

REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J708/03

In the matter between –

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA

First Applicant

D NTSHEBA

Second

& 23 OTHERS

and further Applicants

and

GREENFIELDS LABOUR HIRE CC

First Respondent

TURNMILL (PTY) LIMITED

Second Respondent

JUDGMENT

KENNEDY A J:

- 1] This is an application in terms of s 189A of the Labour Relations Act.¹ NUMSA (the first applicant) on behalf of its members (the individual applicants) seeks an order in the following terms –

“(1) Declaring the retrenchment of the second to [sic] further applicants to be unlawful in terms of s 189A of the Labour Relations Act ...

2) Directing the first respondent to reinstate the second to [sic] further applicants pending the completion of a fair procedure in terms of the Act.

3) Awarding the costs of this application to the applicants.

4) Granting the applicants such further and/or alternative relief as this honourable Court deems fit.”

- 2] Originally the individual applicants were employed by the second respondent. However, in terms of a transfer subject to s 197 of the LRA, they were transferred to the employ of the first respondent, which is a labour broker.

- 3] Section 189A applies only to employers employing more than 50 employees and applies only where the employer is contemplating retrenching a number of employees which exceeds the minimum specified in the Act.² There is nothing in the founding affidavit which clearly states the number of employees employed by the first

¹ Labour Relations Act No. 66 of 1995.

² Section 189A(1).

respondent. A schedule of workers which was prepared at the time of the consultation process lists the names of precisely 50 workers. Section 189A applies only to employers who employ more than 50 employees. There is no evidence before the Court to indicate whether the first respondent employed other employees not listed in the schedule, in other operations unaffected by the present dispute. Mr Cartwright, an official of NUMSA who represented it and its members, indicated that NUMSA had assumed that this would not be an issue because the respondents did not raise the point in the answering affidavit. This approach is in my view inappropriate. An applicant who wishes to rely on s 189A must, in its founding affidavit, set out facts which bring the parties within the scope of that section and in particular show that the requirements relating to numbers of employees employed and retrenched are met. When I put this difficulty to both sides, it appeared that they were both content to argue it on the basis of these requirements under s 189A having been met. I shall assume that that is the case for present purposes.

- 4] Mr Landman, who appeared on behalf of the first respondent, argued that the application should not be entertained because it had been brought after the expiry of the period provided in s 189A (17)(a) of the LRA³ and that the applicants have not sought condonation for this non-compliance. The argument raises interesting questions as to the meaning of the term “given notice to terminate the employee’s services” in s 189A(17)(a) of the LRA, read with the requirement in the Basic Conditions of Employment Act for employees to receive individual notices of

³ Under s 189A(17) of the LRA:

“(a) *An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the employee’s services or, if notice is not given, the date on which the employees are dismissed.*

(b) *The Labour Court may, on good cause shown condone a failure to comply with the time limit mentioned in paragraph (a).”*

termination. In view, however, of the conclusion which I have reached in relation to the merits of the application, as set out below, it is not necessary for me to make any findings in relation to the objection based on the alleged late filing of the application.

- 5] I turn now to the merits. It is clear from s 189A(13) of the LRA that an application may be brought under this section only where “*an employer does not comply with a fair procedure*” in relation to a retrenchment. The applicants allege such a breach on the part of the first respondent.
- 6] It is common cause that some consultation did take place. The applicants allege that it was abruptly and unfairly ended. First respondent on the other hand contends that there was adequate consultation as required by s 189 of the LRA.
- 7] The facts are briefly as follows. On 11 November 2002 the first applicant sent a letter to NUMSA indicating that “*we have no option but to retrench all general workers at Turnmill sites*” (being the sites of the second respondent, to whom the services of employees were made available by the labour broker, being the first respondent). The letter referred to “*operational requirements and the lack of contracts due to the financial situation that prevails. We have already terminated the services of 52 artisans in the last three weeks, a clear indication as to the problems that we are facing.*”
- 8] A meeting was held between representatives of NUMSA and the first respondent on 14 November 2002, at which the first respondent informed NUMSA that the failure to obtain new contracts had resulted in the second respondent having no further work for general workers as from 20 November 2002 and that this would result in the need to retrench 34 permanent employees, of whom 28 were NUMSA members. The letter

set out various proposals as to selection criteria, severance pay and other issues relating to the contemplated termination. An alternative to retrenchment “*in the short term*” was stated to be “*that of a layoff for one month and then to reassess the situation as to whether to continue with retrenchment or not.*”

- 9] At the meeting held on 14 November 2002 NUMSA invoked s 189A of the LRA, stating that it wished to obtain the services of a facilitator from the CCMA to facilitate the process of consultation. NUMSA then lodged the necessary form with the CCMA for the appointment of a facilitator.
- 10] On 21 November 2002, the first respondent notified NUMSA that employees would be laid off for the period from 4 December 2002 to 3 January 2003. NUMSA responded by stating that layoffs should be dealt with as a matter for consultation, together with the retrenchment issue, in the process to be held under the auspices of the CCMA facilitator.
- 11] While the first respondent should in my view have undertaken consultation in relation to that period of layoff, nothing seems to turn on this for ultimately there was agreement to a layoff and it was overtaken by subsequent events which culminated in the retrenchment of the workers.
- 12] The CCMA appointed a facilitator who chaired a consultation meeting on 7 January 2003. At that meeting it was agreed that in an effort to avoid retrenchments the first respondent could lay off employees from 10 January to 3 February 2003 and that the parties would meet on 28 January 2003 to assess whether the second respondent’s financial situation had improved and whether there was still a need to retrench workers. During the course of the meeting there was discussion of various issues

relating to retrenchment, including the possibility that some workers might want to take voluntary retrenchment, the retention of five workers during the layoff period on the basis that they had necessary skills, etc. A further meeting held on 9 January 2003 dealt with the practical issues relating to the layoff and arrangements were agreed to in that regard.

- 13] A further meeting was held on 28 January 2003. The first applicants representative, Mr van Tromp, indicated that there had been a slight improvement in the fortunes of the second respondent which meant that of the original entire group of general workers, it was now possible to retain the services of eleven. As arranged at the meeting, the first respondent subsequently wrote to NUMSA confirming its intention to retain eleven employees and furnished a list of workers indicating the eleven whom it proposed to retain.
- 14] On 29 January 2003 NUMSA sent a letter to the facilitator and to the respondents stating *inter alia* that “*there are those who will volunteer to safe [sic] the situation on condition that severance packages at least three weeks per completed year of service and six months pro rata. Notice pay, training and other related issues will be discussed later.*”
- 15] The next (and final) meeting chaired by the facilitator took place on 8 February 2003. It was agreed by both sides that –
- The selection criteria would be the LIFO principle, subject to retention of skills as well as any workers who volunteered for retrenchment.
 - Any dispute in relation to the selection of employees in terms of those criteria

would be referred to arbitration.

- A further meeting would be held on 11 February 2003 to discuss the final selection of names to be selected, future vacancies and recall procedures, severance pay and determination of years of service.

16] The parties then met on 11 February 2003 (in the absence of the facilitator). The union representatives arrived late for the meeting and Mr Van Tromp had to end it after approximately 45 minutes as he had another commitment. It is, however, apparent from the minutes of that meeting prepared by management and which NUMSA has not placed in dispute that there was discussion at least in relation to the following issues:

- The names of retrenchees selected in respect of which management furnished a list of names.
- Severance pay in respect of which management indicated that they could not give more than what was provided for in the applicable Bargaining Council's main agreement, while the union said that they would have to make a decision in relation to this issue after they had seen financial statements.
- Recall procedure.
- Assistance from the company (in respect of which there was agreement that the company would where possible grant loans to be deducted from severance packages).

- The selection of the eleven employees who were to be retained, in respect of which NUMSA's representative Mr Tladi stated that he needed to meet with the shopstewards and the workers and they would compile a list to be furnished the following day.
- 17] After consulting its members, NUMSA wrote to Mr van Tromp on 12 February 2003 and made proposals or representations in relation to the following –
- Proposals were made to substitute certain workers for others on the list of eleven workers to be retained, on the basis of longer service and skills retention.
 - A list of nine names was furnished of workers who were prepared to take voluntary retrenchment.
- 18] Management replied the same day stating that it required to consider its position together with the second respondent and it would revert in relation to the names proposed for substitution in the list of eleven to be retained. Management's fax also requested an indication of the conditions on which the list of volunteers were prepared to take voluntary retrenchment.
- 19] The following day, 13 February, management sent a further fax acceding to the request to retain a further four workers in addition to the additional eleven but subject to the volunteers. A "final list of the retrenchment" was furnished setting out the names of workers who were to be retrenched, including five workers whose voluntary retrenchment was agreed to, and those who were to be retained. Also furnished was a notice of retrenchment dated 10 February 2003. Management's fax also indicated that it would provide NUMSA with financial statements by the end of the month to prove

why management could not pay a retrenchment packages of more than the statutory minimum.

20] NUMSA replied on 14 February, stating that “*we are in dispute with you over the selection criteria including the need to retrench ...*”.

21] In its response dated 17 February 2003, management stated *inter alia* “*we regret the fact that you are now in dispute with us regarding the whole essence (need for retrenchment) of the retrenchment, something that you have never brought under our attention at any of the meetings held between the parties.*” The letter mentioned that management might reconsider retaining even the original list of eleven employees as well as its offer of reemployment of retrenched employees.

22] A few days later the parties agreed that the dispute relating to the selection of retrenchees should proceed to arbitration, but this process was aborted by NUMSA when, on 26 February 2003, management informed it that it will be paying the retrenchees the following day.

23] During argument for NUMSA, Mr Cartwright submitted that the retrenchments were unfair because there had been a failure to consult fully in relation to the following issues :

- selection;
- recall of retrenchees when work became available; and
- voluntary retrenchments.

- 24] During the course of his argument, Mr Cartwright confirmed that there had been consultation on what criteria should be adopted and the process of arbitration which should be followed if there were a dispute about the application of such criteria. Although he contended that the first respondent had not honoured its commitments to arbitration, he conceded – correctly in my view – that the requirement for consultation in respect of selection criteria⁴ was in fact met.
- 25] Mr Cartwright did not press with any enthusiasm submissions relating to a failure to consult in respect of severance pay or recall procedure. In my view on the papers it is apparent that there was in fact a process of consultation undertaken in relation to severance pay, in which management made its proposals, the union proposed an improvement on this, but this was rejected by management for reasons which were set out in the correspondence. This in my view constituted adequate compliance with the requirement of consultation. In relation to the issue of a recall procedure, this was not an issue raised pertinently in the founding affidavit when articulating the complaint that there had been a failure to complete the consultation process. On the papers, there is in my view no basis for finding that there was inadequate opportunity to consult on this issue.
- 26] In his argument Mr Cartwright emphasized the complaint that management had failed to allow an adequate opportunity to consult in respect of volunteers for retrenchment. He pointed to the NUMSA letter of 12 February 2003⁵ in which the list of eight volunteers was furnished, and the reply of management, also sent on 12 February 2003, requesting advice on “*which conditions your list of employees volunteered for*

⁴ As required by s 189(b).

⁵ The typed letter is dated 13 February 2003 but it is clear from the papers that the correct dated was in fact the 12th February.

retrenchment.” This, Mr Cartwright submitted, indicated that there were still to be further consultations on this issue.

27] This argument in my view loses sight of the fact that a further letter sent by management dated 13 February 2003 indicates that account was being taken of those who volunteered for retrenchment. This was referred to not only in the letter itself but also in the list which accompanied it, which indicated six names of volunteers (Messrs Radebe, Mthimkulu, Mothibi, Mabote, Mahlophe and Gumbi) whom management accepted for purposes of voluntary retrenchment.⁶

28] In my view there is no merit in the complaint that there was an inadequate opportunity to consult in relation to the issue of voluntary retrenchments. The Union was able to make its proposal in relation to eight volunteers, whose names were furnished to management. Most of the eight who volunteered for retrenchment were selected by management for retrenchment. Although the correspondence appears not to have resolved the issue of the package on which those workers were volunteering for retrenchment, there was a full consultation process in relation to the severance package applicable to retrenchees in general. Any complaint that individuals may have had in relation to their selection for retrenchment was capable of being referred to arbitration, which NUMSA elected not to pursue. The only issue before this court is whether there was an adequate opportunity to consult. In my view there was such an opportunity and it was adequate.

29] It was submitted on behalf of NUMSA that had there been further opportunity to consult, this could have yielded acceptance of voluntary retrenchments so as to avoid compulsory retrenchments. In my view on the papers this is highly improbable. Only

⁶ Of those, two (messrs Mthimkulu and Mahlophe) now challenge their dismissals as part of the list of individual applicants.

eight indicated an acceptance of voluntary retrenchment. Management agreed to retrench most of those, while electing to retain the minority in the interests of skills retention. There was accordingly a process of consultation, allowing the union to make its proposals and representations. Management was then entitled to take its decision. It is difficult to see how any further consultation was either necessary or appropriate, or could have affected the final decision to retrench.

30] I am accordingly satisfied that the consultation process was adequate in the circumstances and complied with the requirements of s 189 of the LRA. Accordingly the application must fail.

31] There is nothing raised in the papers or in argument which in my view indicates that costs should not follow the result.

32] I accordingly make the following order :

(a) *The application is dismissed.*

(b) *The first applicant is to pay the first respondent's costs.*

P M Kennedy

Acting Judge of the Labour Court

DATE OF HEARING: 5 February 2004

DATE OF JUDGMENT: 13 February 2004

APPLICANT'S REPRESENTATIVE: Mr David Cartwright of NUMSA

FIRST RESPONDENT'S COUNSEL: Adv André Landman