IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Case no:D102/09

Reportable

In the matter between:

NATIONAL UNION OF

METAL WORKERS UNION OF SA **Applicant**

and

AUNDE SOUTH AFRICA (PTY) LIMITED **Respondent**

JUDGMENT

Molahlehi J

Introduction

[1] The respondent in this matter dismissed the members of the applicant, NUMSA for operational reasons and a day thereafter re-employed them on different terms and conditions. NUMSA has now brought this application in terms of section 189A(13) of the Labour Relations Act 66 of 1995 (the LRA), in terms of which it seeks an order compelling the respondent to comply with the fair procedure and further ordering their reinstatement on terms and conditions applicable prior to their dismissal.

Background facts

[2] The respondent falls under the scope of the Metal Industries Bargaining Council (MIBCO) which regulates the employees' salaries and other terms and conditions of employments in the sector. At some stage the relationship between the respondent and NUMSA was governed by both the recognition agreement and an agency shop agreements. It would appear that the agency shop was cancelled but not the recognition agreement.

[3] During September/October 2008, the respondent engaged in a consultation process in terms of section 189 of the LRA with NUMSA, facilitated by the Commission for Conciliation, Mediation and Arbitration (the CCMA). The end result of this process was that a number of employees were retrenched by the respondent. It was also during the same period that the respondent indicated to NUMSA that it intended in addition to embark on a retrenchment exercise to terminate the employment of all its weekly paid employees and to reengage them afresh and with rates of pay and conditions of service determined by the minimum levels as prescribed by MIBCO's Main Agreement. Although NUMSA indicated that this would be a very drastic measure, it was agreed that the issue would be held over until the completion of the retrenchment exercise which was in process at the time.

[4] On 5th November 2008, the respondent invited NUMSA to a meeting to discuss the restructuring of the terms and conditions of employment of the hourly paid employees and suggested that a meeting be held on the 11th November 2008. NUMSA respondent and indicated that they were available on the 14th November 2008. For whatever reason this meeting did not take place but on the 19th November 2008, the respondent addressed a letter to NUMSA proposing the restructuring of the terms and conditions of the hourly paid employees.

[5] The parties met on 26th November 2008, where the respondent firmed up its intention to retrench and reemploy the weekly paid employees. Having failed on that day to reach consensus NUMSA proposed a further meeting before the end of the year but that proposal was rejected by the respondent who proposed that a meeting should be convened at the beginning of the following year.

[6] On 9th December 2008, NUMSA addressed a letter to the respondent informing it that it had received information from its members indicating that the respondent had concluded an agreement with UASA on the proposed restructuring. The respondent responded in a letter dated 10th December 2008, and enclosed therein the agreement it had concluded with UASA

signed on 5th December 2008. The respondent further proposed a meeting with NUMSA for the 8th January 2008, which did not materialised because of availability problem of the parties. A further correspondence from the respondent to NUMSA is that of the 21st January 2009, wherein the respondent indicated that the membership of NUMSA has dropped to "approximately 33%" and that of UASA was "approximately 60%" of the hourly paid employees. It is further indicated in this letter that UASA had gained majority representation amongst the hourly paid employees and was therefore the sole bargaining agent "for all matters relating to plant level issues including any consultation required by the LRA."

[7] Thereafter, the respondent concluded an agreement with UASA on the 22nd January 2009, in terms of which it was agreed that all the hourly employees would be dismissed and reemployed on different terms and conditions. Pursuant to this agreement members of NUMSA were dismissed on the 25th January 2009 and reemployed on 26th January 2009. Subsequent to concluding the recognition on the 21st January 2009, a day thereafter the respondent concluded a retrenchment agreement with UASA on 22nd January 2009.

The governing retrenchment

[8] A dismissal based on operational requirements of the employer is governed by section 189 of the Labour Relations Act 66 of 1995 (the LRA). That relevant part of that section provides as follows:

> ***"Dismissals based on operational requirements***
>
> *(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;*

The section then provides for other possible parties with whom the employer should consult with in the event there is no collective agreement that requires consultation with any other party.

[9] If an employer in a retrenchment exercise that meets the threshold set out in section 189A, fails to follow a fair procedure, a union 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."

[10]In the present instance the crisp issue is whether or not the respondent had a duty to consult with NUMSA after it lost its majority membership and after the respondent signed a recognition agreement with UASA. It is this recognition agreement which the respondent relied on in supporting its case that there was no duty to consult NUMSA once this agreement was concluded.

[11]In its heads of argument the respondent relied on *Maluleke & Others v Johnson Tiles (Pty) Ltd (2008) 29 ILJ 2606 (LC*), in support of its case that it was not obliged to consult with NUMSA. In that case the Court held that the hierarchy governing the consultation process in section 189(1) (a)-(d) did not require an employer party to consult with any other union or individual employees where the consultation was done in terms of a collective agreement which provides for consultation in the event of an anticipated retrenchment.

[12]The Court in *SACCAWU & Another v Amalgamated Retailers (Pty)* [*2002] 1 BLLR 95 (LC),* seems to have adopted a much broader approach to the issue of whether or not an employer party has a duty to consult with the

parties identified in section 189(1)(a)-(d) of the LRA. In that case the Court in dealing with the issue of consultation in a case where the employer consulted with the recognized trade union which was however not mandated to represent non-union members affected by the proposed retrenchment held at para 26 that:

> *"The identification of a consulting party by applying the criteria established in s 189(1) (a) , (b) and (c) might confer exclusive rights on the partner with first claim in relation to other potential partners listed in those paragraphs, but it does not relieve the employer of an obligation to consult in terms of subsection(d)with affected employees or their representatives for the purpose if those employees are not represented in some manner or form by a collective bargaining agent, workplace forum or registered trade union respectively."*

[13]In *Mahlinza & Others v Zulu Nyala Game Ranch (Pty) Ltd [2004] JOL 12459 (LC),* the Court held that it is only where there is no collective agreement in existence which regulates consultations in respect of a retrenchment, that an employer is under an obligation to consult with another registered union or individual employees.

[14]Although in *Nomalongelo Thobeka Surprice Moyo v Knight Watch Security unreported case number JS 117/08*, the Court was faced with an individual who complained that she was not consulted prior to her dismissal for operational reasons, the principle enunciated therein is apposite the present case. In that case the employer party claimed to have consulted with the majority union before effecting the retrenchment. In dealing with whether or not the employer party had a duty to consult with the employee despite having consulted with the majority union, the Court had this to say:

> "*In the present case whilst there is evidence that suggest that SATAWU was a majority union, there is no evidence that the consultation was done in terms of a collective agreement regulating the consultation process in case of a retrenchment. In the absence of a collective agreement regulating consultation in the event of retrenchment, the Respondent was in my view obliged to consult with the Applicant…"*

[15]In the present instance it is common cause that NUMSA lost its majority membership to UASA in a process which seem to have happened in the midst of a retrenchment consultation between NUMSA and the respondent. It is also common cause that on 21st January 2009, UASA and the respondent concluded a recognition agreement and strangely enough they then a day thereafter on 22nd January 2009, concluded a retrenchment agreement. In

terms of that agreement the hourly paid employees who were not members of UASA were retrenched on 25th January 2009, and reemployed on different terms and conditions of employment on 26th January 2009.

[16] The second introductory paragraph of the agreement states:

> *"ASA (the respondent) has concluded consultation with UASA, as contemplated by section 189(1)(a), on its operational requirements. As a consequence of the consultations, UASA and ASA have agreed that the terms and conditions of employment of ASA changed with the terms of this agreement."*

[17]It is clear that the above clause was intended to relief the respondent from its duty to consult with NUMSA and any other consulting party identified in section 189(1)(a)-(d) of the LRA. The question that arises in this respect is whether at the time this agreement was concluded the respondent had a collective agreement regulating the consultation process in case of a retrenchment. The answer in my view is clearly in the negative. The recognition agreement which the respondent sought to rely on in support of its argument that the procedure it followed was in line with the provisions of section 189(1) (a) of the LRA, is silent in as far as the regulation of the consultation process in case of a retrenchment was concerned. Thus in the absence of this provision in the recognition agreement between the

respondent and UASA or any other collective bargaining agreement between them, the respondent was in my view obliged to consult with NUMSA before the dismissal of its members for operational reasons.

[18]The respondent in its closing argument contended that NUMSA delayed in bringing this application. This issue was never raised in any of the respondent's papers and therefore NUMSA never had the opportunity of responding thereto and providing an explanation if indeed there was a delay.

[19]In my view the respondent was obliged to consult with NUMSA and therefore having failed to do so the retrenchment of NUMSA members on 25th January 2009, was procedurally unfair. I am also of the view that there is no reason in law and fairness why costs should not follow the results.

[20]In the premises the following order is made:

1. The retrenchment of the applicant's members was procedurally unfair.
2. The respondent is ordered to reinstate the applicant's members, on the same terms and conditions, without loss of benefits and salary as applicable to them prior to their dismissals, on 25th January 2009, until such time that the respondent complies with a fair procedure.

3. All or any amounts paid to the applicant's members as severance and or notice pay after the dismissals in January 2009, must be repaid to the respondent, together with interest thereon a *tempore morae* before any payments in terms of this order is made.
4. The respondent is to pay the costs of the applicant.

Molahlehi J

Date of hearing: 11 May 2009

Date of Judgment: 20 May 2009.

APPEARANCES

For the Applicant : Adv. Schumann

Instructed by Brett Purdon Attorneys:

For the Respondent: Adv Posemann

Instructed by Shepstone & Wylie Attorneys: