

IN THE LABOUR COURT OF SOUTH AFRICA**HELD IN CAPE TOWN****REPORTABLE****Case Number: C458/2004**

In the matter between

**RETAIL & ASSOCIATED WORKERS
UNION OF SOUTH AFRICA (RAWUSA)****APPLICANT**

and

SCHUURMAN METAL PRESSING (PTY) LTD**RESPONDENT****JUDGMENT****MURPHY AJ**

1. On 13 October 2004 I handed down an order dismissing the applicants' application for an order in terms of section 189A(13) compelling the respondent to comply with a fair procedure and interdicting it from dismissing any of its employees prior to so complying. At the time of making the order I reserved my reasons for doing so. These are my reasons.
2. The applicant is a trade union representing 32 employees of the respondent. The 32 employees are among a group of 78 who face the possibility of retrenchment by the respondent. The circumstances leading to the prospect of retrenchments appear in the main to be common cause.
3. The respondent came into existence in 1998 as one company of four emerging out of a restructuring of Schuurman Engineering (Pty) Ltd which resulted in the respondent taking over certain assets and all staff of that company.
4. In recent years the company has struggled to maintain profitability. Despite efforts by Mr Jurden Schuurman, its managing director and principal shareholder, to improve the situation by management changes, the business continued to deteriorate to the extent that it has become dependant upon inter-company loans in order to continue to survive.

Attempts to sell the business as a going concern during 2003 were not successful. In the period between March and August 2004 a serious and concerted effort was made by Mr Schuurman and Mr Simon Ledgerwood to secure finance to bring about a management buy-out. On 17 August 2004 the financial institution which had been approached for assistance gave its final decision not to grant Ledgerwood the funding he sought and the deal fell through.

5. Without the possibility of re-financing, the situation became dire. The respondent had liabilities in the amount of R6.6 million and total assets of R5.7 million, leaving it de facto insolvent and essentially unable to service its debt in a commercially viable way. However, Mr Schuurman does not want to liquidate the respondent and would prefer to effect an orderly disposition of the company's assets to meet its debts to staff and creditors, and at the same time to meet the needs of its customers. Moreover, at the hearing it became evident that another light has appeared at the end of the tunnel. It may yet transpire that Mr Ledgerwood is able to put a deal together which will save at least some of the jobs at stake. Before this latter development materialised, the respondent having contemplated that retrenchments were likely, decided in any event to communicate this possibility to its workforce.
6. On 19 August 2004, two days after Schuurman and Ledgerwood learnt that finance was not likely to be forthcoming for the management buy-out, the respondent convened an informal meeting of staff where it was verbally conveyed to them that retrenchments were contemplated. According to the respondent the meeting proceeded on the basis that formal notification pursuant to section 189(3) and consultation would follow later. (The applicant has not contested the specific averments of the respondent, but rather puzzlingly in its replying papers has averred that it will contest paragraphs 1 to 39 by way of argument "at the appropriate time". As such, it has neither admitted nor denied the respondent's averments and allegations; nor were any significant factual disputes raised in argument. Accordingly, I am obliged to accept the respondent's version as set out in paragraphs 1 to 39 of its opposing affidavit as the correct factual position).
7. On 20 August 2004, the respondent addressed correspondence to all relevant trade unions advising that the company was "forced to close down at the end of September 2004" and invited them to attend a meeting with the respondent on the 24 and 25

August 2004 “to consult regarding this”.

8. It was at about this time that Ledgerwood came up with his proposal for the respondent to spin-off certain of its assets to a company to be set up by him. Although the proposal will not prevent the closure of the respondent, it will result in the new company trading from the same premises and the possibility of employment for some staff members. It now looks certain that this deal will go ahead.
9. While discussions about the spin-off option were underway, Ledgerwood posted notices addressed to all employees advising that a consultation meeting would be held on 25 August 2004 and requesting all chosen employee and union representatives to attend. On the same day, Mr R Jantjies, the Chief Organiser of the applicant, sent a fax to the respondent requesting that the meeting be re-scheduled for 26 August 2004 because the union had other meetings and wage negotiations to attend. The respondent wrote back the same day indicating its willingness to accommodate the union, but explained that 26 August was not convenient and instead proposed a meeting on either 31 August or 1 September 2004. It noted however that it still intended to consult with the employees the following day, 25 August 2004.
10. A meeting was therefore held on 25 August 2004 with the applicant’s shop stewards and the representatives of the non-unionised employees. The minutes of the meeting reflect that management outlined the financial problems which had led it to contemplate retrenchments and defined the goal of the meeting to be:-
 - “To initiate a consultation process to answer staff questions and concerns and the closure of SMP.
 - To discuss and negotiate on the proposed offer to staff.”

So formulated it becomes immediately evident that the retrenchments were being presented as a *fait accompli* and that the respondent seemingly did not intend to consult about appropriate measures to avoid the dismissals or to minimise the numbers. The focus was instead to be upon timing, mitigating the effects of the intended dismissals and severance pay. Left at that it would be fair to say that the process was procedurally defective, but as will appear in due course this defect

was largely cured by subsequent events.

11. Consistent with management's *fait accompli* approach, the meeting of 25 August revolved mainly around the proposed packages (though the door was left open for further negotiation), and seeking agreement on a phased approach to the retrenchments, with voluntary retrenchments being solicited from employees willing to resign. The final date for retrenchments was left over for decision two weeks later. The idea was that the representatives would take this information back to staff and could revert with concerns and proposals at a meeting scheduled for 1 September 2004.
12. Two meetings were held on 1 September 2004. The first was with the applicant's shop stewards, an organiser from UASA, (another union recognised by the respondent) and the representatives of non-unionised employees. The second meeting was held with Jantjies, in his capacity as an official of the applicant, and the applicant's two shop stewards. The second meeting was necessary in order to accommodate Jantjies, who had been unable to attend the first meeting.
13. At the first meeting, it was recorded that the retrenchments would begin on 31 October 2004 and would continue through to 30 November 2004. Further discussions took place about the retrenchment packages. Importantly, management announced that arising out of Ledgerwood's spin-off proposal there would be employment prospects for about 30 staff members, but that more details would only become available closer to the time. It was agreed that a further consultation meeting would be held to address any questions arising out of the feedback to staff.
14. At the second meeting, Jantjies thanked the company for informing the union of the retrenchments and the opportunity to fend for its members. He however also made a legitimate request for the respondent to disclose all information as required in terms of section 189(3), including specific information explaining the causes of the deterioration of the respondent's position. He asked that this information be given directly to the union and not via its members. Mr Ledgerwood's response was a bit defensive and perhaps unnecessarily confrontational. His view was that the union had been informed in writing that the company was closing, that it had been invited to the consultation more than 24 hours before it started, that it had been given two possible dates for a meeting

and took more than a week to respond, and that the company had accordingly proceeded with consultation in their absence, but not without the applicant's shop stewards. The minutes reflect a statement by Ledgerwood that he had chosen to proceed taking into account that less than 25% of the staff belonged to unions. His attitude here too was perhaps somewhat ill advised. Section 189(1)(c) obliges the respondent in the circumstances in which it found itself to consult with any registered trade union whose members are likely to be affected by the retrenchments. Proceeding without the union would have been a serious procedural irregularity. Given subsequent events however, and the fact that the union was represented by its shop stewards at every consultation meeting, the defect, if any, can also be considered to have been cured.

15. On 2 September 2004, Mr Russel Vermeulen, a representative of the non-unionised employees, handed Ledgerwood a memorandum setting out a number of employee concerns about the retrenchments. The following day he also received a fax from Jantjies pointing to various provisions of the Labour Relations Act, in particular drawing attention to the respondent's alleged failure to comply with section 189(2) and (3). The union consequently declared itself to be in dispute with the company, requested a meeting on 16 September 2004 and sought permission to meet with its members on 8 September.

16. On 6 September 2004 the respondent, clearly influenced by the correspondence from Vermeulen and Jantjies, replied to the union by asking for a meeting sooner, on 9 September 2004, granted the union permission to meet its members on 8 September and disclosed specific details addressing in point form the information required to be disclosed in terms of section 189(3)(a) – (j). As such, this notice set out fully the reasons for the proposed dismissals and disclosed the alternatives attempted through the introduction of a new management team, the attempted sales of the business and the endeavours to raise finance. The notice set the number of contemplated retrenchments at 78, being the entire workforce including management. It went on to detail the planned phased retrenchments, the proposed severance package and the intention to assist employees with UIF, tax and alternative placements. It concluded by inviting the union to a meeting on 9 September 2004.

17. Because Jantjies' letter of 3 September 2004 had accused the respondent of not complying with section 14(4), pertaining to the rights of shop stewards, and section 16(2) and (3), dealing with the duty to disclose information for the purposes of consultation and collective bargaining, the respondent further requested the union to explain specifically how it was in contravention. The union appears not to have responded to this query in writing at any later stage in the process.

18. On Thursday 9 September 2004 the respondent's management met with the officials of the union, Jantjies and Davis, as well as the union shop stewards. At the commencement of the meeting Davis handed the respondent a letter urging it "to comply with the required provisions regarding retrenchments as your present endeavours (sic) are both legally and fatally flawed." The letter adds that should the company fail to comply within 15 working days the union would "approach the relevant forum for the appropriate relief with a possible order for costs". From the minutes of the meeting it appears that the union had chosen to hold by its position that the process had commenced in a flawed manner and it was therefore entitled to insist that the company not proceed with the retrenchment exercise. Attempts from the management to elicit from Mr Davis an explanation of the alleged unlawfulness seem to have been fruitless. Yet Davis insisted that all previous discussions between the company and the union or its members were null and void because the company had "not followed legal procedure". Despite this, the minutes record further discussion about the need for retrenchments, the issues causing them and some of the practicalities of implementation. At the conclusion of the meeting Schuurman undertook to review the situation, but requested it to be noted in the minutes that the union was attempting deliberately to delay the negotiation process. That the union was seeking a delay is borne out by its proposal made during the meeting that the final retrenchments be postponed until the end of December. Its reliance on a technical or formalistic objection to achieve that objective can be reasonably inferred from the turn of events after the meeting of 9 September.

19. On 14 September 2004, five days after the meeting and the letter declaring a dispute, Jantjies, acting on behalf of the union, referred a dispute to the Bargaining Council, basically alleging that the company had failed to comply with the provisions of the legislation. The next day Ledgerwood wrote a comprehensive letter to the union in

which he dealt with the history of the dispute, noting that the union had cut short the 15 day notice period it had afforded the respondent in its letter of 9 September, lamented the confrontational approach taken by the union and also touched upon a number of disclosure issues. He denied that the company had contravened the legislation and indicated that it did not propose to seek the appointment of a facilitator in terms of section 189A of the Act, stating though that the union was 'welcome' to go ahead and do so in accordance with the provisions of the legislation.

20. The letter also included a plea to the union to re-commence the consultation process. It states:

"The company requests you to reconsider your position regarding the dispute referral and return to the consultation meetings without delay. The company proposes that you withdraw your defective referral and that we meet tomorrow 16 September at 15h00 to further the consultation process."

21. A meeting was convened on 16 September but Mr Geoffrey Booysen, who had been appointed to replace Jantjies, failed to make an appearance at the meeting. On 17 September the respondent wrote to the applicant requesting a further consultation meeting on 21, 22 or 23 September.

22. On 20 September Davis replied again reiterating his view that the respondent had not complied with sections 14, 16 and 189 of the LRA. He concluded:

"Whilst we will forthwith withdraw our application to the Bargaining Council, we also more specifically request that you start retrenchment proceedings as prescribed by legislation. We are sure that this is not too much that we request of you.

Kindly refrain from insisting on meetings until you have correctly triggered these proceedings. Your failure to do so creates suspicion to your allege (sic) bankruptcy."

This letter can be construed to be a refusal by the applicant to engage in any further consultation meetings until such time as the respondent "correctly triggered" the retrenchment process to the union's satisfaction. The "correct trigger", it would seem, being the re-issue of a section 189(3) notice despite the letter of 6 September, other correspondence and minutes having disclosed the relevant information necessary for consultation.

23. Subsequent events reveal that the applicant persisted in this view and directed all its efforts at demanding a fresh start for the consultation process. Essentially it has refused to yield or engage until such time as it receives what it considers to be a proper section 189(3) notice. It is unnecessary to outline all the correspondence which ensued hereafter other than to say that the applicant threatened litigation and the process of ongoing consultation came to a halt.
24. In the face of litigation the respondent referred the matter to its attorneys. On 28 September 2004, Mr R de Lange, the respondent's attorney, addressed a letter to Davis of the applicant. In the letter de Lange sought to persuade Davis that the threat of litigation was uncalled for as his client had been "seeking consensus and input from the employees and unions at all times". He goes on to detail the reasons for the contemplated retrenchments and the process of consultation which had already taken place. He then states:

"No one can expect the company to run at a loss year after year. The reasons for closing down are sound.We invite you to submit proposals as to how the reasons for closing down should or could be addressed.

Our client does not have any solutions anymore. Please submit your written suggestions by Thursday 30/09/04 by close of business, for attention Simon Ledgerwood. The company will respond to your submission in terms of section 189(6) of the Act in writing as soon as reasonably possible."

25. On this basis the respondent refused "to withdraw its notices and correspondence", because it felt (correctly I might add) that no purpose would be served by doing so. However, it urged ongoing consultation in the interests of the members saying: "Let us start with this immediately. We suggest that the parties meet as soon as possible at the company".
26. The applicant's response to this letter reflects poorly on the insight and experience of its organiser. In a letter addressed to de Lange dated 29 September 2004, Davis offers what may fairly be described as a gratuitous slight as follows:

"The presence of yourself as legal advisor gives us the more reason to seek an order compelling your client to comply to proper proceedings."

He then continues:

“We nonetheless reiterate our averment of 21 September 2004 that we shall only return to the consultation table should your client withdraw his correspondence of 20 August 2004 to thereafter both start and continue to heed to (sic) correct procedures.”

27. When the company failed to comply to the applicant’s satisfaction, the applicant filed its notice of motion seeking as a matter of urgency an order compelling the respondent to comply with a fair retrenchment procedure, declaring null and void the respondent’s various notices, including its notification that retrenchments would take place in November, and interdicting the respondent from dismissing any employee until a fair procedure had been complied with. Unpacked and stripped to its essentials, the applicant’s case is that the respondent is in breach of procedure because in August 2004 it failed to issue a notice as contemplated in section 189(3) and at that time presented the contemplated retrenchments as a *fait accompli*.
28. The respondent, as could be expected, has opposed the application and while conceding forthrightly that its initial approach may have been problematic, contends that it has substantially complied with the pre-requisites of procedural fairness and that the earlier defects in procedure were cured later in the consultation process. In the closing paragraphs of its opposing affidavit the respondent concludes with an open invitation to the applicant to put forward meaningful proposals and to continue with consultation. Noting his own view that the closure of the business seems inevitable because of the lack of investment, Schuurman states:

“All the above notwithstanding, I must record that Respondent has an open mind on this issue. I would be surprised (but, I record, pleasantly surprised) if Applicant (or anyone else) has a proposal which would mean that the business would continue, and Respondent be restored to financial health. In order to assist Applicant (and all affected employees) Respondent tenders all necessary financial information which it may require. Moreover, Respondent tenders the resources of its auditors who could be of assistance..... All reasonable proposals as alternatives to the closure of Respondent, and the orderly disposition of its assets, will be considered. An open invitation is hereby issued to Applicant to make such proposals in the consultation process.”

29. The application brought by the applicant, as previously mentioned, is made in terms of

section 189A(13) which permits employees and their representatives to approach the Labour Court on motion for interdictory relief to compel compliance with a fair procedure and to restrain dismissals in the interim. Section 189A is applicable in this instance in terms of section 189A(1) because the employer employs more than 50 employees and contemplates retrenching more than 10 of them.

30. At the hearing Davis, on behalf of the applicant, was able to point to the defects in the initial notice as the only alleged procedural irregularity upon which he relied to obtain relief. He conceded that this had been cured by subsequent correspondence, information and the willingness to make financial disclosure. But he nonetheless persisted with his quest for relief and predicated his claim for a proper section 189(3) notice upon his alleged entitlement to seek facilitation within the time period stipulated in section 189A(3) which is triggered by the issue of a section 189(3) notice. Section 189A(3) provides:

(3) The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if –

- (a) the employer has in its notice in terms of section 189(3) requested facilitation; or
- (b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice.

31. Accordingly, the applicant's claim that employers are obliged to issue a proper section 189(3) notice is not altogether without merit, in that the date of the notice will determine the 15 day time period in which a union will be entitled, as of right, to seek facilitation by the CCMA. However, the right to seek facilitation is conferred only on unions "representing the majority of employees whom the employer contemplates dismissing". The applicant represents 32 out of a group of 78 targeted for dismissal. Consequently it can claim no entitlement to facilitation and the time period stipulated in section 189A(3) (b) is of no application in this case. The applicant can obtain the right to have a facilitator appointed only should it reach an agreement to such an effect with the respondent, as envisaged in section 189A(4). Moreover, even had the applicant represented the majority of employees contemplated for dismissal it could have relied

upon the letter of 6 September as the section 189(3) notice and sought appropriate relief from this Court in the event of encountering any difficulty in that regard, either from the employer or the CCMA.

32. I am therefore in agreement with Mr Kirk-Cohen, who appeared on behalf of the respondent, that 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.
33. The approach adopted by the applicant to the consultation process has been less than satisfactory. So much so that one might reasonably infer from the correspondence and its stance during meetings that with the purpose of dragging out the process, it has not been acting in good faith. Either that, or, through a lack of experience, it is guilty of incompetence. Formalistically latching onto the less than perfect notification of 20 August 2004, and to ignore the respondent's subsequent corrective action and willingness to consult meaningfully, and thereafter to decline to participate in the consultation process, points towards a breach of the obligation to engage in a joint problem-solving exercise. However, because the respondent, in its wisdom, and presumably in the interests of achieving an amicable resolution, has chosen not to persist with its claim for a punitive costs award, it is not necessary to determine whether the applicant has acted *mala fides*. Suffice it to say, it has adopted tactics that sail close to the wind.
34. For the foregoing reasons I am persuaded that the respondent has acted in good faith

and has not perpetrated any procedural irregularity of such an order entitling the applicant to relief under section 189A(13). In the premises the application is dismissed.

Murphy AJ

Date of reasons: 29 October 2004

Date of hearing and judgment: 13 October 2004

Applicant's Representative: Mr. Davis, a union official

Respondent's Representative: Adv. S. Kirk-Cohen

Instructed by: de Lange Attorneys, Durbanville