



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no J 1842/16

JS 351/16

SOLIDARITY obo JF MARITZ

Applicant

and

HELLBERG FARMS

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

JOBE MIZBENI SITHOLE N.O

Third Respondent

Heard: 17 February 2017

Delivered: 20 February 2017

JUDGMENT

VAN NIEKERK J

- [1] There are two applications that serve before the court. The first is an application to condone the late filing of an application in terms of s 189A (13); the second an application to consolidate the application in terms of s 189A (13) with the referral made under case number JS351/16.
- [2] The factual background is canvassed in the papers and need not be repeated. In essence, the applicant's challenge is to the procedural fairness of his dismissal for operational requirements, effected on 24 February 2016. In terms of the applicable time limit, the period within which the applicant was required to file an application to dispute the procedural fairness of his dismissal expired on 26 March 2016. On 5 July 2016, the applicant referred a dispute to the court in which he contended that his dismissal was procedurally and substantively unfair. In its response to the statement of claim, the first respondent raised a jurisdictional point to the effect that the court did not have jurisdiction to determine the procedural fairness of the applicants dismissal, by virtue of the application of s 189A(18) of the LRA. On 23 August 2016, the applicant filed an application under that section and on 8 September 2016 filed an application to condone the late filing of the application, as well as an application to consolidate the two matters.
- [3] The factors that the court must necessarily take into account in the exercise of its discretion in relation to any application for condonation are well established. Principally, these are the period of the delay, the explanation proffered for the delay and the applicant's prospects of success. There is an additional factor that must necessarily be taken into account in the matter such as the present. This court has made clear on more than one occasion that the purpose of s 189A(13) is one that enables this court to supervise an ongoing retrenchment process or

one that has recently been concluded; it is not a remedy that is available well after dismissals have been effected. The section intends to ensure that a fair process is followed; it is not a means to thwart retrenchment itself or to claim compensation long after the proverbial horse has bolted (see *Insurance and Banking Staff Association v Old Mutual Services and Technology* (2006) 27 ILJ 1026 (LC)). To the extent that the applicant seeks redress in terms of s 189A (13), the court must necessarily have regard to the fact that this is a provision ordinarily reserved for urgent intervention in a consultation process involving a significant number of employees.

- [4] The applicant advances as his principal reason for the delay, the contention that he had not been alerted to a dismissal in terms of s 189A. It would appear that the applicant approached his union after the consultation process had already commenced. After the 189 (3) notice had been issued in December 2015, a facilitation meeting took place on 15 January 2016. The applicant was present at the meeting, which was facilitated by the second respondent and chaired by the third respondent. It was agreed at the meeting that there was no alternative to retrenchment. Consensus was also reached on severance pay and that retrenchments would be effected on 25 January 2016. On that date, the first respondent issued termination letters to all of its employees. The first respondent was informed on 12 February 2016 that the applicant did not receive a termination letter; a letter was furnished to him on 24 February 2016. It is not in dispute that the applicant had full knowledge of the first respondent's farming operations since at least August 2015, and that he had already expressed himself as part of the consensus reached as a result of the second respondent's facilitation regarding the inevitability of the cessation of the first respondent's farming business and the terms on which its employees would be retrenched. Of particular relevance in the present instance is the successful intervention in the consultation process by the second and third respondents, and the outcome of that intervention. The applicant contends that the proceedings were 'ambiguous', but he does not elaborate of this contention nor does he

explain why at the time he did not raise any concerns with the members of the first respondent's management present, or with the facilitator, the third respondent.

[5] In short, the delay in filing the s 189A application is excessive, the explanation inadequate and the prospects of success minimal if they exist at all.

[6] In the circumstances, the application for condonation stands to be dismissed. It follows that the application for consolidation, which is predicated on a successful application for condonation, should also be dismissed. In my view, given the broad discretion conferred on the court by s 162, there is no reason why costs ought not to follow the result.

I make the following order:

1. The applications for condonation and consolidation are dismissed, with costs.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Union official

For the first respondent: Mr R Maddern, Wright, Rose Innes Inc.