



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Not of interest to other judges

Case no: JS 650/16

In the matter between:

BOITUMELO SEFULARO

Applicant

And

NKOMATI JOINT VENTURE

**(a partnership between African Rainbow
Minerals Limited and Norslik Bickel
Africa (Pty) Ltd)**

Respondent

Heard: 22 February 2018

Delivered: 20 March 2018

Summary: Labour Relations Act, 66 of 1995: Section 189A large scale retrenchments – Court lacking jurisdiction to determine fairness of procedure followed – Section 189(3) notice to managerial employee referring thereto – Employee recusing himself and not consulting affected employees on behalf of employer after receipt of notice - Employee retrenched in context and as

part thereof: Newly created position open to affected managerial employees – Employee applying unsuccessfully – Employee requesting training record of successful candidate for trial purposes – Employee contending can also perform duties of position in pre-trial minute – Employer submitting record irrelevant – Record irrelevant in circumstances – Effective application to compel dismissed.

JUDGMENT

LEKALE, AJ

Background and introduction

[1] The applicant was employed by the respondent as Superintendent: Employee Relations and Contracts (SERC) when he was retrenched on or about 15 April 2016 following an unsuccessful application by him for appointment into a newly created position of Human Resources Development Co-ordinator (“HRD Co-ordinator”). He was initially employed as Human Resources Superintendent on 2 March 2011 but was transferred to a new position of SERC on 18 October 2013.

[2] The Human Resources Development and Human Resources Superintendent positions later merged into a new position of HRD Co-ordinator, rendering the applicant’s position redundant. The applicant was, on 10 February 2016, notified in terms of section 189(3) of the Labour Relations Act (“the LRA”) of the respondent’s intention to retrench him and, as such, he excused himself from the section 189 consultations that he was involved in on behalf of the respondent in relation to retrenchments pending at the relevant time.

- [3] He was kept informed about the Commission for Conciliation, Mediation & Arbitration ("the CCMA") facilitated consultation process involving the National Union of Mineworkers ("NUM") through information sessions in which he indicated to the respondent that he was, as a managerial employee, not a member of the NUM and, as such, not part of the section 189(A) facilitation process.
- [4] The applicant felt aggrieved by the dismissal and referred the same to the CCMA for resolution. When the dispute remained unresolved after an attempt at conciliation he referred it to this court for adjudication in terms of section 191(5)(b) of the LRA contending that the dismissal was both procedurally and substantively unfair.
- [5] The respondent employer resists the claims and in its Statement of Response, *inter alia*, contends that the court is precluded by law to adjudicate the fairness of the procedure followed in dismissing the applicant.
- [6] In the pre-trial minute the parties are *ad idem* that the manner in which the selection criteria was applied is in dispute with the applicant contending that somebody else should have been retrenched in his stead on the basis of Last In First Out ("LIFO") selection criterion and that he could also perform the functions of the newly created position of HRD Co-ordinator to which some other person was appointed.
- [7] On 19 February 2018 and in anticipation of the trial the applicant party requested, *inter alia*, the curriculum vitae (CV) of such other person who

was the successful candidate for the HRD Co-ordinator position as well as her training record. The respondent obliged with regard to the CV but failed to provide the requested training record.

[8] The matter now serves before me for trial purposes but at the outset of the proceedings the parties pointed out that they have issues of non-adjudicatability of procedural fairness and failure to furnish the requested training record to raise *in limine*.

[9] This judgment, therefore, deals only with the preliminary issues so raised by the parties respectively.

Issues for determination

[10] The parties are *ante omnia* at variance on whether or not the court lacks jurisdiction to determine the fairness of the procedure followed in retrenching the applicant with the respondent contending that the dismissal took place in the context or as part of large scale retrenchments in terms of section 189A of the LRA and, as such, section 189 A (18) of the LRA is applicable thereto.

[11] The parties are, further, in dispute over whether or not the information requested by the applicant relating to the qualifications of the candidate who successfully applied for the newly created position of HRD Co-ordinator is relevant to the issue before the court.

Contentions for and on behalf of the parties

A. Lack of jurisdiction

- [12] Mr Van As for the respondent submits, *inter alia*, to the effect that it is patent from the section 189(3) notice issued to the applicant that his retrenchment was part of large scale retrenchments in terms of section 189A of the LRA. Section 189A (18) of the LRA, therefore, applies with the consequence that the court is precluded from adjudicating the fairness of the procedure followed. Insofar as the applicant contends that he was not consulted he should have invoked section 189 A (13) of the LRA for relief according to Mr Van As.
- [13] Mr Mogane submits, on behalf of the applicant, *inter alia*, to the effect that section 189A of the LRA is not applicable in the instant matter because the applicant was not a member of NUM and should, as such, have been consulted personally as prescribed by section 189(1) of the LRA.
- [14] It is true, for the purposes of the instant matter, that section 189A of the LRA applies where the employer, who employs more than 50 employees, contemplates retrenching at least 10 employees out of 200 employees it employs.¹
- [15] It is, further, correct that in large scale retrenchments the CCMA is obliged to appoint a facilitator to assist the parties engaged in consultations if they so request.²
- [16] It is, furthermore, true that where the employer does not comply with a fair procedure in effecting large scale retrenchments, the consulting party contemplated in section 189(1) of the LRA may approach the court for an

¹ See section 189A(1) of the LRA.

² See section 189A(3) and (4) of the LRA.

order, *inter alia*, compelling the employer to comply or interdicting and restraining him, or restoring the status *quo ante* or for compensation.³

[17] Section 189 A (18) of the LRA, on its part, ousts the jurisdiction of the court as far as procedural fairness is concerned in cases of large scale retrenchments. The “crawl-back” of jurisdiction is the consequence of section 189A(13) which enables the aggrieved employee to enforce compliance with a fair procedure before the dismissal or to claim compensation for unfair procedure even before dismissal.⁴

[18] The parties are effectively in dispute over whether or not section 189A of the LRA is applicable in the instant matter insofar as the applicant party does not dispute the effect of section 189A(18) of the LRA and contends, in effect, that his dismissal was not part of large scale retrenchments insofar as he was a managerial employee and not a union member.

[19] I am, however, satisfied from the material properly before the court that the applicant's retrenchment took place in the context of and as part of large scale retrenchments contemplated in section 189A of the LRA regard being had to section 189(3) notice issued to him which referred to section 189A as well as the number of employees likely to be affected. I am, further, persuaded that the applicant was himself aware of the applicability of the relevant section insofar as he withdrew from the retrenchment process which he was handling on behalf of the respondent as soon as he learnt that his position was likely to be affected by the retrenchment

³ See section 189A(13) of the LRA and *Edcon Ltd v Steenkamp & Others* [2017] ZALAC 81.
⁴ See generally *Edcon Ltd v Steenkamp & Others supra*.

process. In my view if the relevant process was not applicable to him he would not reasonably possibly have recused himself from the relevant process.

[20] The court, therefore, lacks jurisdiction to determine the fairness of the procedure invoked in effecting the dismissal *in casu*.

B. Application to compel

[21] The applicant effectively seeks an order compelling the respondent to furnish the training record of the candidate who was appointed HRD Co-ordinator following successful application and interview.

[22] The dispute between the parties in this regard is limited to whether or not such information is relevant to the issue with the applicant contending that he also could perform functions of the position in question. The respondent, through Mr Van As, maintains that the information requested is irrelevant because the applicant effectively concedes that the successful candidate has the qualifications and skills to perform such functions.

[23] The motivation underlying the request for the information in question appears to be the desire, on the part of the applicant, to verify the qualifications and/or skills of the successful candidate in relation to the relevant position.

[24] As correctly contended for the respondent party, the issue as to whether or not the successful candidate has the minimum qualifications and skills for the relevant position is not before the court for determination regard being

had to paragraph 19.7.2 of pre-trial minute signed and submitted jointly by the parties.

[25] The information requested is *stricto sensu* not relevant to the issue before the court in the light of the implicit concession made by the applicant in the pre-trial minute to the effect that he also could perform the relevant functions.

[26] In conclusion I note *en passant* that the question as to the fairness of the appointment of the successful candidate to the relevant position probably constitutes a distinct dispute which is not before the court for determination. The situation would, most probably, be different if the applicant and such successful candidate were not required to apply for the position in question and the relevant candidate was simply offered the position as an alternative to retrenchment. In the instant matter it is evident that the appointment was made consequent to and on the basis of applications made.

Order

[27] In the result:

1. The court lacks jurisdiction to determine the fairness of the procedure followed to effect the dismissal of the applicant;
2. The application to compel is dismissed;
3. Costs shall be costs in the cause.

LJ Lekale

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances

For the Applicant: Mr C Mogane

Instructed by: Moshwana, Mabena Mogane Inc.

For the Respondent: Mr M Van As

Instructed by: Cliffe Dekker Hofmeyer

LABOUR COURT