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IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C612/2000

DATE: 31-8-2000

In the matter between:

NATIONAL EDUCATION HEALTH & Applicant

ALLIED WORKERS UNION

and

Respondent

MEDI CLINIC

JUDGMENT : EX-TEMPORE

WAGLAY, J:

[1] The applicant seeks a final order interdicting and restraining the respondent from terminating the contracts of employment of the person listed in Annexure A to its papers on the basis of respondent's operational requirements;

(i) without first having given each of the persons listed in the Annexure at least one calendar month's notice of such termination, or alternatively but only where such

period exceeds one calendar month, without having given each such employee at least four weeks notice of such termination as envisaged in section 37(1)(c) of the Basic Conditions of Employment Act, and

(ii) without first having negotiated and concluded a retrenchment and redundancy procedure with the applicant as envisaged in Clause 18 of the Recognition and Procedural Agreement concluded between the applicant and the respondent on 13 December 1999.

[2] Applicant further seeks for this Court to grant a declaratory order directing the applicant and the respondent to negotiate and agree a retrenchment and redundancy procedure as envisaged in Clause 18 of the aforesaid Agreement.

[3] The relevant facts giving rise to this application can be summarised as follows:

3.1. On 13 December 1999 the parties concluded a recognition and procedural agreement (hereafter referred to as "the agreement"). Clause 18 of the said agreement provides as follows "Retrenchment and Redundancy Procedure

“A retrenchment and redundancy procedure shall be negotiated as soon as the company deems it necessary for such action to be taken.”

On 20 March, respondent handed a letter to the staff employed in its housekeeping and laundry units headed "Notice in terms of section 189 of the Labour Relations Act No. 66 of 1995". In this letter it notified its employees referred to above that it was contemplating out-sourcing the laundry and housekeeping services and thus wanted to commence the consultation process as provided for in section 189 of the Act.

3.3. A number of meetings were held thereafter and various correspondence passed between the parties. From the correspondence and minutes of meetings presented it

is evident that respondent had, from the outset, or at least on 12 April 2000, suggested that an agreement needed to be concluded between it and the applicant with regard to the procedure relating to the retrenchment exercise. At best for the applicant it remained non-committal on this issue.

3.4. On 25 April 2000, respondent presented applicant with a document headed "Process to be followed in case of termination of contracts based on operational requirements in terms of the Recognition Agreement between Vergelegen Medi Clinic and NEHAWU" (the respondent and applicant respectively). Some time on or after 25 April 2000, applicant adopted the position that until such time as the procedure envisaged by clause 18 is agreed upon, there can be no discussion in respect of retrenchment.

3.5. On 15 May 2000, applicant forwarded a letter to the respondent, the contents whereof were as follows:

"With reference to your proposal on termination of contracts based on operational requirements; On 20 March 2000 notices were served to the employees

stating that the company is planning to start a consultation process regarding operational requirements.

ne opinion that the company is breaching the Recognition Agreement in terms of clause 18.

Therefore we believe that the company should apologise to the

oyees in writing and withdraw the said notices and the company will honour the Recognition Agreement that was on

13 December 1999"

3.6 The respondent, in response to the aforesaid letter, forwarded a circular letter to its

housekeeping and laundry staff stating:

"I would like to inform you that your union representatives have brought to my attention that no reference was made to clause 18 of the Recognition Agreement in the notification sent to you on 20 March 2000.

On behalf of management I would like to apologise for any misunderstanding that might have been created. According to clause 18 of the Recognition Agreement, the union, on behalf of all employees that might be affected by the possible out-sourcing, has the right to negotiate with the company the procedure which is to be followed.

I am pleased to make mention that the union and management are now in a position to negotiate this procedure."

Before despatching the circular letter referred to above, respondent discussed the contents thereof with the applicant to ensure that it had addressed the complaint raised by the applicant and this was done at the meeting held on 16 May 2000. At this meeting, and after finalising the circular letter aforesaid, respondent then enquired if the "way was now clear for the negotiations on the procedure to start." Applicant responded that it was. The respondent then called upon the applicant to forward its proposals in that respect.

3.7. On 6 June 2000, the applicant presented its proposals with regard to the retrenchment and redundancy procedure at the meeting held between the parties. From a reading of the minutes of this meeting, it is clear that applicant held the view that before the respondent could embark upon any process in respect of retrenchment or redundancy, an agreement as provided for in clause 18 of the Agreement had to be negotiated. The meeting ended without any agreement on the retrenchment procedure and on 10 June 2000, respondent, in a letter to the applicant, stated, inter alia, the following:

"In terms of clause 18 of the Recognition Agreement the company and the union has to negotiate the procedure that has to be followed. Clause 18 reads as follows."

It then records the contents of clause 18 of the Agreement and adds "The union was of the strong opinion that such procedure could not be negotiated until such time as the reasons for the contemplated retrenchments were provided by management, scrutinised by the union and the final decision to go ahead was taken."

(I must add that at this stage that what is recorded in the paragraph *infra* is in accordance with the various minutes which have been presented to this Court.)

"Subsequently management provided the union with written reasons for the contemplated retrenchments on 24 March 2000 and on 17 April 2000, and verbally at more than three meetings ,confirmed by written minutes. This was done notwithstanding the fact that management repeatedly stated to the union that they see this as one of the first steps to be taken in the negotiated procedure and therefore such a procedure should be negotiated first of all. In support of this, management provided the union with a written proposal of such procedure on 25 April 2000. In the meantime the union still further explored the reasons provided by management but until today management have not received any form of counter-proposals from the union to avoid the possible retrenchments."

The letter then goes on to state:

"A further delay was caused when the company acceded to a request by the union to postpone a further meeting in order to give them time to get a union official to join in the process and help them with a counter-proposal regarding the proposed retrenchment procedure. Eventually, but without the union official being present, management received counter-proposals from the union regarding the proposed process at the meeting of 6 June 2000. This counter-proposal, however, does not constitute a process at all, but rather reads like a list of demands largely based on what section 189(2) to (7) of the Labour Relations Act, No. 66 of 1995, envisages the parties to consult about and try to reach consensus on before dismissals based on

operational requirements take place. It has become apparent to the company that the views of the union and the company respectively regarding the process to be followed in the case of termination of contracts based on operational requirements are irreconcilable at the present moment.

In an attempt to bring order to the process, management would like to extend a final invitation to the union to put any alternatives to retrenchments in writing to them before the next meeting on 12 June 2000. In the absence thereof, management will assume that the union has no viable alternatives to table. Further, management will treat the proposals tabled at the meeting of 6 June 2000 as proposals based on section 189(2) to (7) of the Labour Relations Act and would like to make the following information available in writing as counter-proposals in line with the requirements of section 189(3) of the LRA."

3.8. The letter then goes on to deal with the disclosure of such information as is required in terms of section 189(3) of the Act. The aforesaid letter was handed to the applicants on 12 June 2000 at the meeting held between the parties. At this meeting, respondent, having rejected the applicant's proposals dated 6 June 2000, expressed the view that it was still willing to negotiate the procedures required by clause 18 of the Agreement. The applicant's response reiterated that unless the procedures required by the above clause was concluded:

"The employees' jobs cannot be made redundant."

3.9. In response, the minutes record that respondent explained that since the parties disagree on what the negotiated process should be and the proposals submitted by the applicant did not constitute a process, and further that since there has been no progress over this matter, the respondent was:

"Going to default to the provisions of the LRA section 189."

Thereafter the respondent requested that applicant suggest any alternatives it may have to the proposed out-sourcing. The applicant refused participate in the process. The applicant thereafter declared a dispute in terms of the Agreement and the matter was eventually referred by the applicant to the Commission for Conciliation, Mediation and Arbitration ("CCMA") for conciliation.

3.10. In referring the matter to the CCMA, the applicant fashioned the dispute as follows under the heading "Nature of the dispute":

"The dispute is about the refusal of the employer to bargain as is required by the provisions of clause 18 of the Recognition Procedural Agreement concluded between the parties on 13 December 1999."

Under the heading "Result of the conciliation" it records:

"The outcome we would like is an agreement between the parties that they shall," negotiate and agree a retrenchment and redundancy procedure as is required in terms of clause 18 of the Recognition & Procedural Agreement".

3.11. The dispute was set down for conciliation on 19 July 2000. The Commissioner seized with the dispute refused to entertain the dispute on the basis that respondent had agreed to the outcome sought by the applicant in its referral of the dispute to the CCMA. Notwithstanding the CCMA's refusal to entertain the dispute, applicant sought an undertaking at the conciliation from the respondent that it will not proceed with the redundancy proposals pending the finalisation of the process agreement as required by clause 18 .Respondent refused to give such an undertaking. The demand for the undertaking was repeated by the applicant at the meeting held between the parties on 21 July 2000. It was again refused by the

respondent.

3.12. On the same day, 21 July 2000, applicant again referred a dispute to the CCMA and this time under the heading of the nature of dispute and the results of conciliation it expressed its dispute more clearly.

3.13 On 8 August 2000, the parties received notification from the CCMA that it would conciliate the referral dated 21 July on 30 August 2000. In the meantime, and after the applicant referred the initial dispute to the CCMA, the respondent appears to have continued with the process, albeit in the absence of the applicant, and between 1-4 August 2000, gave notice to all of its employees in the laundry and housekeeping units, all of whom are members of the applicant, terminating their services due to operational requirements with effect from 31 August 2000. On 23 August 2000, respondent launched this application.

[4] The relief sought by applicant, as recorded earlier, is to interdict and restrain the respondent from unlawfully terminating the employment of its members on the basis of respondent's operational requirements; more particularly, that the dismissal of the applicant members should be interdicted pending the negotiation of a retrenchment and redundancy procedure as envisaged by clause 18 of the Agreement which regulates the relationship between the parties. Applicant also prays for this Court to interdict and restrain the retrenchment pending the giving of proper notice in terms of the employee's individual contracts of employment or in terms of the BCEA. Further, that I direct the parties to negotiate and agree a retrenchment and redundancy procedure. The application is fashioned in the form of a final interdict and a declaratory order.

[5] Dealing firstly with the final interdict, the requirements for such an order to be granted is that the applicant must satisfy this Court that it has a clear right, a reasonable apprehension of harm and the absence of an adequate alternative remedy. In determining the above requirements, this Court is obliged to base its decision on the facts as stated by the respondent, read together with the facts as stated by the applicant - which are admitted by the respondent - provided that this Court may refuse to accept allegations or denials by the respondent where such allegations or denials are clearly untenable that the Court is justified in rejecting them on the papers **(see Plascon Evans Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A).)**

[6] With regard to the issue of clear right, applicant claims it has a clear right to the relief claimed as:

6.1. The parties were obliged in terms of clause 18 of the Collective Agreement to negotiate a retrenchment and redundancy procedure once the respondent deemed it necessary for such action to be taken. In the absence of such a procedure having been agreed to, to proceed with the retrenchment constitutes a breach of the agreement and is, therefore, unlawful and renders the dismissals unfair.

6.2. That the respondent is obliged in terms of the contracts of employment of the affected employees to give them one calendar month's notice .This the respondent failed to do; alternatively, that the respondent is obliged to comply with the provisions of section 37 of the BCEA in giving notice of termination and the respondent as failed to comply with such provisions of that Act.

[7] Applicant's argument is that since clause 18 of the Agreement requires that an agreement on retrenchment and redundancy should be negotiated as soon as the

company deems it necessary to retrench, such clause ipso facto precludes the effecting of any retrenchment prior to the conclusion of the retrenchment procedure referred to in clause 18. The respondent disagrees. As I understand respondent's argument, respondent states that notwithstanding the absence of an agreed procedure in terms of clause 18, it may still proceed with the retrenchment as long as the procedure adopted by it does not fall foul of section 189 of the Act. Alternatively, respondent argues that clause 18 only requires that the parties negotiate and that this term "negotiate" does not include a conclusion of an agreement. Finally, it argues that this Court has no jurisdiction to interpret or apply the agreement which is the real dispute before this Court as it is precluded from doing so in terms of section 158(5) read with section 26(5) of the Act.

[8] Having regard to the facts as I have recorded above, it is clear that respondent's view was at all times, or at least prior to 10 June 2000, that the parties were required to negotiate procedure as required by clause 18, before the matter of retrenchment could be dealt with. To then argue that such procedure is not a prerequisite to any consultation or negotiations on retrenchment cannot be seen to be as a serious or an honest belief held by the respondent. To further argue that negotiations does not imply concluding an agreement is rather simplistic. The purpose of negotiation is nothing other than to arrive at an agreement acceptable to the parties involved in the negotiations. When negotiations fail to result in an agreement it does not imply that the matter negotiated about falls away, particularly where the need to negotiate is part of an agreement that provides for dispute resolution mechanisms. Hence, when an agreement requires that the party thereto conclude a side or axillary agreement to the main agreement by negotiations, where such agreement is not arrived at by the parties, the parties are required to resolve the matter in terms of the dispute resolution process that may be provided for in the main agreement.

If this is not so, an agreement to negotiate would have no meaning. Having regard to the agreement of which clause 18 is a part, it is clear that what was required was that an agreement be concluded between the parties on the procedure to be followed once respondent contemplated retrenchment or redundancy by negotiation.

[9] I therefore find that respondent's submission that negotiations does not imply concluding an agreement, to be without merit. Negotiations is described by Chambers 20th Century Dictionary to mean "bargain, to confer for the purpose of mutual agreement, to arrange for by agreement, to manage, to transfer or exchange for value". It is, therefore, not simply a matter of coming together to haggle and wrangle without more. It means to come to a conclusion by mutual consent.

[10] Respondent's further argument that since section 26(5) provides that the application and interpretation of the collective agreement, (and in this respect it is common cause that the agreement referred to herein is a collective agreement) must be referred to arbitration for determination, it is not for this Court to pronounce upon the application or interpretation thereof. This argument is not without merit. While it is so that matters relating to interpretation and application of a collective agreement have to be referred to arbitration, the issue before me is not the application and interpretation thereof, but a breach of that agreement. I believe that there is a distinction between a breach of an agreement and the application or interpretation thereof.

[11] Dealing simply with the application or interpretation of an agreement presupposes that the parties to the agreement jointly recognise that their views in respect of the application and/or interpretation of the agreement, differ. Either or both of them may, therefore, refer the matter to the CCMA for arbitration. However, where both

parties are not at a loss as to the applicability or the interpretation of the agreement and one of the parties believes the other to be in breach, then I do not see why such a matter cannot be referred to this Court. I do not by this imply that the CCMA does not have jurisdiction to determine a breach. I believe that both the CCMA and this Court has jurisdiction to entertain a dispute that has as its basis a breach of a collective agreement.

[12] I say this because in determining a breach, the interpretation and/or the application of the agreement is, perforce, inevitable. Since the CCMA has the power to arbitrate an issue dealing with the application or interpretation of agreement, it must also have the jurisdiction to arbitrate a dispute relating to a breach of the agreement. Further, since the Act does not expressly oust the jurisdiction of this Court in respect of a breach of a collective agreement, I am satisfied that such a dispute can be entertained by this Court notwithstanding that in determining the breach, this Court might, or will, be obliged to interpret the agreement. In the circumstance if for example the applicant in this matter brought an application on the basis that its members' dismissal on the grounds of respondent's operational requirements was unfair, then firstly, the applicant would be obliged in terms of the Act to refer the dispute about the unfair dismissal to this Court and not to the CCMA. Secondly, in determining whether or not their dismissal was unfair, this Court will be obliged to consider and interpret the collective agreement to ascertain whether there was a breach of such an agreement. It cannot be said that the CCMA must hand down an arbitration award on the interpretation of the agreement and then this Court must determine the dispute about the dismissal. To argue that it is the dispute that is the relevant factor and a dispute regarding a collective agreement has to be referred to arbitration and a dispute about a dismissal for operational requirement has to be referred to this Court is to place superficial barriers because in the example I have

given the determination of the dispute about the dismissal would necessitate the interpretation of the agreement.

[13] In the circumstances I am satisfied that I have jurisdiction to interpret a collective agreement when the allegation relating to the agreement is one of breach of the said agreement.

[14] As stated earlier, applicant's submission is that the respondent is in breach of the agreement in that it was obliged to negotiate and conclude a procedural agreement before it could proceed with the retrenchment exercise, but failed to do so.

[15] Having regard to clause 18 I am satisfied that applicant's submission is in fact correct. In arriving at this decision, not only have I had regard to what I conclude to be the import of the said clause, but also the fact that respondent itself was satisfied that the meaning preferred by the applicant was the correct one. Respondent only changed its view when it became apparent that its proposal with regard to the procedure and that proposed by the applicant was so divergent that it appeared that the two proposals were irreconcilable. The fact that the two proposals appear to be irreconcilable did not give the respondent the right to abandon the need to conclude such an agreement. It was required of either of the parties to then invoke the dispute resolution procedure as provided for in the agreement to resolve the matter.

[16] In this respect applicant followed the procedure as was required. It declared a dispute as required by the agreement and thereafter, in terms of the agreement, referred the matter to conciliation to the CCMA. Sadly, it failed to express either the nature of the dispute or the outcome it would like adequately and respondent latched upon what was written in the referral to satisfy the CCMA that there was in fact no

dispute before it. Applicant is correct when it says that respondent knew that the real dispute was the failure to conclude rather than agree to negotiate the procedural agreement in terms of clause 18. Respondent nonetheless took advantage of the literal expression contained in the referral, to abort the matter.

[17] Respondent's argument, however, goes further. It is that the referral by the applicant was in any event improper because applicant refers the dispute as one of "refusal to bargain". This, it argues, is untenable because section 64(2) of the Act defines what constitutes a refusal to bargain. The dispute about failing to agree to a procedural agreement in terms of clause 18 of the Agreement cannot, so respondent continues, be construed as a "refusal to bargain". I do not express an opinion whether or not respondent is correct as it is not necessary for me to do so in respect of the present matter. I may add, however, that section 64(2) does not provide an exhaustive list of what constitute a "refusal to bargain" dispute. The sub-section specifically provides that:

"A refusal to bargain includes..."

By using the word "includes" it is not limiting what constitutes a refusal to bargain dispute, but extends it to certain instances which may not ordinarily fall under the category of the "refusal to bargain" dispute.

[18] The fact that the CCMA failed to entertain the dispute does not, however, imply that applicant does not have a clear right . I am satisfied that clause 18 of the Agreement does require the parties to conclude a procedural agreement before respondent can embark upon a retrenchment or redundancy exercise and as such the Applicant has satisfied this court that it has a clear right .

[19] Turning then to the issue of reasonable apprehension of harm and the absence of

adequate or alternative remedy. Dealing with the issue of adequate or alternative remedy, applicant's contentions in this regard are based on the premise that since the dismissals only come into effect today, this Court should interdict and restrain such action. This is no reason to grant the relief. While it is true that the affected employees are required to work in terms of the notice terminating the services until today or such further period, depending on the notice being correct, the employment has in fact terminated. It was terminated on the day they were given the notice to that effect. The dispute is, therefore, one of dismissal. I cannot in the circumstances interdict and restrain the respondent from terminating the contracts of employment. The contracts of employment have been terminated.

[20] Having regard to the fact that the applicant has included in the notice of motion a prayer for alternative relief, I am prepared to consider the granting of interim reinstatement pending finalisation of the dispute relating to the retrenchment of the affected employees. To do this, however, the applicants have to advance special circumstances to persuade this Court to grant such status quo relief. The fact that applicant is required to satisfy this Court that there are special circumstances for the Court to grant the relief which I am prepared to consider stems from the fact that the Act makes adequate provisions to address the issue of unfair dismissal. In terms of the Act the applicant is entitled, if the dismissal of its affected members is found to have been unfair, to an order of reinstatement from the date of their dismissal. The effect of this will be that once reinstated and the respondent is still intent with proceeding with the retrenchment exercise, it will be required to follow such procedure, inadequacy of which results in the dismissal being found to be unfair. In these circumstances, respondent's submission that unless relief is granted to the applicant, the applicant will lose the opportunity to consult or negotiate substantive aspects of the retrenchment, is of no merit.

[21] Since the Act provides an adequate remedy and no special circumstances have been placed before this Court as to why this Court should grant status quo relief, I am satisfied that the relief prayed for by the applicant, or any alternatives thereto, should be dismissed.

[22] I may add that applicant's reliance on the judgment in the matter of **Num & Others v Dumsa Dzima Manufacturing (Pty) Ltd** is misguided. In that matter the Court had not found that the individual applicants had in fact been dismissed and therefore granted an interdict restraining the retrenchment of the individual applicants pending the respondent complying with the collective agreement that regulated the relationship. Had the applicant in this matter also come to this Court as early as 19 July 2000 when the CCMA refused to entertain the dispute, or immediately after 21 July 2000 when respondent refused to give it an undertaking that it would not proceed with the retrenchment pending the conclusion of a procedural agreement, this Court may well have granted the relief prayed for. This would have been so because the retrenchment exercise had not been concluded by the respondent at the time and the employment relationship continued to remain in force.

[23] Once the employment relationship has been terminated, this Court cannot come to the assistance to grant reinstatement, albeit interim reinstatement, unless it is satisfied that there are special circumstances to do so. If such relief is to be granted simply because there is evidence of the process not being followed properly, then this Court would be exceeding its powers and creating a right that has not been provided for in the Act.

[24] The further relief sought by the applicant is that I direct the respondent to negotiate

and agree to a retrenchment and redundancy procedure as envisaged by clause 18 of the Agreement. I am not inclined to entertain this prayer. I refuse to do so on the basis that since the main prayers of the applicant have been dismissed, there is nothing urgent about the granting of this order, assuming that there is merit in granting same.

[25] Turning then to the issue dealing with the notice to the affected employees. The applicant's contention that the termination of the employment of the affected employees is or will be unlawful because the respondent had failed to give the affected employees one calendar month's notice or notice as required by section 37 of the BCEA, is of no merit. Even if I accept that notice given by the respondent should have been given on or before 1 August to terminate the services on 31 August, or as provided for by the BCEA, this does not mean that the notice not in compliance with the above is invalid. If the notice is late or inadequate all it means is that the employer is obliged to pay the employee for such period as such employee would be entitled to. That is, if the employer is required to give notice of one calendar month, he is obliged to hand such notice to the employee by the 1st of that month. If he does so only after the 1st, he will be obliged to pay the employee an extra month's salary as a notice period of one calendar month shall only expire at the end of the following calendar month. Likewise, if the BCEA requires a notice period of a particular period and the notice given is short, such notice is not void because of its failure to comply with the notice period , it only entitles the employee to claim remuneration for the period that the employer was obliged to give notice to the employee.

[26] In the circumstances applicant has failed to establish any clear right or a right open to some doubt in respect of the termination of the employment based on improper

notice.

[27] Finally, with respect to costs, this matter clearly has not reached its end. I have little doubt that the applicant will proceed against the respondent on the basis of an unfair dismissal. Clearly where there is a matter pending between the parties, this Court should attempt not to place any hindrance for the parties to attempt a resolution of their disputes. Granting an order of costs against the applicant might, in the present circumstances, lead to hardening of attitudes and place an unnecessary barrier on the parties attempting to resolve the various matters on which they differ. I am, therefore, not satisfied that this is a matter which the terms of law and equity demands that a costs order be made.

[28]In the result the application is dismissed. There is no order as to costs.

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Waglay ,J .

For the Applicant :**Adv.M.W.Janisch instructed by Chennels Albertyn.**

For the Respondent :**P.R Dreyer of Kocks & Dreyer Attorneys**

Date of Hearing & Judgment :**31-08-2000**