IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: J 1568/10

In the matter between:

NATIONAL EDUCATION, HEALTH & ALLIED

WORKERS UNION obo MEMBERS **Applicant**

and

NATIONAL HOME BUILDERS
REGISTRATION COUNCIL **Respondent**

JUDGMENT

LAGRANGE,J

Introduction

1. This is an urgent application which was heard on 11 August 2010. On 12 August the following order was handed down. My brief reasons for the order are set out below, and may be supplemented if necessary.

   "It is ordered that:

   1.1. The respondent is prohibited from advertising vacancies or conducting interviews of candidates for new posts it has created in terms of its intended new organizational structure and from filling of such posts or taking any steps

pursuant to the filling of such posts for a period of 30 calendar days from the date of this order.

1.2. For the purposes of this order 'new posts' refers to those posts designated as "Proposed New Posts" in column 4 of the schedule attached to the respondent's letter of 8 March 2010, attached to the applicant's founding affidavit as Annexure "AM11"

1.3. By 15 August 2010, the respondent must issue a notice in terms of section 189(3) of Labour Relations Act 66 of 1995 ('the LRA') and the applicant and the respondent must engage in consultations in terms of section 189(2) of the LRA, to commence no later than 18 August 2010.

1.4. No order is made as to costs."

2. The applicant union sought urgent interim relief against the respondent in the following terms:

> *"Interdicting the respondent from proceeding with the restructuring process (including advertising of so called 'new' posts, interviewing candidates for such posts, and all actions relating to the filling of such posts) pending –*
>
> *a) Compliance by it with the procedure set out in s 189 of the LRA; and*
>
> *b) The outcome of a dispute referred to the CCMA pursuant to the terms of the organizational redesign agreement."*

Background

3. For the purposes of this decision and given the nature of the application only the briefest summary of background information is given and I make no attempt to encapsulate all the events described in the 351 pages comprised of the affidavits and

annexures produced by the parties. Only a few of the events described therein and some of the annexures were dealt with in any depth by the parties' representatives at the hearing of the matter.

4. At some stage in 2008 the respondent identified a need to restructure itself to achieve greater efficiencies. On 24 November 2008 the applicant and respondent concluded a collective agreement entitled 'Organisational Redesign Study and Process'

5. In terms of the agreement:

   5.1. The respondent's need to embark on a process of 'organisational re-alignment' in line with it statutory mandate to regulate the homebuilding industry and protect consumers was recognized.

   5.2. The appointment of Sizimisele Manaagement Solution (Pty) Ltd to undertake the organisational redesign study and process was noted.

   5.3. The objects of the exercise were *inter alia* to conduct a detailed organization and work study exercise, a competency and skills audit and to develop an optimized structure and comprehensive Human Resources Plan for the respondent.

   5.4. The agreement commenced in November 2008 and is deemed to terminate at the 'end of the Human Capital study'.

6. Of particular significance to the applicant are the provisions of clause 6 of the agreement entitled "PARTIES AGREE TO THE FOLLOWING" which *inter alia* states -

   "6.1 The final recommendations of Sizimisele Management Solutions will be discussed, studied by both Management and Nehawu., thereafter: a consultative meeting will be arranged between Nehawu and Management. After the consultative, the joint report will be forwarded to REMCO for final approval.

   6.2 In an event where the report will be altered or rejected, it will be referred back to the consultative forum for further engagement.

6.3 The organizational redesign shall not result in forced retrenchment."

7. The applicant alleges that Sizimisele's final recommendations referred to in clause 6.1 were produced in May 2009, but only came to its attention in August 2009 and no consultative meeting as envisaged in that clause has taken place, nor has any joint report been forwarded to REMCO.

8. There is a dispute over whether a consultative meeting as envisaged in clause 6.1 took place.

9. In February 2010 a letter entitled section 189(3) notice was issued by the respondent together with a proposed organogram of the new structure. The letter invited the union to join the respondent in a joint consensus seeking process with it in regard to "…any contemplated retrenchment of members, where alternative options have been fully exhausted." The letter goes on to list the items for consultation as set out in section 189(2) of the LRA. It further states under an outline of alternatives to possible redundancy of posts that "Within the context of the operational processes a number of existing positions are to be declared redundant. However, in order to streamline tha NHBRC's operational inputs , a number of new posts are to be introduced."

10. The letter goes on to list redeployment of redundant employees in the new positions, VSPs, early retirement and early termination of contract staff as alternatives to retrenchment. The anticipated date of retrenchment in the event of no viable alternatives for retrenchment being found was identified in the letter as 1 April 2010.

11. In response to this letter the union declared a dispute over management's alleged failure to comply with the agreement and section 189(3) of the LRA. Subsequently, this dispute was withdrawn after a meeting between the parties on 12 March 2010, and a further process was initiated. Management indicated that it wanted to advertise certain existing vacancies in critical posts that had nothing to do with the new posts that would be created by the restructured entity. In that meeting the union stated its view that clauses 6.1 and 6.2 of the agreement mentioned above had not been complied with and objected to the advertisement of new posts. The union alleges that

the dispute was withdrawn on the basis that the respondent would abide by its obligations under the agreement and section 189(3).

12. A document entitled "NHRBC's Implementation and Framework – Organisation Redesign Process" was tabled by the respondent at a consultative meeting on 12 March 2010 but not discussed in that meeting. In terms of the document, the number of existing posts – a considerable number of which were currently unoccupied - would be reduced from 537 to 377. At that point the respondent only employed 373 personnel in the existing posts and accordingly the number of staff employed would increase slightly under the envisaged structure. However, because approximately 26 existing posts would cease to exist, retrenchments were envisaged arising from those positions. The document proposed a placement policy in terms of which existing employees would be placed in the new positions based on a best 'match' between their existing competencies and those of the new post. Where an employee refused to apply for a new post or be transferred to one they could apply for a voluntary severance package ('VSP'). Retrenchment was only envisaged 'as a last resort'.

13. Subsequent to the meeting there was a hiatus in further consultations though there was correspondence between the parties. The respondent was anxious to advertise vacancies for existing positions that it required to fill. It stressed in its correspondence that none of these positions were ones that were newly created ones in terms of the envisaged structure.

14. In a letter of 8 April 2010, the respondent also announced that new positions had been created in terms of the envisaged structure and that staff in 'impacted' positions would be given first preference in applying for the new posts. From paragraph 2.7 of the respondent's letter of 8 April 2010 it is evident that new positions include those that required grading because they were newly created and those that did not require grading but the number of which were to be increased. The process of redeploying staff to the new positions was identified as the first phase of the organizational redesign process.

15. The respondent stated that a second stage of the process would commence only if employees in the impacted positions were not successfully redeployed. In that event, the letter went on "…further consultations will be held in order to assess these individual situations in the light of the operational requirements of the NHBRC, subject to the outcome of phase one, in accordance with the provisions of section 189 of the LRA, should this be appropriate."

16. The two-phase process laid out by the respondent essentially described the same process envisaged in its letter of February but now relegated consultations under section 189 to the second phase, which would only arise after the re-deployment exercise had been completed. This two-phase approach now articulated by the respondent underpinned its stance in these proceedings. The position adopted is that it was not obliged to commence consulting over retrenchments under section 189(1), because until phase two was reached it could not be said that it had reached the point at which the obligation to consult was triggered, namely "(w)hen an employer contemplates dismissing one or more employers for operational reasons based on the operational requirements."

17. On 8 July 2010, the respondent sent a letter to the union again entitled 'Notice in terms of section 189(3) of the Labour Relations Act'. The following section of the letter is pertinent:

> *"3. As a consequence of the organizational re-design process, an the fact that the current organizational structure is no longer functional in accordance with the organisation's operational requirements, the intention as per our numerous meetings and letters is to create a number of new positions and to realign a number of existing positions, while at the same time, identifying positions which have become redundant.*
>
> *4. As a consequence, the Council may contemplate the possibility of retrenching employees in the affected positions, who may ultimately not be successful in terms of placements following recruitment processes, where a number of newly created posts are to be advertised in the course of next week.*

5. The proposed new or realigned positions, together with the positions which have been identified as redundant have already been communicated to you.

6. The NHBRC shall once again attempt to reach consensus with the union during the continued consultative process, including a 'bosberaad' on:

a. appropriate measures to:

i. avoid the retrenchments;

ii. to change the timing of the retrenchment should this be the result of the consultation process; and

iii. to mitigate the adverse effects of the retrenchment if this is the outcome.

b. the method for selecting employees that may be retrenched should they not be successful in terms of placements."

18. The letter goes on to outline all the issues that ought to be contained in a written notice issued in terms of section 189(3) inviting a union to engage in consultations. The letter did not specify the number of employees likely to be affected but promised to provide a detailed list of names of persons who would be impacted, the new positions and an organogram at the next meeting. The proposed method of selection mentioned in the letter was to be "…based on the positions identified by the organizational redesign process as being redundant." The letter also indicated that it anticipated that persons for whom no viable alternatives to retrenchment could be found would be retrenched on 31 August 2010. The respondent proposed a meeting with the union on 13 July. In this notification, even though the respondent talks about the possibility that it 'may' have to contemplate the possibility of retrenchments, the invitation is extended to the union to consult with it. It also effectively spells out its view of how employees for retrenchment would be selected in the event that situation arises.

19. The union responded to this letter on 9 July proposing a meeting the following week and objecting to the notice letter on the basis that the notice seemed at odds with resolutions of previous meetings between the parties. No detail was provided in this regard.

20. On 13 July 2010, the respondent then issued letters to all impacted staff entitled "Implemenation of Organisational Redesign Processes: New Positions". This letter confirmed the employer's intention to create a number of new positions and to realign a number of existing positions, and that these positions '…together with the positions which have been identified as redundant…' had already been communicated to staff. The letter announced that during the rest of July the respondent would attempt to place impacted staff in the newly created positions and invited them to apply for the 'soon to be advertised posts' in which they would be given preference in the recruitment process. This stage of the process was envisaged to end by 31 July 2010.

21. The notification to members prompted the union to refer a dispute over unfair retrenchments to the CCMA on 15 July 2010. The referral stated that the respondent had failed to consult with the union in terms of section 189 of the LRA and had issues retrenchment notices on individual members. It sought to compel the respondent to stop proceding with the 'current retrenchment process' and to comply with section 189.

22. The union subsequently requested the company to withdraw the s 189(3) notice by 20 July 2010, or it would approach this court to stop it proceeding with the retrenchment in breach of previous undertakings and a collective agreement and in violation of the LRA. On 22 July 2010, the respondent issued a general communiqué to all staff by email reiterating the previous invitation to apply for the new and realigned posts, and inviting those not willing to do so to apply for a termination package. This reaffirmed the respondent's view of whom it considered would be potential candidates for retrenchment, albeit voluntary at that stage.

23. In an apparent response to earlier correspondence from the union, the respondent's erstwhile attorneys then sent a letter to the union's attorneys on 22 July 2010. The

letter deals with a number of issues, only some of which are immediately relevant. Firstly, the letter states that the letter sent "to staff" on 8 July 2010 was "…not a formal notice as contemplated by 189(3) of the LRA as the employer is still in the process of placing impacted employee's into alternative positions." It is unclear if this was an intended reference to the notice to the union of the same date or to the letters sent to 'impacted members' on 9 July 2010, but the letter goes on to state that only if persons in impacted positions were not successfully redeployed would the second stage commence. Paragraph 3.11 reads "Only at this stage, where it would appear that retrenchments are unavoidable, will a formal notice in terms of 189(3) be issued and due processes in terms of s189 will be followed." By this communication the respondent effectively resurrected the two stage process it had adopted in April and withdrew its earlier invitation to consult on possible retrenchments.

24. Towards the end of July a complicating factor in the progress of the matter was the respondent's suspension of the union's chief shop steward on 22 July relating to charges of alleged poor performance and abuse of his office.

25. On 29 July 2010, the union also referred a second dispute to the CCMA in which it alleged that the respondent had failed to comply with the terms of the collective agreement. Although it is not specified in the referral form, on the pleadings it appears that this dispute refers to the agreement of 24 November 2008.

26. This application was filed on 4 August and set down for a hearing on 11 August 2010.

Merits of the Application

27. The applicant's primary concern is that if the appointments under the new structure proceed it will not have an opportunity to consult properly. Secondly it is concerned that the terms of the reorganization dispute would be rendered meaningless.

28. The respondent does not dispute the applicant's right to consult over possible retrenchments but argues that the time for consultation has not arrived. For the same reason, the respondent argues this application is premature.

29. What seems to be clear from the history of the matter is that both in February and July 2010, the respondent believed it was appropriate at those junctures to issue section 189(3) notices. On the face of those actions, it would appear that it must have contemplated retrenchments on both occasions when it issued the letter. The position which it now taken on whether or not it ought to consult in terms of section 189 was first expressed in April and then again in the letter from its attorney's on 22 July 2010. In the letter of 22 July 2010, its view was that the requirement to issue a notice in terms of section 189(3) would only arise when retrenchments became 'unavoidable'.

30. While there have been differing approaches adopted by the labour courts on how to identify at what point of an employer's forward thinking it will be held to be contemplating retrenchment, it could never have been intended that this would only be when it considered the retrenchments 'unavoidable'. This would be equivalent to saying that the duty to consult arises only when an employer views retrenchment as a certainty. If an employer only had to begin consultations when it arrived at that conclusion, it would narrow the scope for meaningful consultations on the issues set out in section 189(2), because by the time such a view is adopted operational conditions will often have deteriorated to such an extent that no feasible alternatives exist.

31. In this case, if the whole consultation process is deferred until the placement process is complete, there will be little point in discussing the selection of candidates for retrenchment as the placement process will have effectively pre-selected them. Because the process of placement has this consequence, in practice it is also amounts to method of identifying staff for retrenchment. Some proposals of alternative methods of selection after this stage might entail undoing the placement process, which would obviously be difficult if the successful candidates had been chosen.

32. Unless the union has had an input on how the selection of candidates for placement is done, any input it might make on its views on selecting retrenchment candidates after the placement exercise is complete will be addressing a virtual *fait accompli* in regard

to this issue. If, on the other hand, it was able to engage with the employer before the placement exercise it could, for example, make proposals about how placement candidates should be considered if more than one existing employee applies for one of the posts in the new structure. Likewise it could make proposals on the voluntary packages under consideration. In the circumstances of this matter, the scope for meaningful consultation on all the issues stipulated in section 189(2) would be significantly circumscribed if it was delayed until the placement process was complete. Accordingly, the intended aim of the section would be frustrated if this happened. This situation is not the same as those in which the employer's prior efforts to avoid retrenchment do not have the effect of pre-determining the outcome of a consultation process, such as responding to a drop in orders by implementing short-time before even consulting with a union. In that case there is nothing about the prior implementation of alternatives,[1] which entails the effective selection of retrenchment candidates if it fails to avoid the need for retrenchment at a later stage. Accordingly, because the placement programme will also effectively determine specific candidates for retrenchment, if consultation only commenced thereafter, consultation on selection criteria will be practically meaningless.

33. The applicant indicated that it relies partly on section 189A(13) but also on section 189. It is difficult on the facts to be confident of the number of employees will reach the threshold required by 189A. In any event, the real issue here is whether the obligation to consult in terms of section 189 has arisen, and it is this right which the applicant is seeking to assert. While it is true that if an unfair procedure is followed, employees who are ultimately retrenched have a claim for procedurally unfair dismissal or possibly relief under section 189A, that does not mean that the court will not intervene to get the consultation process going as in a case like this.

34. Although the employer can say it does not know at this stage if there will be retrenchments of one or more employees, the placement process it has initiated will

[1] **See Continental Tyre SA (Pty) Ltd v NUMSA [2008] 9 BLLR 828 (LAC)** at paras [27] to [28], 834 where the LAC had to deal with a situation were the employer had adopted various measures to avoid retrenchment which did not have the effect of pre-selecting candidates for retrenchment.

advance matters to the point were some aspects of consultation will be rendered virtually pointless once the employer specifically identifies any candidates for retrenchment. It would not be unreasonable to characterize the process embarked on as one which contemplates as a real possibility that one or more employees might be selected for retrenchment by 31 August 2010. Accordingly, consultation ought to commence now, and the union can assert that right. Because the placement process has such important consequences for the scope of consultations, a 30 day moratorium should give the parties sufficient time to engage in meaningful consultations on the key issues.

35. On the enforcement of the collective agreement, I am less persuaded there is any urgency in this. Insofar as the employer might not have complied with certain provisions of that agreement, the union could have invoked the right to consult on Sizimisele's report after August 2009.

36. There is not pressing urgency apparent on the face of the papers for the employer to finalise the placement process, and disadvantage of delaying it for 30 days must weighed against the advantages gained from facilitating the consultation process.

ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT

Date of Hearing: 11 August 2010
Date of Judgment: 12 August 2010

Appearances

For the applicant:

G Hulley instructed by Thaanyane Attorneys

For the respondent:

X Matyolo of Perrot, Van Niekerk & Matyolo Inc.