



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 788/2012

In the matter between:

LADY- PEACE LINDI NDABA & 15 OTHERS

Applicants

and

T - SYSTEMS (PTY) LTD

First Respondent

ARIVIA.KOM (PTY) LTD

Second Respondent

Delivered: 7 October 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The applicants brought this matter before this Court by way of a statement of claim. They alleged that the termination of their services constituted an automatically unfair dismissal as contemplated in section 187 (1) (g) of the Labour Relations Act¹, alternatively, that the dismissal on account of operational requirements was substantively unfair. Preliminary points were

¹ Act 66 of 1995 as amended

raised in regards to the nature of the Applicants' claim. These however are to be considered against the following background;

Background:

- [2] The Applicants were all initially employed by the Second Respondent, Arivia.Kom (Pty) Ltd (Arivia) in different capacities. Arivia is a state owned information technology company which came out of a merger between Datavia, Eskom ITS and Ariel Technologies. Arivia was acquired by the First Respondent, T-Systems on January 2010 and the Applicants' employment was transferred to T-Systems in terms of the provisions of section 197 of the Labour Relations Act. All the Applicants were then moved to the career centre and had their services terminated between December 2010 and January 2011. From the initial sixteen applicants that had brought the claim, only four are still pursuing the claim before the court, viz Abel Galane, Valencia Hoosain, Shadrack Poola and Patrick Mnguni.
- [3] The Applicants' case was that they were told that within 60 days of being placed in the career centre they would be retrenched if they had not been placed in alternative positions. They further alleged that they were not consulted on severance pay, selection criteria, the timing of the retrenchments or alternative positions. They further complained that other candidates with less skills, experience and years of service as compared to them were appointed in the positions they should have been considered for; that new staff were recruited in the Applicant's former positions after their retrenchment. It was however conceded that the unions were consulted on the restructuring process.
- [4] T-Systems' case is that it had entered into an agreement in March 2010 with Arivia in terms of which it bought 100% of its shares. Pursuant to the sale, it became necessary for Arivia to comply with the provisions of section 197 of the LRA. This necessitated an automatic transfer of the employment contracts of all the employees of Arivia to the T-Systems. T-Systems had held various meetings with the Applicants' union, SATAWU in respect of the section 197 process.

- [5] The employees and SATAWU were then informed that with effect from 1 January 2010, their contracts would be transferred to T-Systems. Subsequent to the transfers, T-System had realised that the model applicable to Arivia did not fit with international standards, and it being an international company, it had commenced a process of integration and restructuring. This process was informed by duplications of positions as Aravia was already in business at the time that T-Systems acquired the shares.
- [6] The process '*People Integration People Case for ICTO-CSS AO Integration*' commenced and had produced a final draft in August 2010. That process also involved SATAWU and had ended with certain agreements on principles being reached. Each division was tasked with coming up with a new structure to integrate the old structures of Arivia and T-Systems, which structure would be compatible with the business model of T-Systems.
- [7] Each division had completed its structure which was presented to the employees by its divisional heads. Input was also sourced from employees, and during presentation meetings, employees were made aware that the new structure would be filled through a process of matching and placing, assessment, recruitment and interviews. In the event that employees were unsuccessful for positions they had applied for, they were to be removed to a career centre to be empowered with soft skills and be assisted in obtaining alternative positions within or outside of the company. The employees' salaries were guaranteed whilst they were at the career centre until the end of December 2010. In August 2010 a voluntary package was offered and a number of employees including some of the Applicants who have since withdrawn from the dispute had accepted the offer.
- [8] In October 2010, a process commenced to notify the employees at the career centre of possible retrenchments. A consultation process was embarked upon and in November 2010 notices of retrenchment were issued. A number of employees had their services terminated on 31 December 2010, whilst others' services were terminated in January 2011.

- [9] T-Systems' contention is that the termination of the Applicants' services was mutual and was followed by a proper separation agreement. It further contended that with effect from 1 January 2010 and pursuant the section 197 process, the contracts of the Applicants were transferred to it. Furthermore, it was contended that the dismissal of the Applicants was as a result of its operational requirements and a process contemplated in section 189 of the LRA was followed.

Preliminary points:

- [10] At the commencement of the proceedings, T-Systems had raised a preliminary issue in regards to the nature of the Applicants' claim. The complaint was that it was not clear from the statement of case as to what case it had to meet. Other than this issue, a further contention was that the court could not adjudicate any dispute pertaining to alleged procedural unfairness of the retrenchment process.
- [11] An order was issued in terms of which it was determined that the Court had the necessary jurisdiction to determine both the alleged unfair dismissal dispute on account of operational requirements, and also in respect of the alleged automatically unfair dismissal. The Applicants were granted leave to amend their statement of case, with the Respondent having a right of reply.
- [12] In the amended statement of claim, the Applicants contended that their dismissal was unlawful, invalid and of no force and effect on the basis that the First Respondent had failed to comply with the provisions of section 189A (2) of the LRA² pertaining to the giving of notice of termination. In this regard, it was contended that the termination notice was issued on 26 November 2010 before the expiry of the 60 days period within the contemplation of section 189A (7) of the LRA³. It was argued that the provisions of section 189A of the

² Which provides that;

'(2) In respect of any dismissal covered by this section -

(a) an employer must give notice of termination of employment in accordance with the provisions of this section;

(b) despite section 65(1)(c), an employee may participate in a strike and an employer may lock out in accordance with the provisions of this section;

(c) the consulting parties may agree to vary the time periods for facilitation or consultation.'

³ Which provides that;

LRA applied to T-Systems and that it had to comply with those provisions before the Applicants' contracts of employment could have been terminated based on operational requirements.

- [13] A further argument advanced on behalf of the Applicants was that they were not pursuing a claim of procedural fairness by way of the issues raised in the amended statement of claim, and that they were pursuing a claim for unlawful dismissal and a declaratory order to that effect. To this end, it was submitted that the Court had jurisdiction to entertain such a claim by virtue of section 77 (3) of the Basic Conditions of Employment Act, and section 158 (1) (a) (ii) and (iv) of the LRA.
- [14] It was further submitted that the Applicants' complaint about non-compliance with section 189A was not directed at the procedural fairness of the dismissal, but at the lawfulness thereof, and the court was not prevented from making a determination by the provisions of section 189 (13), 189A (17) or 189A (18).
- [15] T-Systems contends that the issue raised in the amended statement of claim relates to procedural unfairness and is incapable of adjudication. It was contended that T-Systems in its notice in terms of section 189 (3) of the LRA had not requested facilitation within the contemplation of section 189A (3) or agreed to facilitation within the meaning of section 189A (4) of the LRA. It therefore followed that the issue of the appointment of a facilitator and the issuing of notice in terms of section 189 (3) are issues of process as opposed to substance.
- [16] In addition to the above amended pleadings and responses, the parties had then compiled a Supplementary pre-trial minute wherein the issues for determination by the Court in line with the preliminary issues to be raised were;

'(7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189(3) –

- (a) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and
- (b) a registered trade union or the employees who have received notice of termination may either –

- (i) give notice of a strike in terms of section 64(1)(b) or (d); or
- (ii) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).'

“4.1 Whether the termination of employment contracts entered into by the Applicants are void, alternatively voidable, alternatively should be cancelled and set aside and the said Applicants should be reinstated in the employment of T-Systems and/or awarded damages.

4.2 Whether the notice of termination of the Applicant's services was premature and invalid for being in breach of section 189A (2) of the LRA and whether the Applicants' dismissals were accordingly invalid and of no force and effect”

[17] Further in accordance with the supplementary pre-trial minute, the parties had agreed that the Applicants' submissions that the retrenchments were unlawful, invalid and of no force and effect should be dealt with first, and further to submit heads of argument in that regard. They further agreed that with leave of the Court, should the Respondents be successful in proving that the retrenchments were lawful, the parties shall then lead evidence on whether the reason for dismissal were related to a transfer as contemplated in section 197 of the LRA and for the court to make a ruling on whether the reason for dismissal were related to a transfer as contemplated in section 197 of the LRA.

[18] The parties had further agreed that should the court rule in the Respondents' favour, it was requested that evidence during the proceedings form part of the record for the remainder of the trial, and where the Respondents were to be successful, the court should set the matter down for the unfair dismissal matter.

Evaluation: Re: Preliminary points:

[19] In this case, it was common cause that a facilitator as contemplated in section 189A (3) of the LRA was not involved in the consultation process. Furthermore, a dispute had not been referred for conciliation by either of the parties at the CCMA before the notice of termination was issued to the Applicants. It is further common cause that none of the Applicants had brought an application to the Labour Court in terms of section 189A (13) alleging non-compliance with fair procedure. The Applicants' case is primarily

that the dismissals should be declared unlawful, invalid and/or void on account of the provisions of section 189A (2) of the LRA. Reliance in this regard was placed on *NUM v De Beers Consolidated Mines (Pty) Ltd*⁴ and *De Beers Group Services (Pty) Ltd v NUM*⁵, where it was held that where an employer issues notices of termination before the period referred to in section 189A (8) (b) of the LRA has elapsed (i.e. prematurely), the ensuing dismissals are invalid, and accordingly of no force and effect. (The *De Beers principles*)

[20] The preliminary points raised in this case and the *De Beers principles* relied upon received attention recently in *Edcon v Steenkamp and Others*⁶, and these principles are no longer considered as correct⁷. In circumstances where a facilitator was not appointed, the applicable provisions are those in section 189A (8) of the LRA⁸. In this regard, the Respondents' contention, and correctly put is that once a notice of termination was received, an employee could only refer a dispute concerning whether there was a fair reason for the dismissal to this court in terms of section 191 (11) of the LRA.

[21] Further in regards to the notice issued, it was submitted on behalf of the Respondents that this was issued on 18 October 2010 and the termination notice was issued after 30 days on 21 November 2010. Accordingly, the notice issued was in accordance with the subsection within the contemplation of section 198A (2) of the LRA, and was therefore not premature.

⁴ (2006) 27 ILJ 1909 (LC)

⁵ (2011) 32 ILJ 1293 (LAC)

⁶ 2015 (4) SA 247 (LAC)

⁷ See order of the LAC where it was held that;

1. "It is declared that the interpretation of section 189A(2)(a) read with section 189A(8) of the LRA by this Court in *De Beers Group Services (Pty) Ltd v NUM* [2011] 4 BLLR 319 (LAC) and *Revan Civil Engineering Contractors and Others v NUM* [2012] 33 ILJ 1846 (LAC) that non-compliance with the provisions of section 189A(2)(a) read with section 189A(8) results in the invalidity of any ensuing dismissal is wrong and an erroneous interpretation and therefore that non-compliance with these provisions does not lead to an invalid dismissal"

⁸ Which provide that;

'If a facilitator is not appointed –

(a) a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189(3); and

(b) once the periods in section 64(1)(a) have elapsed –

(i) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and

(ii) a registered trade union or the employees who have received notice of termination

may –

(aa) give notice of a strike in terms of section 64(1)(b) or (d); or

(bb) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).'

- [22] In *Edcon*, the LAC also reaffirmed that section 189A(18) of the LRA provides that the Labour Court may not adjudicate a dispute about the procedural fairness of an operational requirements dismissal referred to it in terms of section 191(5)(b)(ii) of the LRA. Consulting parties who allege procedural unfairness in the consultation process are now required to approach the Labour Court by way of an application made in terms of section 189A(13) of the LRA within 30 days after the employer has given notice to terminate or, if notice of termination is not given, within 30 days of the date of dismissal⁹.
- [23] The LAC further in *Edcon* reaffirmed that a premature notice of termination of employment, where the termination was substantively fair, relates to the manner in which the termination was effected and would found a cause of action under section 189A(13) of the LRA that the employer had not complied with a fair procedure in the form of due notice¹⁰.
- [24] In regards to arguments pertaining to whether the retrenchments were unlawful, invalid and or of no force and effect as a consequence of termination notices being issued prior to the expiry, the LAC had held that non-compliance with section 189A(8) of the LRA was not intended by the legislature to result in the invalidity or nullity of any ensuing dismissals, and that the earlier decisions to the contrary in *De Beers Group Services (Pty) Ltd v NUM*¹¹ and *Revan Civil Engineering Contractors and Others v NUM*¹² were wrongly decided¹³.

⁹ At para [19] where the LAC held that;

"Having carved out distinct alternative procedures for the resolution of disputes about the substantive fairness of large scale retrenchments, section 189A of the LRA additionally creates a distinct procedure for disputes about procedural fairness in dismissals falling within the ambit of the section. Section 189A(18) of the LRA provides that the Labour Court may not adjudicate a dispute about the procedural fairness of an operational requirements dismissal referred to it in terms of section 191(5)(b)(ii) of the LRA. Consulting parties who allege procedural unfairness in the consultation process are now required to approach the Labour Court by way of an application made in terms of section 189A(13) of the LRA within 30 days after the employer has given notice to terminate or, if notice of termination is not given, within 30 days of the date of dismissal. In an application made in terms of section 189A(13) of the LRA, the consulting party may seek an order, if need be on an urgent basis"

¹⁰ At para [54]

¹¹ [2011] 4 BLLR 318 (LAC).

¹² [2012] 33 ILJ 1846 (LAC)

¹³ At para [56]

[25] It therefore follows from the above that the claim brought before the Court after the dismissal took place can only be in respect of an alleged substantive unfairness in terms of section 189A(18) and section 189(19) of the LRA. The Court therefore lacks jurisdiction in regards to any claim of procedural unfairness in respect of the retrenchments. Furthermore, in line with the principles as set out in *Edcon*, there is no basis for any conclusion to be reached that the retrenchments were unlawful, invalid and/or of no force and effect. In accordance with the parties' supplementary pre-trial minute and the issues which it was required the court to decide, the following order is made;

Order:

- i. The preliminary points raised by the Respondents are upheld.
- ii. The termination of the Applicants' employment contracts is not void or voidable.
- iii. The notice of termination of the Applicants' services was not premature and invalid.
- iv. The dismissal of the Applicants was not invalid or unlawful.
- v. The parties are to approach the office of the Registrar of this court in respect of the disputes pertaining to an alleged unfair dismissal and automatically unfair dismissal of the Applicants if these claims are still to be pursued.
- vi. Each party is to pay its own costs.



Tlhotlhalenajie, AJ

Acting Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

On behalf of the Applicants: Mr J Rhodie of Bester & Rhodie Attorneys

On behalf of the Respondents: Mr G Moshwana of Mohlaba & Moshwana Inc

LABOUR COURT