Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT DURBAN

Case No: D 1489/17

In the matter between:

AMCU obo THE EMPLOYEES LISTED IN ANNEXURE “FA 1” **Applicant**

and

PATCON CONSTRUCTION AND CIVIL ENGINEERING CONTRACTORS (PTY) LTD **Respondent**

Heard: 01 December 2017

Delivered: 13 December 2017

Summary: (S 189A (13) application - stalled consultation process – compensation suitable alternative – meaning of procedural unfairness in s 189A(13))

JUDGMENT

LAGRANGE J

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Background

[1] This is an application in terms of section 189A (13) of the Labour Relations Act, 66 of 1995 ('the LRA') by AMCU on behalf of 88 employees or former employees of the respondent, a construction company ('Patcon'). Apart from seeking a direction ordering Patcon to comply with a fair consultation procedure, the union seeks an order interdicting the company from dismissing any employees who are still employed and reinstating any that had been retrenched pending the conclusion of the consultation process above. In the alternative, the union claims compensation for lack of compliance with a fair procedure.

[2] There is a dispute as to which of those employees the union is entitled to represent on a list annexured as "FA1" to the founding affidavit. There is also a lack of clarity as to which of them have been retrenched already and which of them remain employed, though this is within the respondent's knowledge.

[3] What the parties are agreed on is that, approximately 33 of the employees on the list were retrenched in March 2017 and a further 10 employees were retrenched in April 2017. A number of the remainder were retrenched at the end of September 2017 -and on13 October 2017 Patcon retrenched a further 30.

[4] Section 200 of the LRA provides that:

> "200. Representation of employees or employers
>
> (1) A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party-
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> (a) in its own interest;
>
> (b) on behalf of any of its members;
>
> (c) in the interest of any of its members.
>
> (2) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings."

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The LAC held in ***MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers & Construction Union & others***[1] that this section only refers to circumstances where a union is itself a party to a dispute and that it does not deal with the situation where it is acting purely in a representative capacity for a member. However, the LAC further held that:

> " [37] In *National Union of Mineworkers on behalf of Mabote v Commission for Conciliation, Mediation & Arbitration & others (Mabote*), the Labour Court (Steenkamp J) recognised that s 200 and CCMA rule 25(1) found union rights and individual rights. On appeal, in *Kalahari Country Club v National Union of Mineworkers & another* (2015) 36 *ILJ* 1210 (LAC) the decision was upheld. The distinction between the distinct roles of a union is, accidently, illustrated by the controversy that arose in *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2003) 24 *ILJ* 355 (LAC) (*County Fair*). A worker was dismissed. The dispute was referred to the CCMA by union A, in its name, as it could do in terms of s 200(1)*(b).* Later union A withdrew, but the worker presented himself with union B as his representative, who sought to have itself substituted for union A. The employer argued that the dispute was only between it and union A. The court held that substance had to prevail over form: the dispute was about the worker's dismissal and it mattered not which union 'represented' him. Plainly, what triumphed was the worker's choice of his representative.
>
> [38] In this matter, AMCU had become a party in its own right, but its presence could not have been limited to that role alone.
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> *What is an employer's locus standi to concern itself with the union membership status of an employee?*
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> [39] Although this matter can be decided on the interpretation issue alone, as did the Labour Court, the conduct of the appellant is so egregious that it is appropriate to deal with the tactic adopted by it, ie to challenge the right of its dismissed employees to demand in dismissal proceedings before an arbitration forum to be represented by a union of their choice of which they claimed to be members.

[1] (2016) 37 *ILJ* 2593 (LAC) at 2607, para [36].

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> [40] Bluntly, what business is it of an employer, in such circumstances, to concern itself with whether membership dues are up to date or any other aspect of the relationship between individual employees and their union? In my view, there is no basis at all.
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> [41] On the facts of this case, the individuals claimed to be members and the union claimed them as members. Assuming that the employer's challenge that the individuals were not in good standing were to be true, surely the choice of the union to elect not to cancel the membership or enforce specific performance is one which it can make without regard to any third party? No creditor is by law obliged to cancel a contract because the debtor fails to comply with the terms of the contract. Moreover, it has been held by Basson J in *Transport & General Workers Union & others v Coin Security Group (Pty) Ltd* (2001) 22 *ILJ* 968 (LC) at paras 160-161 that an employee who appears before the Labour Court represented by a union pursuant to s 161(1)*(c)* of the LRA, needs not have been a member at the time of that employee's dismissal. If that be so, the relationship between union and a purported member in such proceedings is not dependent, in the least, on a history of membership, a point also latent in the decision in *County Fair* above where a union claimed to be acting in a representative capacity on behalf of members of the union, it was not a matter for the employer to concern itself with the issue."

(emphasis added)

In this instance, AMCU claims that the employees listed on Annexure "FA1" are members in good standing of the union. In light of the authority above, I am satisfied that, that puts an end to the question about the union's *locus standi* to represent the individuals on that list.

Brief chronology

[5] On 10 March 2017, Patcon initiated retrenchment consultations by sending AMCU a notice of proposed retrenchment in terms of section 189A of the LRA. The prospective retrenchments arose from the termination of core contract Patcon had with Engen, which Patcon anticipated would ultimately lead to the closure of the company.

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[6] A consultative meeting over the proposed retrenchments was held on 16 March 2017. During that meeting, the company proposed a series of phased layoffs once work at various sites was completed. The first proposed layoff was anticipated to take place immediately and the consequent retrenchment would occur on 9 May 2017. The letter stated that "It is noted that the company may be required to further implement and continue such layoffs in phases on other affected sites during the consultation period". Elsewhere, the letter spoke of retrenchment been implemented in 6 phases.

[7] It is apparent from handwritten minutes of the meeting that the union floated the idea of LIFO as a selection method, but management felt that it would be impractical because of the phased nature of the process. Management also outlined the dates of proposed phased layoffs of 60 days in consecutive stages starting on 13 April 2017 and ending on 30 April 2017. The union wanted an opportunity to consult with its members about the proposed 60 day layoffs and the company indicated its intention that during the layoff periods, consultation would take place and it would be decided whether to extend the layoff until more work became available.

[8] After the meeting there was a significant amount of email correspondence. The critical communications in this regard took place between 23 and 27 March 2017. On 23 March, the union notified the company that following the meeting with members on 18 March, the union confirmed "…that our position as per the mandate we got, we don't agree with the layoff as you proposed, However, we preferred the retrenchment take place as soon as tomorrow." After considering the union's response, management responded on 27 March in an email headed "RE Patcon -retrenchments- Engen phase 1". The email then went on to confirm that Engen (Phase 1) employees would be retrenched "effective immediately as requested". The rest of the email set out more details of this retrenchment. It was clear from the tenor of the communications that the pressing issue that the parties' attention was focussed on was the imminent layoffs in Phase 1.

[9] On 6 April 2017, AMCU wrote to the company requesting an urgent meeting. The body of the letter stated that the union wish to meet with the

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company a few days later to discuss the following issues: “2 weeks of service per each year completed; Notice pay 4 weeks; Leave Pay; Bonus and bumping and LIFO”. Patcon unequivocally rejected the proposed meeting in the following terms in its reply of 10 April:

> “1. We cannot agree to meet as requested to reopen retrenchment consultations as proposed.
>
> 2. On written request by AMCU as mandated by members, a request for <u>immediate</u> implementation of retrenchment was received on 23rd March 2017, and subsequently implemented, effective 31st March 2017 at ENGEN (phase 1).
>
> 3. To now request to restart consultation would not be possible as phase 2 of retrenchments will take place this week.”

On the same day, the union confirmed that it objected to the company proceeding with the retrenchment of employees without consultation in violation of the LRA. The company responded tersely, reserving its rights and stating: “As per written confirmation from your offices we proceeded with the implementation of the proposed retrenchments as explained in our previous correspondence.”

[10] On 24 May 2017, AMCU referred an unfair retrenchment dispute to relevant bargaining Council in which it alleged that Patcon had not consulted with the union in terms of the requirements of section 189 of the LRA and sought “fair consultation” as a remedy. The bargaining Council notified AMCU that the referral was defective because they did not identify where the dispute arose or the members it represented. AMCU did not pursue that dispute referral any further.

[11] What followed was a long hiatus in communications between the parties, apart from some correspondence relating to an offer of work for some employees in May 2017. On 6 September 2017, AMCU reopened matters with another request for an urgent meeting. The request was expressed in the following terms: “We kindly request the meeting on 8th September 2017 … to get clarity regarding the agreement on [sic] place and concerns from the workers about operation and previous retrenchments.”

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[12] The meeting took place on 11 September and it is apparent from a letter from Patcon confirming what transpired at the meeting that the union was "shocked and concerned regarding the further implementation of the retrenchment process, after the initial phase-in retrenchment." The letter also reflected the union's belief that its email of 23 March 2017 had only been confirmation of the first phase retrenchment and urged the company to engage with it on the further phasing in of retrenchments. The letter also records the company's response during the meeting, in which it reiterated its view that it had confirmed on 27 March that the balance of affected workers would be retrenched as per the phase-in process. The company further confirmed that all temporary work, in terms of which some employees had been engaged on fixed term contracts, would come to an end at the end of September and the remaining retrenchments would take place at the end of September or in October. Lastly, the company confirmed that it could not agree to recommence consultation regarding retrenchment packages at such a late stage.

[13] On 20 September 2017, the company confirmed that all fixed term contracts would terminate no later than 29 September 2017 and that other affected employees will be retrenched on 13 October 2017.

<u>Evaluation</u>

[14] The synopsis above leads to a number of conclusions. Firstly, Patcon initiated retrenchment discussions in March this year, which contemplated the retrenchment of all the employees listed on Annexure "FA1". However, at the first consultation meeting, the attention of the parties quickly moved to the imminent first phase of proposed layoffs. The union's members affected by the first phase were reluctant to wait for a period of two months without pay in circumstances where the prospect of further employment thereafter seemed remote. This prompted the union to propose the immediate retrenchment of those employees without the implementation of an interim layoff phase.

[15] Despite the company's contention that the union's communication of 27 March amounted to an agreement that it could proceed with all retrenchments, it is fairly obvious from the correspondence that the

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communications at the end of March concerned the 1st group of affected employees. The company however insisted on its own interpretation of that communication and when the union attempted to reopen discussions in early April, it disingenuously refused to entertain them on the basis that an agreement had been concluded. It is true that much later the union referred to an 'agreement (in) place', but if one has regard to the events and correspondence in March, April and May it is clear that any such agreement which was reached related only to the first phase of the retrenchments and that the union clearly wanted to discuss other issues but the company peremptorily shut down the prospect of further discussions.

[16] The next step taken by the union in May was to refer the dispute over the consultations to the bargaining Council that it abandoned its efforts in that regard once the bargaining Council raised technical problems with the referral. Thereafter, nothing happened until the union tried to reopen discussions in September.

[17] It is fair to conclude on the basis of the above that the consultation process was unduly curtailed by Patcon and that discussions had not run their course except in relation to the first phase of retrenchments, which was implemented quite rapidly, without much else being canvassed that one would expect in a normal s 189 consultation process. On the other hand, the union faltered in pursuing the failure of Patcon to re-open discussions. It certainly cannot be said that the consultation process which took place in March this year entailed the kind of meaningful consultation over proposed retrenchment envisaged in section 189 (2) of the LRA.

[18] The issue which then arises as what would be an appropriate remedy. In ***Banks & another v Coca-Cola SA - A Division of Coca-Cola Africa (Pty) Ltd*** [2] it was stated that:

> '[15] It is well established that the aim of the consultation process established by s 189 is to avoid dismissal, or at least to effect a reduction in

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[2] (2007) 28 *ILJ* 2748 (LC), at 2755-6. See also SA Society of Bank Officials v Standard Bank of SA (2011) 32 *ILJ* 1236 (LC) at 1244-5 at paras [25] – [29], and NUMSA v General Motors of SA (Pty) Ltd [2009] 9 BLLR 914 (LC) at

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the number of dismissals and to mitigate the effect of dismissal on affected employees. The nature of the process is equally well established - the parties are required to engage in a problem-solving or joint consensus-seeking exercise (see s 189(2)).

[16] The four remedies established by subsection (13) afford the court a wide discretion. The first two remedies (a compliance order, and an interdict against dismissal) clearly contemplate intervention by the court before a dismissal takes effect, the latter (reinstatement until there is compliance with a fair procedure, monetary compensation) contemplate intervention after an employee has been dismissed. This provision is to be read with the time-limits established by subsection (17). These contemplate intervention by the court at a time that is appropriate given the circumstances of the case, and having regard to the particular remedy that is sought.

[17] The requirement in subsection (17) that an application be brought "not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed", read with subsection (13), places what might be termed an "outside limit" of 30 days post-dismissal or notice of dismissal within which the application must be brought. However, the wording of the subsection and the structure of s 189A generally envisage that the court may be asked to intervene at any appropriate stage during a consultation process that has been initiated, or even prior to that, for example, when an employer purports to dismiss employees without commencing any consultation with them or their representatives.

[18] In short, the conclusion to be drawn from the wording of s 189A is that this court appears to have been accorded a proactive and supervisory role in relation to the procedural obligations that attach to operational requirements dismissals. Where the remedy sought requires intervention in the consultation process prior to dismissal, the court ought necessarily to afford a remedy that accounts for the stage that the consultation has reached, the prospect of any joint consensus-seeking engagement being resumed, the attitude of both parties, the nature and extent of the procedural shortcomings that are alleged, and the like. If it appears to the court that little or no purpose would be served by intervention in the consultation process in one of the forms contemplated by s 189A(13)*(a)*, *(b)* and *(c)*, then compensation as provided by para *(d)* is the

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> more apposite remedy.
> [19] In *Insurance & Banking Staff Association & another v Old Mutual Services & Technology Administration & another* (2006) 27 ILJ 1026 (LC), Pillay J came to a similar conclusion. In that case, the court noted that although the timing of s 189A (13) application is not connected to the date when the procedural unfairness occurred, it is a relevant consideration as to whether the application should succeed. More specifically, the court held that if there is an undue delay between the occurrence of the procedural flaw and the launching of the application, the remedies established by subsection (13)*(a)*-*(c)* would be inappropriate (at 1031G-H). Similarly, these remedies are not appropriate once the retrenchment process is completed (at 1031H-I)''

In my view, the principle above is apposite here and there would be little point at such a late stage of trying to remedy the flawed consultation process, for those who have already been retrenched. There is also no value in referring the matter to oral evidence as the consultation process, such as it was, is adequately canvassed in the affidavits. Accordingly, an award of compensation is appropriate taking into account the failure of the applicants to act earlier in obtaining the primary relief envisaged by section 189A (13), namely to remedy the procedural inadequacies of the consultation process, which is why the LRA requires the application to be brought expeditiously. Account must also be taken of the way the respondent rebuffed attempts to re-open discussions.

[19] In relation to any remaining employees who still face the prospect of retrenchment, provision must be made for an opportunity for consultation to still take place, though given that such prospective retrenchments should have been the subject of proper consultation much earlier when they were first raised as a possibility only a limited period for concluding such discussions is provided for.

[20] An argument was advanced by the respondent that because the applicants did not explain why the retrenchments were procedurally unfair for want of compliance with section 189A, their claim of procedural unfairness must fail. This argument was based on an interpretation of the following extract from a lengthy judgement of Zondo J in the Constitution

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Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening) :

> "[135] The LRA spells out the consequences of an employer's breach of the procedural requirements of s 189A (8) both in s 189A (9), which is the strike route, and in subsection (13). That the subsection (13) orders are consequences of non-compliance with the procedural requirements is made clear when subsection (13) refers to 'non-compliance with a fair procedure'. That phrase is a reference to the procedure set out in s 189A. If the provisions that cover the 'fair procedure' referred to in subsection (13) include the procedural requirements of subsection (8), I then logically that would lead to the conclusion that the subsection (13) orders represent the consequences of non-compliance with subsection (8)."[3]

Indeed, read in isolation, the learned judge might appear to have been conflating fair procedure in retrenchment with compliance with section 189A. However, apart from the fact that this passage would appear, strictly speaking to be *obiter* in relation to the principal *ratio* of the decision in that case, it is doubtful that it was intended to be read so narrowly, as is evident from an earlier passage in the same judgement of the learned judge, viz:

> "[124] The first judgment is wrong that s 189A cannot be smoothed into the fabric of the unfair dismissal provisions of the LRA. That section fits comfortably into those provisions. If non-compliance with s 189A <u>results in dismissals being procedurally unfair</u>, <u>the ordinary unfair dismissal provisions of the LRA as well as the special remedies that s 189A provides may be invoked</u>. If the employer's operational requirements for dismissals are inadequate, this can be challenged as rendering the dismissal substantively unfair with the advantage of immediate access to the Labour Court or the right to strike provided for in s 189A may be invoked."[4]

(emphasis added)

If anything, it is possible that the learned judge was entertaining the possibility that even if non-compliance with section 189A did not render a dismissal invalid, it might well add another dimension to whether a

[3] (2016) 37 *ILJ* 564 (CC) at 606.

[4] At 603.

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retrenchment is procedurally unfair. In any event, one simply has to look at the wording of the introductory section of section 189A (13) to realise that that non-compliance with section 189A *per se* is not a prerequisite for invoking that section, viz: "(13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application…." The section makes no mention of non-compliance with section 189A as such, but uses the broader term 'fair procedure' which is used throughout the LRA to distinguish the procedural fairness of a dismissal from the substantive fairness of the dismissal.

[21] One other issue remains to be dealt with. Patcon claims that the application was out of time in view of section 189A (17) of the LRA. That section provides:

> (17)(a) An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed.
>
> (b) The Labour Court may, on good cause shown, condone a failure to comply with the time limit mentioned in paragraph (a)."

The application was served on 19 October 2017. Clearly, the application is out of time in so far as any of the employees who were retrenched prior to 20 September 2017. There was no evidence that employees retrenched at the end of September were personally given notice of their dismissal prior to their retrenchment. An argument was advanced, as I understood it, on the basis of the judgement in ***Transport & Allied Workers Union and others v Natal Cooperative Timber Ltd*** [5] that notice of termination might be considered effective from the date that the union was notified of the retrenchments. However, that judgement makes it clear that giving notice to the union of the retrenchments does not obviate the need to notify the affected individuals as well.[6] In any event, the provisions of section 189A(8)(b)(i) make it clear that where no facilitation process takes place notice of termination must be given in accordance with section 37(1) of the

[5] (1992) 13 ILJ 1154 (D)

[6] At 1164E-F

Basic Conditions of Employment Act". Accordingly, it is improbable that the 30 day time period envisaged in s189A (17) was intended to refer to anything other than notice to the individual employees.

[22] In any event, as mentioned there is no evidence of any notice being given to individual workers in respect of the retrenchments at the end of September and mid-October, so the 30 day time period must be reckoned from the date of termination. Consequently, there is no doubt that the application was brought with the time period stipulated in s189A (17)(a) in relation to employees dismissed in September and October or other employees to whom individual notices of termination were given before the application was launched.

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Costs

[23] The application ought to have been brought earlier and the applicants have been partially successful. On the other hand, the respondent sought to take advantage of a supposed ambiguity in correspondence to avoid further consultations, when it ought to have been clear that the ambit of any agreement in March was very narrow and, at best for Patcon, related only to the employees affected by the first phase of planned layoffs. In the circumstances, the applicants should be awarded a portion of their costs.

Order

[1] The forms and service provided for in the rules of the Labour Court are dispensed with and the matter is dealt with as one of urgency.

[2] Within 10 days of this order, the respondent must pay compensation equivalent to four (4) weeks' remuneration calculated at their respective rates of remuneration on the date of their termination of service, to each of those employees whose names appear on Annexure "FA1" to the founding affidavit who were retrenched by the respondent at the end of September and on or about 13 October 2017, or who were issued with notices of termination for operational reasons not more than 30 days prior to 19 October 2017.

[3] The company is interdicted and restrained from retrenching any of the remaining employees listed in Annexure “FA1”, who are not amongst those mentioned in paragraph [2] of the order, for a period of two weeks following the date of this judgment. During that period the applicant and respondent must hold at least three meetings to try and reach consensus on the issues listed in s 189(2) of the LRA, unless they agree otherwise in writing.

[4] The respondent must pay half the applicant’s costs.

Lagrange J

Judge of the Labour Court of South Africa

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APPEARANCES

APPLICANT:	L Naidoo instructed by Flitcher Poppesque Attorneys
RESPONDENT:	C Edy instructed by Cox Yeats Attorneys