



IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: J 1879/18

Not Reportable

In the matter between:

TIRISANO TRANSPORT AND SERVICES

WORKERS UNION (TASWU)

First Applicant

SOUTH AFRICAN TRANSPORT AND

ALLIED WORKERS UNION (SATAWU)

Second Applicant

TRANSPORT AND ALLIED WORKERS

UNION OF SOUTH AFRICA (TAWUSA)

Third Applicant

and

PUTCO (PTY) LTD

Respondent

Heard: 7 June 2018

Delivered: 14 June 2018

JUDGMENT

WHITCHER J

Nature of the dispute

- [1] On 19 March 2018, Putco gave notice as contemplated in s 189(3) of the Labour Relations Act, 1995 (“the Act”) to the applicants and other trade unions involved, notifying them that it contemplated that about 327 employees would be retrenched.
- [2] Following a consultation process facilitated by a CCMA Commissioner, during which the statutory 60-day consultation period was extended by a week, Putco, on 1 June 2018, gave a month’s notice to 140 monthly-paid employees and a week’s notice to 81 weekly-paid employees.
- [3] In this application, brought in terms of s 189A(13) of the Act, the applicant unions seek the reinstatement of the retrenched employees, and an extension of the consultation process by a further 30 days, *alternatively* a compensation order.
- [4] The unions’ case is that there was no meaningful engagement on all the topics that require consultation. This, they allege, was as a result of the national bus strike having taken place for part of the 60-day period, Putco’s failure to respond to issues raised by them during the process and their inability to interrogate the Department of Transport on Putco’s claims regarding underfunding and subsidy problems.
- [5] Putco’s case is that it sought to consult comprehensively on all consultation topics, but the unions placed obstacles in the way of proper consultation. Putco therefore cannot be blamed for any shortcoming in the consultation process.

Brief chronology

- [6] From the affidavits and the detailed minutes of the facilitated meetings attached to the answering affidavit, the following summary of pertinent events can be made. The accuracy of the minutes for the most part was not a matter of contention and the parts that were questioned were not contested in any meaningful manner.

- [7] On 19 March 2018, Putco issued the s 189(3) notice to the unions.
- [8] The notice addressed in detail all the aspects prescribed by s 183(3), namely the reasons for the proposed dismissal, the number of positions likely to be affected, actions Putco had taken in an attempt to avoid the proposed dismissals, its proposed method for selecting affected employees, a proposed timing of the dismissals and proposed assistance to affected employees.
- [9] According to the notice Putco is in a perilous financial position due to various factors. These include protracted underfunding, a decrease in subsidies, petrol increases and a failure by the Gauteng Department of Transport to renegotiate competitive contracts.
- [10] The notice informed the unions that the statutory 60-day consultation period would end on 18 May 2018.
- [11] A facilitator was appointed and 6 facilitated consultation meetings were held: on 6 and 12 April; 16, 18, 23 and 25 May 2018. The 60-day facilitation period elapsed on 18 May 2018, but Putco agreed to a week's extension. There was a national bus strike for 27 days, from 18 April to 14 May 2018.
- [12] At the first facilitated meeting, Putco had a comprehensive presentation prepared on all aspects listed in s 189(3) which it wanted to present to the unions. Putco had at the commencement of the meeting provided the unions with an "evidence bundle" containing the presentation and supporting documents, including extracts from audited financial statements and a presentation made by Putco to the Gauteng Roads and Transport Portfolio Committee Enquiry on the bus contract and subsidy programme.
- [13] The unions refused to allow Putco to make the presentation. Their purported reason: Putco had not provided them with the "evidence bundle" prior to the meeting. They also wanted the 6 April 2018 to be considered the first day of the 60-day period.
- [14] The facilitator concurred with Putco's submissions that employers are permitted to make such a presentation in the first meeting and that, in terms of

s 189(A)(7) of the Act, the 60-day period ran from 19 March and lapsed on 18 May 2018.

- [15] The unions, however, persisted with their position and facilitator had to adjourn the meeting.
- [16] The unions instructed Putco to provide them with the following additional information before the next facilitated meeting: a list of Putco's suppliers and sub-contractors, Putco's audited financial statements for 2009, 2014, 2015, 2016 and 2017, Putco's unaudited financial statements for 2018, details of the earning of top management and the names of all employees potentially affected. Putco dispatched the information to the unions on 10 and 11 April 2018.
- [17] The second facilitated meeting took place on 12 April 2018. NUMSA and Trisano were accompanied by their own accountants.
- [18] Putco took the unions through its presentation and supporting documents. In the process, Putco was asked and answered various questions about its financial state. At the end, the unions said they needed time to digest and prepare a response to the presentation (despite them having been in possession of all this information from 6 April 2018).
- [19] Further facilitated meetings were scheduled for 19 and 20 April 2018. The unions instructed the facilitator to secure the attendance of the Department of Transport at the next facilitated meeting to address the issue relating to subsidies.
- [20] Importantly, the unions also asked how the parties would proceed with the scheduled consultation meetings in light of the impending national bus strike. After discussions on the matter, they agreed that they would attend the meetings and Putco agreed to assist them by providing the shopstewards with transport or transport costs. Putco arranged the latter on 18 April 2018.
- [21] The Department of Transport agreed to attend the consultation meeting scheduled for 20 April 2018.

- [22] The national bus strike commenced on 18 April 2018.
- [23] On 18 April 2018, SATAWU, TAWUSA and NUMSA indicated in an e-mail trail to all parties that they would not attend the scheduled meetings on 19 and 20 April 2018 because they would be busy with the strike.
- [24] TASWU stated that although it was part of the s 150 conciliation meeting scheduled for 19 and 20 April 2018 (in respect of the strike), it had been prepared to improvise and attend the pre-arranged facilitated meetings on 19 and 20 April 2018.
- [25] The CCMA had to postpone the consultation meetings scheduled for 19 and 20 April 2018, but immediately informed the parties that the next facilitated meeting would take place on 4 May 2018, with the 9 or 10 May 2018 being proposed for a follow-up meeting.
- [26] The unions informed the CCMA that they were not available on 4 May 2018. The CCMA then scheduled meetings for 10 and 14 May 2018.
- [27] On 4 May 2018, TAWUSA, in an e-mail trail, stated that the facilitation process should be postponed *sine die* due to the bus strike. NUMSA proposed that the 60-day period be extended for 30 days because of the strike.
- [28] On the same day, Putco informed the unions that it was not in a position to extend the consultation period “given its (dire) financial position” and that an extension would amount to “reckless trading by the company”. The strike had in fact worsened its financial and cash flow problems.
- [29] Putco urged the parties to discuss the matter during the next consultation meeting, scheduled for 10 May 2018.
- [30] The unions did not attend the meetings scheduled for 10 and 14 May 2018.
- [31] The national bus strike ended on 14 May 2018.

- [32] The next facilitated meeting took place on 16 May 2018. At the meeting Putco expressed its concern that the end of the 60-day period was drawing close with the parties not having engaged on various matters for consultation.
- [33] The unions present (NUMSA, SATAWU and TASWU) objected to the meeting proceeding, stating that the CCMA had omitted to send the notice of the meeting to IMATU and TAWUSA. Putco contends that these unions were, nevertheless, aware of the date of the meeting.
- [34] The unions requested a one-month extension of the consultation process because of the national strike. Putco agreed to extend the consultation process by a further week only.
- [35] All the parties agreed to hold further consultations on 18, 23 and 25 May 2018, and the meeting was adjourned without any discussions on substantive issues.
- [36] The parties met on 18 May 2018. The facilitator reported that the Department of Transport had not been responsive to follow-up letters on its attendance at rescheduled consultation meeting.
- [37] Putco reported that the number of potentially affected employees had been reduced from 327 to 241 due to resignations, retirements, deaths and dismissals.
- [38] The unions argued that given this change in numbers, Putco was required to issue a new section 189(3) notice and commence the consultations process afresh.
- [39] They also insisted that the meeting could not continue in the absence of the Department of Transport.
- [40] The facilitator stressed that there were other issues that could be deliberated on in the meantime.

- [41] Following a caucus the unions decided to pose questions to Putco on the financial information given to them on 10 April 2018, but it was agreed that they would submit their questions in writing by 19 May 2018, and the meeting adjourned. On 22 May 2018, Putco provided the unions with its written responses to the questions.
- [42] The fifth facilitated meeting took place on 23 May 2018. Putco took the unions through its written responses provided on 22 May 2018. Further questions on Putco's financial position were posed and Putco undertook to respond thereto in writing. (It did so on 24 May 2018).
- [43] Before the meeting ended, the facilitator reminded the parties that only one meeting was left in the consultation process and expressed concern that there had been no meaningful progress on the matter.
- [44] On 24 May 2018, Putco sent a lengthy letter to the unions in which it outlined its proposals for the conclusion of the consultation process and urged the unions to deal with the outstanding issues listed in s 189(3).
- [45] The sixth and final facilitated meeting took place on 25 May 2018. The unions took the view that the meeting should not proceed unless Putco withdrew its insinuation in the letter of 24 May 2018 that the unions had failed to engage on the items listed in the letter and had frustrated the consultation process. Only after much argument on the matter, did they agree to proceed with the meeting.
- [46] There was a lengthy discussion on alternatives to dismissal, with Putco explaining why, in its view, the alternatives suggested were not viable.
- [47] At the end of the meeting the unions stated that the consultation process could not proceed in the absence of the Department of Transport.
- [48] On 29 May 2018, Putco sent a letter to the unions, in which it proposed a final meeting on 31 May 2018 to close out the consultation process (it had taken the decision to retrench and (again wished to consult over the consequences of the decision)).

[49] The 31 May 2018 meeting did not come about and the unions did not respond to Putco's proposals (as they had been invited to).

[50] On 1 June 2018, Putco issued notices of termination.

Evaluation

[51] It is my view that the applicants have failed to make out a case for the relief prayed for. It is evident that the purpose of s 189 (a joint-consensus seeking process) was not achieved in this case – but, Putco was not at fault and, in fact, did all it could to consult comprehensively on all matters.

[52] The unions' claim that Putco failed to respond to important issues and questions is vague and unsubstantiated. It appears that throughout the process Putco furnished all required and requested information timeously and sought to answer all queries put to it by the unions.

[53] Putco further furnished detailed proposals on all the aspects listed in s 189 and afforded the unions' sufficient time to consider and respond to same.

[54] And, in relation to this case, it sought to consult comprehensively on all these aspects, but the unions frustrated this process.

[55] They unnecessarily delayed the process in the first two meetings.

[56] I agree with Mr Myburgh that the fact that the national bus strike took place during the consultation process is a red herring. The unions undertook to attend the consultation meetings during the strike and later reneged from this undertaking. The unions did not explain why, considering their size with established infrastructure and a greater number of trade unions officials and the fact that the strike lasted 27 days, they could not honour their commitment to attend the consultation meetings during the strike by deploying officials to deal with the national bus strike and deploying other officials to the consultations. They also did not offer any principled reason for not attending the consultations during the strike.

- [57] The fact that the Department of Transport was not responsive to further invitations to attend the consultations did not justify delaying the process. When the Department was prepared to honour its commitment to attend a scheduled meeting, the unions failed to attend. In any event, the unions did not demonstrate why the information on the Department provided by Putco, with supporting documents, was insufficient or why they could not have sought answers (even written ones) from the Department during the 27 day strike.
- [58] Putco extended the consultation process by a week beyond the statutory 60-day period, and gave rational financial reasons as to why it could not tenably delay the retrenchment any further than it did.
- [59] Considering this reason and the fact that the unions were afforded ample time to engage Putco on all matters, it was not unfair for Putco to have decided on 29 May 2018 that it was only prepared to attempt to consult and reach consensus on one more occasion and to decide that, if necessary, it was going to act unilaterally thereafter. It is significant that unions made no attempt to attend this meeting and did not explain their absence.
- [60] In the circumstances, I agree that Putco sought to consult comprehensively on all consultation topics, but the unions frustrated their attempts. Putco therefore cannot be blamed for any shortcoming in the consultation process.
- [61] I do not believe that an adverse cost order is appropriate. The parties have a continuing relationship and the matter was important in that it potentially affected over two hundred employees.



- [62] In the premises, I make the following order:

Order

1. The application is dismissed.
2. There is no order as to costs.

B Whitcher

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:	Advocate V.P Ngutshana
Instructed by	Masondo Malope Attorneys Inc
For the Respondent:	Advocate A. Myburgh SC with R Itzkin
Instructed by	Bowman Gilfillan Inc

Labour Court