

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J142/20

In the matter between:

**NATIONAL ASSOCIATION OF SOUTH AFRICAN
WORKERS (NASA-WORKERS)**

1st Applicant

THOMAS MAROBONGWANE

2nd Applicant

And

UNILIVER SOUTH AFRICA (PTY) LTD

Respondent

Heard: 13 February 2020

Delivered: 14 February 2020

Summary: Application to compel consultation and or follow a fair procedure in terms of section 189A (13) of the LRA. Employee offered and

accepted an alternative position. Trade union insisting on consultation that ought to have happened in their view prior to offering an employee an alternative. The purpose of section 189A (13) is to ensure judicial management of the process with the sole purpose to ensure job security. Where job security is not threatened, there is no need for a court to judicial manage the process. Trade union having being told that the judicial management is not necessary is to be mulcted with costs. Held (1): The application is dismissed. Held (2): The Trade union to pay the costs of this application.

JUDGMENT

MOSHOANA, J

Introduction

- [1] This is one of those hopeless applications that grace the courtrooms of this Court. The strange feature about this case is that a trade union seeks to reverse the gains achieved by its member to achieve job security. The net effect of this application being that the appointment of the second applicant, which was made to avoid the dismissal of the second applicant for operational requirements, should be disregarded and compel the employer into a consultation process en route termination for operational requirements. Strange enough, it is a known fact that trade unions exist mainly to protect the employees job security, this trade union seeks to obtain an order that would effectively threaten the job security of its member.

Background facts

- [2] Given the view I take at the end of this judgment, it is unnecessary to detail the facts relevant to this matter with any measure of volume. The pertinent facts are that during August 2019, the respondent commenced

a process contemplated in section 189 of the Labour Relations Act, 1996, as amended ("the Act"). A facilitation process commenced within contemplation of section 189A of the Act. Later, the facilitation process conducted by the Commission for Conciliation, Mediation and Arbitration ("the CCMA") was withdrawn. According to the retrenchment notice, the position occupied by the second applicant – 4 JC16 roles – would become redundant. On or about 7 January 2020, the second applicant was offered an alternative position since his position became redundant. Around 30 January 2020, the second applicant accepted the alternative position. Despite that, on 7 February 2020, the present application was launched to be heard on 13 February 2020.

- [3] Owing to that, the respondent through its attorneys of record, addressed a letter to the trade union advising against the application since the second applicant was not dismissed. A demand was made to have the application withdrawn. This demand was ignored and the application was persisted with for some spurious and flimsy reasons. The application was argued before me on 13 February 2020.

Evaluation

- [4] The procedure available to consulting parties in section 189A (13) is there for a purpose. Its purpose was clarified by the Constitutional Court.¹ Its purpose is to ensure judicial management to effectively protect job security. Where job security is not threatened, it is an abuse of court processes to invoke the Court's judicial management powers. In the present application, it is common cause that the second applicant was not dismissed. A submission that the second applicant's old position was not redundant is neither here nor there. Should the second applicant hold a view that he has been demoted by being offered a new position, the applicant may invoke the unfair labour practice process. One of the obligations provided for in section 189 is for an employer to disclose the alternatives considered before proposing dismissal. Thus, the

¹ *Steenkamp v Edcon Limited* [2019] ZACC 17 (30 April 2019)

respondent was obligated to offer the second applicant an alternative before it may propose dismissal. Having made an offer, which was accepted, the respondent reached consensus on appropriate measures to avoid the dismissal.

[5] Having reached consensus, the obligation to consult ends. An application to compel a purposeless consultation is nothing but an abuse of a court process. In terms of section 162, this Court has a wide discretion with regard to costs. This is one of those applications that are vexatious and frivolous. An order of costs is warranted, despite the fact that there is an on-going relationship between the parties. The applicants were warned about the lack of merits of the application and further was given an opportunity to withdraw the application without incurring costs. Taking all of the above into account, it would be unfair to mulct the respondents with the costs of this application. Affidavits in support of this application were made by a union official. There is not even a confirmatory affidavit by the second applicant. In the absence of a confirmatory affidavit, one doubts whether the second applicant supported the application. Resultantly, the trade union must solely be ordered to carry the costs of this application. Its conduct is reckless and deserves a punitive costs order as a mark of displeasure.

[6] For all the above reasons, the application must fail.

[7] In the results, I make the following order:

Order

1. The application is dismissed
2. The first applicant, the trade union must pay the costs of this application on the scale of attorney and own client.

G. N. Moshwana

Judge of the Labour Court of South Africa

Appearances

For the Applicants: Ms Mokoena Seritsane (Union Official – NASA)

For the Respondent: Mr G Fourie SC

Instructed by: Norton Rose Fulbright South Africa, Sandton.

LABOUR COURT