



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 1166/13

In the matter between:

WESSEL ENSLIN

Applicant

and

LONMIN PLATINUM COMPRISING

WESTERN PLATINUM LIMITED

Respondent

Heard: 13, 14 and 20 August 2018

Delivered: 20 September 2018

JUDGMENT

MAHOSI, J

- [1] The respondent dismissed the applicant, Mr Wessel Enslin, on 31 July 2013 for operational requirements. On 11 December 2013, the applicant filed a statement of claim in this Court in term of which both the procedural and substantive fairness of his dismissal are challenged.

- [2] The question of procedural fairness of the applicant's dismissal was raised during the cross-examination of the respondent's first witness, Mr Prinsloo. Flowing from that, the Court *mero motu* raised the question of the applicability of section 189A of the Labour Relations Act¹ (LRA). The parties were therefore directed to address the question whether this Court has jurisdiction in this trial to adjudicate the procedural fairness of the dismissal based on the employer's operational requirements.
- [3] The applicant, on the one hand, submitted that section 189A is not applicable in this case and further that the respondent embarked on a normal retrenchment and not a large-scale retrenchment. The basis for the applicant's submission was that the respondent, in its section 189(3) notices, failed to disclose the number of employees who were likely to be affected by the restructuring process. The applicant submitted that the number disclosed by the respondent in its notices was only three.
- [4] On the other hand, the respondent submitted that section 189A applies and that consequently this Court's jurisdiction to enquire into procedural fairness is ousted by section 189A(18) of the LRA.
- [5] Section 189 deals with dismissals based on operational requirements. Subsection (1) requires the employer to consult with affected employees prior to embarking on retrenchment programmes and provides as follows:
- '(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult -
- (a) any person whom the employer is required to consult in terms of a collective agreement;
 - (b) if there is no collective agreement that requires consultation –
 - (i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace

¹ Act 66 of 1995 as amended.

forum; and

(ii) any registered trade union whose members are likely to be affected by the proposed dismissals;

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.'

[6] In terms of section 189(3), the employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to:

'(a) the reasons for the proposed dismissals;

(b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;

(c) the number of employees likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which employees to dismiss;

(e) the time when, or the period during which, the dismissals are likely to take effect;

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the employees likely to be dismissed;

(h) the possibility of the future re-employment of the employees who are dismissed;

(i) the number of employees employed by the employer; and

- (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.’

[7] Section 198A(1) provides as follows:

‘189A. Dismissals based on operational requirements by employers with more than 50 employees

- (1) This section applies to employers employing more than 50 employees if-
 - (a) the employer contemplates dismissing by reason of the employer's operational requirements, at least-
 - (i) 10 employees, if the employer employs up to 200 employees;
 - (ii) 20 employees, if the employer employs more than 200, but not more than 300, employees;
 - (iii) 30 employees, if the employer employs more than 300, but not more than 400, employees;
 - (iv) 40 employees, if the employer employs more than 400, but not more than 500, employees; or
 - (v) 50 employees, if the employer employs more than 500 employees; or
 - (b) the number of employees that the employer contemplates dismissing together with the number of employees that have been dismissed by reason of the employer's operational requirements in the 12 months prior to the employer issuing a notice in terms of section 189(3), is equal to or exceeds the relevant number specified in paragraph (a).’

[8] Section 189A is applicable only if the employer employs more than 50 employees and if the employer contemplates retrenching employees in accordance with the scale provided in section 189A(1)(a). It is further applicable if the number of employees that the employer contemplates

dismissing together with the number of employees that have been dismissed by reason of the employer's operational requirements in the 12 months prior to the employer issuing a notice in terms of section 189(3), is equal to or exceeds the relevant number specified in section 189(1)(a).

[9] In the current matter, it is common cause that the respondent issued two notices purporting to comply with the provisions of section 189(3). The first notice was dated 7 November 2012, and it was addressed to the trade unions involved, being NUM, UASA, Solidarity and AMCU (the trade unions) and the second notice was issued to the applicant on 25 February 2013. Both notices were worded similarly and stated that:

- ‘1.1 Lonmin Platinum wishes to advise that it is reviewing its current operating model and contemplating restructuring its management structure.
- 1.2 Lonmin Platinum needs to be focused and manage the current cost pressures affecting the business. The magnitude of the losses sustained by Lonmin Platinum must be appropriately managed as well need to investigate areas for revenue improvement and cost improvement.
- 1.3 All these initiatives could result in retrenchments.
- 1.4 During the course of the next few weeks, Lonmin Platinum will be consulting on, amongst others, the reasons for its restructuring, advised operating model and the proposed operational structure to support the operating model as well as to receive input from you, other employees in Petterson job grades F, E, D, and C. By virtue of you falling in these grades, you are affected.’

[10] In these notices, the respondent disclosed that it employed approximately 28 042 employees and further that the number of employees that have been dismissed for reasons based on operational requirements in the preceding 12 months was three. On the number of employees likely to be affected, the notice stated that:

‘...The number of employees who may have to be retrenched, if any, is unknown to Lonmin Platinum at this stage.’

[11] On 13 November 2012, there was a consultation meeting. The minutes of the said meeting discloses that the consultation session is the commencement of the 60-day period as required by the LRA. Further that its purpose is to provide an overview of the restructuring process in respect of the state of the business, way forward on the proposed facilitation of consultations and proposed use of previous restructuring agreements. The parties agreed to seek a facilitator to assist in the restructuring process starting from 20 November 2012. Subsequently, a number of consultation meetings were held between the respondent and the trade unions.

[12] According to the pre-trial minute, it was common cause that on 28 February 2018, the applicant attended the restructuring update at the game farm during which Mr. Prinsloo was present. Mr Prinsloo testified on the document titled “Lonmin Restructuring Project – Updated EXCO Presentation” dated 27 February 2013 which was presented on 28 February 2013. The overall proposed headcount reduction in terms of the executive summary of this updated EXCO presentation is 83 employees. Mr. Prinsloo, further testified on a document titled “Voluntary Separation, Early Retirement and Redeployment Agreement in Respect of Marikana Operations.” The interpretation clause of the said documents records as follows:

‘1.1 This agreement is the reflection of the consultation process between the parties in terms of section 189 and 189A of the LRA that commenced on 13 November 2012.’

[13] To an extent that the respondent’s section 189(3) notice did not disclose the number of employees likely to be affected and the job categories in which they are employed, such notice was irregular and/or defective. However, it is apparent that the said defect was rectified in the consultation meeting of 28 February 2013 when the respondent disclosed that 83 employees were likely to be reduced. The applicant argued that the word reduction does not mean retrenchment as reduction may be achieved in various ways including early retirement. I find this argument to be baseless.

[14] It is apparent that the section 189(3) notice disclosed that the respondent is reviewing its current operating model and contemplating restructuring its management structure; it employed approximately 28 042 employees and that it retrenched three employees in the preceding year. Although the notice disclosed that the number of employees who may have to be retrenched was unknown at the stage when section 189(3) was issued, the respondent subsequently disclosed in its document titled “Lonmin Restructuring Project – Updated EXCO Presentation” dated 27 February 2013 which was presented on the consultation meeting on 28 February 2013, that it contemplated reducing 83 employees.

[15] Section 189(13) provides that if an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order: (a) compelling the employer to comply with a fair procedure; (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure; (c) directing the employer to reinstate an employee until it has complied with a fair procedure; (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.

[16] Section 189A(18) provides that:

‘The Labour Court may not adjudicate a dispute about procedural fairness of a dismissal based on the employer’s operational requirements referred to it in terms of section 191(5)(b)(ii)’.

[17] In *Edcon Ltd v Steenkamp and Others*,² the Court considered the effect of section 189A(18) and held as follows:

‘There could be no clearer indication that after a dismissal had taken place under the stipulated circumstances of operational requirements of an employer, the Labour Court is bereft of jurisdiction, save in respect of substantive fairness. That express exclusion of jurisdiction to evaluate procedural unfairness *ex post facto* is in stark contrast to the jurisdictional competence of the Labour Court in other kinds of dismissal disputes.’

² (2018) 39 ILJ 531 (LAC) para 19.

[18] In my view, the evidence is compelling that, subsequent to the consultation meeting of 28 February 2013, it became clear that section 189A was applicable. The employer employed more than 50 employees and it contemplated retrenching employees in accordance with the scale provided in section 189A(1)(a)(v). In addition, a facilitator was appointed in terms of section 189A(4). This being a large-scale retrenchment, section 189(13) read with section 189A(18) was applicable. In the premises, this Court lacks jurisdiction to determine procedural fairness of the applicant's dismissal.

[19] Accordingly, I make the following order:

Order

1. This Court has no jurisdiction to adjudicate a dispute about the procedural fairness of the applicant's dismissal based on the employer's operational requirements.
2. The matter is to be set down for trial for hearing of evidence in relation to the substantive fairness of the applicant's dismissal on the dates to be agreed to between the parties and the Registrar of this Court.
3. The matter is part-heard.
4. Costs to be the costs in the cause.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the Applicants

Advocate Hein Gerber

Instructed by

Welman and Bloem Incorporated.

For the Third Respondent

Advocate A. Makka

Instructed by

Cliffe Dekker Hofmeyr Attorneys

LABOUR COURT