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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J 1982/19

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA — **Applicant**

and

SCRIBANTE AFRICA MINING (PTY) LTD — **First Respondent**

SCRIBANTE CONSTRUCTION (PTY) LTD — **Second Respondent**

Heard: **3 October 2019**

Delivered: **5 November 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The applicant (NUMSA) approached this Court in terms of the provisions of section 189A(13) of the Labour Relations Act (LRA)[1] to seek a declaratory order that the dismissal of its members by the first and second respondents due to operational requirements, was unlawful/and or unfair, on account of the failure to invoke the provisions of section 189 and/or 189A of the LRA, or to follow a fair procedure as envisaged in those provisions.

[2] Central to NUMSA's contentions is that when the facilitation process envisaged under section 189A (3) of the LRA was concluded, and the time periods contemplated in terms of the provisions of section 189A(13) read with section 189 of the LRA had expired without the dismissals having been effected, the first and second respondents were effectively precluded from dismissing its members on the strength of that abandoned facilitation process, and ought therefore have issued a fresh section 189(3) of the LRA notice.

[3] The first and second respondents opposed the application and denied that the facilitation process was abandoned. They contend that NUMSA and its members were advised on 30 June 2019 in a consultative meeting that the termination of employment would be effective from 30 September 2019, and that there was no obligation or a need to issue a fresh notice or start the facilitation process afresh after the facilitation process had taken its course.

<u>Background:</u>

[4] NUMSA represents its members who are or were employed at the first respondent's coal mining operations in eMalahleni, Mpumalanga. It further conceded that some of the individuals mentioned in Schedule 'A' to the founding affidavit may not necessarily be its members.

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[1] Act 66 of 1995 (as amended). Section 189A (13) provides:

> '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.'

[5] The first respondent, Scribante African Mining (Pty) Ltd is a company incorporated in terms of the relevant statutes of the Republic and is a subsidiary of Scribante Group (Pty) Ltd. The second respondent, Scribante Construction (Pty) Ltd is further a subsidiary of the Scribante Group. NUMSA's contention is that to its knowledge, the first respondent is the employer and that in the event that it is found that the second respondent was erroneously cited, no relief is sought against it. For the purposes of convenience however, the first and second respondents will collectively be referred to as 'Scribante'.

[6] In July 2016, Scribante and a third party, South 32 Coal Holdings (Pty) Ltd (South 32), had entered into a three year contract of service, which was due to end on 31 August 2019, with an additional two months for the purposes of de-establishing the workplace and invoicing. In giving effect to the service contract, Scribante had employed a number of employees in terms of indefinite contracts or limited duration contracts linked to the duration of the South 32 contract.

[7] Scribante contends that as the production in terms of the service contract was due to terminate on 30 June 2019, it had commenced with retrenchment consultations process by issuing a notice to NUMSA on 31 April 2019. In the notice, Scribante recorded that the service contract was coming to an end, and had however made an undertaking to the employees that it would pursue negotiations with South 32 with the intention of extending the service contract for a further period post the termination date.

[8] In the notice, Scribante however indicated that the consultation process as contemplated in section 189A of the LRA remained desirable, in view of the fact that the dismissal of the employees remained a possibility, notwithstanding the planned attempts to secure an extension of the service contract with South 32. In the same notice, Scribante further indicated its intentions to refer the contemplated consultation process to the Commission for Conciliation Mediation and Arbitration (CCMA) for facilitation. Indeed on 30 April 2019, a request for a facilitation in terms of the provisions of section 189A of the LRA was made to the CCMA.

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[9] Following a request, the CCMA conducted such facilitations on 24 and 31 May 2019. On 4 June 2019, Scribante issued what it termed a comprehensive section 189(3) notice, with the view of obtaining all the affected employees' submissions, to which NUMSA and the other unions had responded on 10 June 2019. A further facilitation under the CCMA took place on 6 June 2019.

[10] Scribante further contends that on 18 June 2019, it had responded and addressed all of NUMSA's representations made in its response of 10 June 2019, and had also presented a slide show on the issues raised by NUMSA and its responses, at an un-facilitated meeting held on that date. The final facilitation meeting was held on 26 June 2019, resulting in the Facilitator issuing a report which NUMSA seeks to rely on for its contentions that the process followed by Scribante was flawed.

[11] On 30 June 2019, Scribante had issued a letter to NUMSA advising that since the 60 day period for facilitation had expired, the employees' services were to be terminated at the end of September 2019. On 30 August 2019, Scribante advised NUMSA that it was unsuccessful in its attempts to extend the service contract with South 32 beyond 30 September 2019. The letter also served as a one month's notice to NUMSA and its members, and advised that a small number of employees would be retained for the purposes of de-establishment. NUMSA's response on 3 September 2019 was to advise Scribante to stop the dismissals and commence afresh with the consultations.

[12] On 20 September 2019, NUMSA advised Scribante that it could not accept that the dismissals were to be proceeded with without a fresh notice and compliance with the provisions of section 189 and 189A of the LRA in respect of joint consensus seeking consultative process. It placed Scribante on terms to undertake not to proceed with the dismissals failing which this Court would be approached for urgent relief.

[13] On 25 September 2019, Scribante sent correspondence to NUMSA and all affected parties to advise that all employees indicated in a list published the previous week, would render their services until 30 September 2019, and

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further indicated how and when their final payments would be made. This was followed by a response to NUMSA's letter of 20 September 2019 wherein it was indicated that in the light of the process followed through facilitation, any urgent application would be opposed.

<u>The parties' submissions:</u>

[14] NUMSA holds the view that proper consultations were not held, in that to the extent that the facilitation process was abandoned, Scribante ought to have issued a fresh section 189(3) notice for the purposes of a proper joint meaningful consensus seeking consultative process.

[15] NUMSA appreciated that whilst facilitations took place, they however came to an end on 26 June 2019 without dismissals, and nothing of substance occurred given the uncertainty which had prevailed at the time in respect of the contractual arrangements between Scribante and South 32 and their engagements in that regard. NUMSA further relies on the report of the CCMA Facilitator issued on 26 July 2019, which recorded *inter alia* that the position of Scribante in relation to whether jobs would be lost or not was unclear.

[16] Thus, according to NUMSA, it was only once the dismissals became a reality after Scribante's engagement with South 32 had failed, that it was obliged to issue a fresh notice and conduct fresh consultations, as new information and a new economic rationale arose from those engagements. To this end, NUMSA also holds the view that other options flowing from those engagements with South 32 would have included looking at it utilising its influence with South 32 to save jobs, or making a range of proposals including looking into whether the employees could not be absorbed into Scribante's other companies.

[17] Despite the facilitation process having run its course and having been concluded some four days prior to the date of the proposed dismissal, NUMSA holds the view that whilst some interaction took place during such consultations including looking at alternatives, there were no proper and comprehensive consultations on all the issues given the uncertainty that prevailed, including on the timing of dismissal, the selection criteria,

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severance pay etc., and that the facilitation came to an end due to a lack of direction on the part of Scribante.

[18] NUMSA further contends that at no stage did Scribante reserve its rights to proceed with the dismissals, and nor did it disclose its further engagements with South 32. It was only on 30 August 2019 that Scribante had advised by way of official notice, that it was unable to secure a contract with South 32 beyond 30 September 2019 and that it accordingly intended to terminate all contracts of employment even though it would endeavour to find alternative placement for scarce and essential skills in anticipation of future work.

[19] NUMSA also questioned the rationale behind the dismissal of 900 employees when the CCMA report had mentioned that there was a total workforce of 1 786 employees, and contended that since there was no proper consultations, it was not privy to Scribante's reasoning in this regard.

[20] Following Scribante's correspondence to NUMSA on 19 September 2019 in which NUMSA was advised of the list of employees whose last day of service was deemed to be 30 August 2019, and the fact that some employees were to be retained (based on skills and LIFO) for the remainder of the de-establishment phase, NUMSA further raised concerns about plans to retain other employees for the purposes of de-establishment, when that issue was never discussed nor formed part of the consultations.

[21] Scribante opposed the application on a number of grounds including that;

21.1 NUMSA's proposition that the consultation process terminated on 26 June 2019 with no dismissals taking effect and therefore necessitating fresh consultations was ill-founded, as it was advised on 30 June 2019 at the consultation meeting that the employees would be dismissed on 30 September 2019. That advice was repeated and confirmed on 30 August 2019 with the notice of termination, as at the time, it was clear that no new contract would be entered into with South 32.

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21.2 The fact that the service contract was extended was merely incidental to the dismissal, and had not changed anything other than delayed the timing of the dismissal.

21.3 The allegations that Scribante did not consult on the selection criteria, the timing of the dismissals and severance pay were untruthful as correspondence exchanged between the parties indicated that these issues were dealt with at length. In this regard, the first of such correspondence was on 31 May 2019, where as per the section 189 notice, Scribante had indicated to NUMSA that if the service contract with South 32 was not retained all employees were to be affected, and where also LIFO with skills retention and severance package was proposed in respect of employees that were to be retained.

21.4 The second correspondence was from NUMSA on 10 June 2019 where it had specifically raised the possibility of employment of employees on other sites, and that in regards to the selection criteria, NUMSA had requested information relating to skills and particulars of employment, and further proposed LIFO and not skills to be used as a selection criteria. In that correspondence, NUMSA had also proposed the end of December 2019 as the termination date, and made proposals on the severance pay.

21.5 The third correspondence was from Scribante on 18 June 2019 in response to NUMSA's proposals, wherein it was indicated that the employment of employees on other sites was not possible due to the nature of the contracts, and had responded to proposals on selection criteria and severance pay. In the light of the correspondence, Scribante contends that NUMSA gave an input on all the issues it alleged it was not consulted on, which it had responded to.

21.6 Scribante's further contention is that the income from the service contract with South 32 came to an end at the end of September 2019, and it did not have money to pay the employees beyond that period.

<u>The legal framework and evaluation:</u>

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[22] In *Association of Mineworkers and Construction Union and Others v Tanker Services*[2], Van Niekerk J reiterated the trite principle that in relation to procedural fairness of a retrenchment, the LRA contemplates that the consultation process is one in which the parties jointly seek to avoid retrenchment and ameliorate its consequences. It is not a process in which the employer party simply announces the decisions that it intends to implement, and must remain open to persuasion.

[23] In *Steenkamp and Others v Edcon Limited*[3], it was stated that the objectives of section 189A(13) of the LRA is to enhance the effectiveness of the consultation process by providing for the appointment of a facilitator and the mechanisms to pre-empt and resolve disputes about substantive and procedural unfairness issues as and when they arise, during the consultation process. Primarily, section 189A(13) of the LRA affords employees or their union who are aggrieved with the manner with which consultations were conducted, an opportunity to approach this Court on an expedited basis, in order to compel the employer to comply with a fair procedure, or to interdict or restrain the employer from dismissing them before having complied with a fair procedure as envisaged in sections 189 and 189A of the LRA.

[24] Bearing the above principles in mind, the starting point is that it does not appear to be in dispute in this case that the employment of the employees was linked to the service contract with South 32, which was due to come to an end in August 2019. To the extent that NUMSA disputes the economic rationale for the retrenchment (as per its response of 10 June 2019 to

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[2] (2018) 39 ILJ 2265 (LC) at para 22

[3] 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC); See also *Retail and Associated Workers Union of South Africa v Schuurman Metal Pressing (Pty) Ltd* (C 458/2004) [2004] ZALC 74 (13 October 2004) (Unreported, where it was held;

> "… the aim of section 189A(13) is to provide a remedy to employees to approach the Labour Court to set their employer on the right track where there is a genuine and clear cut procedural unfairness which goes to the core of the process. The section is aimed at securing the process in the interests of a fair outcome. It follows that not every minor transgression of a procedural nature will invite the benefit of the court's discretionary power to grant a remedy. To hold otherwise would be to open the door to excessive litigation, abuse and unnecessary delay in the process of consultation. Section 189A(13) is aimed at unjustifiable intransigence, it is not available as a tool to thwart a retrenchment process where the process, as in the present case, is otherwise capable of being rescued by genuine efforts to cure such flaws as may exist. Moreover, it would be cumbersome, if not futile, to make an order compelling the respondent to issue a notice disclosing information which it already has disclosed. There would be no point."

Scribante's notice of 4 June 2019), that is clearly not an issue for this Court to determine at this stage.

[25] The question that arises in this case is whether the consultation process embarked upon by the parties since the first notice was issued on 30 April 2019 was flawed, for the purposes of the relief sought by NUMSA under the provisions of section 189A(13)(a) – (b) of the LRA. It is common cause that facilitation process initiated after the section 189(3) notice issued on 30 April 2019 came to an end on 26 June 2019 without any dismissal. The question therefore is whether any subsequent events necessitated the process to start afresh, specifically after Scribante's engagements with South 32 in regards to the extension of the service contract.

[26] To recapture NUMSA's argument, it contended that despite the fact that the facilitation did not result in any dismissals taking place, the notice leading to that facilitation process issued on 30 April 2019, did not in any event, comply with the requirements of section 189(3) of the LRA, and was nothing but an attempt to compel the employees to agree to a different shift system arrangement under threat of retrenchment. It further placed reliance for its contentions on the report of the Facilitator, wherein it is recorded that as at 26 June 2019 when the facilitation process ended, no dismissals had taken place; that Scribante relied on a service contract without producing a copy in that regard; and further that Scribante sought to introduce a two-shift system by using the section 189A process.

[27] The notice issued on 30 April 2019 is headed; *"Consultations on possible retrenchment, alternatively alignment of resources at the South 32 site in terms of section 189 of the Labour Relations Act'.* It is addressed to NUMSA, EWUSA and all employees at South 32 site, and advises that the contract with South 32 was due to terminate at the end of June 2019, but that the parties were engaged in discussions on the possibility of the service contract going beyond that date. Scribante further advised that depending on the outcome of engagements with South 32, there might be a need to align its operational needs and that there may be a possibility of termination and/or changes, which would include but not limited to working hours and shift

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structures. In the notice, it was further indicated that the CCMA would be approached for facilitation of the consultation process on issues that are ordinarily covered under section 189(3) of the LRA and the nature of the information to be disclosed.

[28] NUMSA is correct in pointing out that the notice does not indicate how many employees would be affected. Be that as it may, this does not necessarily make the notice defective, on the basis that at the time that it was issued, Scribante could not have known how many employees would be affected, as it was still going to enter into discussions with South 32 on the possibility of an extension of the service contract. This was even more evident in the request for facilitation by the CCMA, where Scribante had indicated the number of employees to be affected to be 951, but had not indicated the number of those to be retrenched.

[29] NUMSA does not deny that four facilitations were held between 24 May 2019 and 26 June 2019, with an additional un-facilitated meeting on 18 June 2019. Its case however is that that facilitation process ended up with no dismissals being effected, which meant that since there were new developments necessitating a retrenchment, a new notice ought to have been issued.

[30] Several difficulties arise from NUMSA's contentions. The first is that under the provisions of section 189A(7) of the LRA, where a facilitator has been appointed, the employer is precluded from giving notice to terminate the contracts of employment, unless a 60-day period from the date on which notice was given in terms of section 189(3) of the LRA has lapsed. In this case, the notice of contemplated retrenchment was issued on 30 April 2019, and it was common cause that a comprehensive notice (dated 31 May 2019) had followed on 4 June 2019. That had followed upon two facilitation meetings already held on 24 and 31 May 2019.

[31] In the latter notice, Scribante again reiterated that it was unsure as to how many employees it was anticipated would be dismissed in view of on-going discussions with South 32. It however gave a number of approximately 400 positions that may be affected, further indicating that those figures may

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change depending on discussions with South 32. In the notice, it was indicated that Scribante was committed to meaningful consultations with a view to reach consensus on a variety of issues, indicating that no final decision was taken on the matter as consensus had to be reached on those issues.

[32] NUMSA had on 10 June 2019, comprehensively in a ten-page document, responded to the notice and its contents by disputing the economic rationale for the retrenchments, and had made substantive counter proposals. Scribante had on 18 June 2019, also comprehensively responded to NUMSA's counter proposals, which was followed by a slide presentation on at an un-facilitated meeting attended by NUMSA.

[33] On 30 June 2019, Scribante had issued a notice to NUMSA, advising that the 60 day period for the facilitation had expired and that there was an agreement with South 32 to extent the service contract by a further three months, which meant that the services of the affected employees would be terminated at the end of September 2019.

[34] To the extent that the notice of intention to retrench was issued in April 2019, which was followed by another one in May 2019, and notwithstanding the uncertainties at the time, it was not in dispute that the notice of dismissal was issued on 30 June 2019 and again on 30 August 2019. Clearly the latter notice of termination was issued after the 60 day period.

[35] Further in the light of the above time line of events, I have difficulties in comprehending the basis upon which it can be said that Scribante did not properly consult with NUMSA or that the provisions of section 189 and 189A of the LRA were not complied with.

[36] Scribante had from April 2019, indicated its intention to engage South 32 on an extension of the service contract and had kept NUMSA abreast on its engagements, including advising it of the extension of the service contract in June 2019. NUMSA was fully aware of the fact that as at the end of September 2019, the services of the employees were to be terminated. To this end, the contention that there was a need to issue a fresh notice after

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26 June 2019 is misplaced, in that all that happened with effect from 30 June 2019, was that Scribante had obtained an extension of the service contract until end of September 2019. Nothing can be read from the fact that no dismissals were effected before or after 26 June 2019, as Scribante and the employees had merely obtained a life-line for an extra three months. The fact that the Facilitator had recorded that no dismissals were effected and that all the jobs were saved is of little consequence in that at the end of the facilitation process, Scribante was still discussing the possibility of an extension with South 32. The position however changed after 30 June 2019 when the service contract was extended.

[37] For NUMSA to however suggest that simply because no dismissals took place as at 26 June 2019, and that an extension of the service contract was obtained thereafter which therefore necessitated a fresh notice is clearly without merit. The fact that the service contract was coming to an end remained real, and it cannot be correct that the extension of that contract by a further three months created new circumstances or a new rationale for the retrenchment for the purposes of new consultations. Nothing changed except that the service agreement meant that the employees would be kept for another three months.

[38] If NUMSA was of the view that had it been engaged properly it would have exerted its influence with South 32 to either extent that service contract further, or that it could have implored Scribante to look at other options, or that it could have influenced consultations in regards to the timing of dismissal, the selection criteria, severance pay etc., those are issues that are intrinsically linked to substantive fairness of the retrenchments, that can be dealt with at some point in the future to the extent that NUMSA seeks to challenge the economic rationale of the retrenchment. In any event, NUMSA had conceded that alternatives were explored during consultations, and the fact that its counter proposals in that regard were not accepted does not imply that they were not considered with an open mind.

[39] To reiterate, Scribante's contract of service given its limited duration was always going to come to an end, and it is not clear from NUMSA's

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submissions as to how it could have prevented that eventuality. The fact that Scribante was uncertain about when that was going to happen or how many employees were to be affected given its engagements with South 32, could not have given rise to new circumstances after the last facilitation process of 26 June 2019, for the purposes of deeming that facilitation process nugatory.

[40] The submission made on behalf of NUMSA that the notice on 30 April 2019 was not a proper notice and was merely meant to put pressure on the Union is also without merit, as the service contract was due to come to an end in June 2019. In the light of the uncertainties surrounding whether an extension of the service contract would happen or how many employees were to be affected, there was nothing that prevented Scribante as from April 2019 in the light of the imminent termination of the service contract, from forming a *prima facie* view on possible retrenchments, even a firm one, provided it demonstrated and kept an open mind in the subsequent process of consultations[4]. Scribante had done so as evident from its engagements in the facilitation process, private engagements between the parties; an exchange of correspondence between the parties in regard to proposals and counterproposals; the advice by Scribante in June 2019 that an extension with South 32 was obtained; and the subsequent notices of termination in June and August 2019.

[41] In summary, I am on the whole, satisfied, that Scribante was prepared to discharge its statutory consultation obligations with an open mind, to consult in good faith, and to do whatever it could to extent the service contract with South 32 and to save jobs. NUMSA might be aggrieved with the ultimate outcome of that process, but that however does not imply that it was flawed.

[42] The submission made on behalf of NUMSA that Scribante abandoned the facilitation process after June 2019 before the 60 day period is equally without merit in the light of the conclusions reached elsewhere in this judgment, and in any event, it could have sought an extension of that facilitation process under the provisions of section 189A(2)(c) and (d) of the LRA, if it was of the

[4] See *South African Commercial Catering and Allied Workers Union and Others v JDG Trading (Proprietary) Limited* (2019) 40 ILJ 140 (LAC); [2019] 2 BLLR 117 (LAC) at para 29

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view that further consultations under facilitation were necessary after 26 June 2019.

[43] Furthermore, the fact that the notice of termination issued on 30 June 2019 indicated that there were ongoing endeavours to obtain an extension with South 32 cannot make that notice invalid or irregular, as it was common cause that those engagements were ongoing. In the end, a conclusion that the consultation process was flawed simply because it took place in circumstances where there were uncertainties, or engagements between the employer with a third party to extend a fixed term contract of service in order to save jobs, cannot be sustainable. There is therefore, no basis for any conclusion to be reached in this case that the process followed was a sham or designed by Scribante to change the shift systems to its advantage or obtain a leverage in its engagements with South 32, or to put pressure on NUMSA. Ultimately, the contract with South 32 came to an end, and I fail to appreciate what leverage was obtained by Scribante in the circumstances.

[44] Further to the extent that NUMSA sought relief by way of reinstatement or an interdict to stop any further dismissals, it was not in dispute that the service contract with South 32 came to an end and clearly there are no positions where the employees can be reinstated. To the extent that NUMSA is aggrieved by the fact that some employees were retained for the purposes of winding up operations at the site, those are issues related to the fairness of the selection criteria which can be dealt with in due course if NUMSA elects to pursue them. Consequently, this application ought to fail.

[45] I have further had regard to the requirements of law and fairness in regards to the question of costs, and I am of the view that each party must be burdened with its own costs.

Order:

[46] In the premises, the following order is made;

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1. The applicant's non-compliance with the Rules of this Court in respect of the time frames and manner of service is condoned and this matter is heard as one of urgency.

2. The applicant's application in terms of the provisions of section 189A(13) of the LRA is dismissed.

3. There is no order as to costs.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances

For the Applicants: M. Niehaus of Minnaar Niehaus Attorneys

For the First Respondent: M Grobler with O. Smith, instructed by: Van Wyk & Associates

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