the companies consulted in bad faith in: not disclosing information; breaching the agreement reached with the CEO; entering into the retrenchment agreement while the disclosure application was pending; and concluding the retrenchment agreement in a "cavalier" fashion. In my view, the short answer to all of this is that the retrenchment agreement, and its extension to non-party employees, constitutes, in effect, a settlement of any and all such complaints (which have thus been extinguished).

[27] Absent the existence of an agreement in terms of section 189(1)(a).

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[38] Another answer lies in the acknowledgement of the fact that consultations over large-scale retrenchment, which may culminate in strike action in terms of section 189A, overlap with a process of collective bargaining. Where that process produces a collective agreement (which is then extended to non-party employees), provided the agreement is lawful, this court will not intervene to scrutinise the bargaining conduct of the parties or the terms of the agreement, any more than it would intervene in the case of a protected strike to pass judgment on the merits of a demand.[28] This is so because when it comes to the regulation of collective bargaining, the LRA has adopted a voluntarist system.[29]

[39] A final point relates to the legal construction that the applicants advance in seeking to avoid the operation of the retrenchment agreement, and the relief that they seek. As set out above, the applicants seek an order that the companies should "not … give effect to" the retrenchment agreement and that to "the extent necessary", the agreement should be "set aside". However, having accepted that the retrenchment agreement is valid *inter partes*, the best that the applicants can hope to achieve is an order that no effect should be given to the retrenchment agreement in relation to them, and that the agreement be set aside in relation to them. For the reasons set out above, to my mind, there exists no basis for the grant of any such relief.

[40] Turning finally to <u>the third question</u>, once it is accepted that as a matter of legal principle a retrenchment agreement can be extended in terms of section 23(1)(d) to non-party employees, and that there exist no unique facts in this matter that somehow causes a different result, this, in my view, puts paid to the applicants' claim in relation to the retrenchment at SAA. As stated above, the retrenchment agreement (as extended) constitutes, in effect, a settlement

[28] See *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA & others* (2014) 35 *ILJ* 3241 (LC) at para 19.

[29] Under this system, as held in *National Union of Public Service & Allied Workers on behalf of Mani & others v National Lotteries Board* (2014) 35 *ILJ* 1885 (CC) at paras 193-194, an employer has "the right to determine its own strategies and tactics in dealing with … collective bargaining", and "[p]rovided that [it] does not act unlawfully, it may adopt a confrontational stance". Of course, the same applies to unions.

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of any dispute falling within the scope of the agreement that non-party employees (and thus their unions) may have had.

[41] In the result, the application as against SAA fails.

SAAT: evaluation and findings

[42] As mentioned above, the catalyst for the bringing of this application was the conclusion of the retrenchment agreement at SAA. The issue consumes the majority of the papers, and was the focus of the written and oral argument. The position at SAAT was, by way of comparison, a side issue.

[43] Different to SAA, the consultation process at SAAT is ongoing. According to SAAT, the parties are still due to consult on the economic rationale, alternatives to dismissal, and the selection criteria (including the proposed organisational structure). Another distinguishing feature is that the disclosure application remains alive in relation to SAAT (at least at the time of the hearing of this application). Further to the ruling of the facilitators on the application, consultations over the economic rationale and alternatives to retrenchment can proceed. As set out above, the issue of the disclosure of information has been a major stumbling block to date, but it will now be resolved (one way or the other) by the facilitators' ruling. As things stand, the section 189A process has been extended to 22 August 2015.

[44] In circumstances where the parties have, to date, engaged in nine facilitated consultation sessions and 45 private consultation sessions, and where the consultation process is due to continue at SAAT, I am unable to detect any substantial procedural failure in relation to SAAT that would warrant the intervention of this court in terms of section 189A(13) at this stage.[30]

[45] In any event, to my mind, there is merit in the point taken by the companies that the relief sought in relation to SAAT (in prayers 2 and 3.3 of the amended notice of motion) is overly broad and ill-defined. As this court has made it

[30] *RAWUSA v Schuurman Metal Pressing (Pty) Ltd* [2005] 1 BLLR 78 (LC) at para 32.

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clear in the past, open-ended orders will not be granted in terms of section 189A(13), and relief should be crafted to address specific defects in the process.[31]

[46] In the result, the application as against SAAT fails.

Order

[47] In the premises, the following order is made:

a. the application is dismissed;

b. there is no order as to costs.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

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[31] *SA Society of Bank Officials v Standard Bank of SA* (2011) 32 *ILJ* 1236 (LC) at para 29.

APPEARANCES:

On behalf of the Applicants: T Ngcukaitobi
Instructed by: Minnaar Niehaus Attorneys

On behalf of the First and Second Respondents: L Sibeko SC (main heads of argument drawn together with V September)
Instructed by: Cliffe Dekker Hofmeyr

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