THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN

Not Reportable/Of interest to other judges
Case no: 2024- 133773

In the matter between:

SOLIDARITY OBO MEMBERS	**APPLICANT**
and	
WESTERN CAPE EDUCATION DEPARTMENT	**FIRST RESPONDENT**
HEAD OF EDUCATION WESTERN CAPE	**SECOND RESPONDENT**
PRINCIPAL OF HOËRSKOOL BELVILLE	**THIRD RESPONDENT**
THE SCHOOL GOVERNING BODY OF HOËRSKOOL BELVILLE	**FOURTH RESPONDENT**
EDUCATION LABOUR RELATIONS COUNCIL	**FIFTH RESPONDENT**

Heard: 26 November 2024
Delivered: 3 December 2024
Summary:(Urgent application to declare selection process of additional staff to fall within the ambit of s 189 and/or s 189A of the LRA, and to compel employer to comply with operational dismissal consultation obligations – Application premature – Struck off the roll)

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an urgent application brought by the union, Solidarity, on behalf of three of its members employed as educators at Hoërskool Belville ('the school). The application is opposed by the School and the Western Cape department of Education ('the department').

[2] Solidarity seeks declaratory and consequential relief flowing from the department's decision to declare the union's three members as "additional" to the educators' staff establishment. It wants a declaration that the act of deciding that staff are additional to the staff establishment, is a process governed by the provisions of section 189A(13) of the Labour Relations Act, 66 of 1995 ('the LRA') and calls on the court to find that the department acted unfairly when it determined that it's members were additional to the staff establishment. It also asks the court to 'reinstate' the members in their posts or retract the determination that they are 'additional' and compel the respondents to embark on a meaningful joint-consensus seeking consultation process in terms of section 189A read with S 189 of the LRA. In the alternative, Solidarity asks the court to prevent the respondents from taking any further steps in the transfer process embarked on pending the outcome of the dispute it had referred about the interpretation and application of Education Labour Relations Council collective agreement CA 4 of 2016.

[3] The three affected members are employed as educators at Hoërskool Belville ('the school). The application is opposed by the School and the Western Cape department of Education ('the department').

Factual Background

[4] The salient facts set out below are largely common cause.

[5] On or about 27 August 2024, the department issued a circular to all principals, educators and school-based staff at public schools informing them,

amongst other things, that it will reduce the educators' post allocation in the province by 2407 posts with effect from January 2025.

[6] This situation is a result of the department being unable to meet the costs of recent negotiated salary increases while simultaneously struggling to meet budget cuts.

[7] On 6 September 2024, five educators at the school, including Solidarity's three members, were called to a meeting with the third respondent, the principal of the school. He advised them that they had an option of going on early retirement and if they accepted it, the school governing body ('the SGB') would contribute to their monthly pension for a period of two years. They apparently declined this offer.

[8] On 19 September 2024, the union's three members were informed that they have been declared additional to the educators' staff establishment with effect from 1 January 2025. They were handed letters from the principal and the department's circuit manager, respectively. The letter from the principal stated, among other things, that:

8.1 in terms of the LRA, the SGB was giving each affected educator notice that their post was being restructured;

8.2 the process of transferring staff who are additional to the school's establishment would be implemented in terms of the Education Labour Relations Council resolution 4 of 2016, and

8.3 attempts would be made during 2025 to place educators who were declared additional in posts of other permanent educators who left the department, subject to the candidate matching the curriculum requirements of the vacated post.

[9] The circuit manager's letter informed the affected employees that:

9.1 The educator establishment for 2025 had been reduced;

9.2 A consultative process under collective agreement 4 of 2016 had been completed;

9.3 if the employee was unhappy with being identified as additional to the educator establishment, they could declare a formal dispute;

9.4 the employee would be subject to a matching and placement process which could result in the employee being placed in another school;

9.5 the employee was required to submit a detailed profile by the end of September for the matching and placement process, and

9.6 the determination of A consultative process as envisaged in the ELRC collective agreement 4 of 2016 ("CA 4/2016") had been followed;

[10] The department determined that the number of educator posts with effect from 1 January 2025 would be reduced by 2407 posts. The department maintained that around 2100 educators leave it each year for reasons such as relocation or resignation, so that it was not improbable that alternative placements would be found for educators deemed additional to the educator establishment at the school. Solidarity retorts that even if this is a reliable estimate, the probabilities indicate that there would still be a considerable shortfall of alternative posts, and accordingly the possibility of retrenchment must be contemplated by the department.

[11] On 1 October 2024, Solidarity claimed the process followed by the school in identifying the three members as additional had not been accordance with CA 4 of 2016 nor with the LRA. Apart from requesting information of the process, Solidarity asked for a meeting to discuss the issue. The school responded that the process was finalised and Solidarity should raise any issues with the department. The department claimed the procedures had been followed.

[12] CA 4 of 2016 is a collective agreement governing the transfer of serving educators for operational requirements, which includes financial constraints. It sets out the procedure to be followed when the incumbent educators at a school exceed the staff establishment determined by the department, or where the skill profiles of incumbent educators do not match the requirement of the staff establishment. An arbitrator dealing with the enforcement, interpretation or application of the agreement may, in certain circumstances, set aside the

department's decision to transfer an educator and refer the issue back to the department for a fresh decision. It does not deal with retrenchment.

[13] On 1 November 2024, Solidarity referred a dispute about the interpretation and application of CA 4 of 2016 to the bargaining council. The relief sought is that the transfer of its members should be suspended and that the process under the collective agreement be restarted. In a letter of the same date, Solidarity called on the respondents to put any planned transfers of its members on hold pending the ruling of the arbitrator in the dispute. It also accused the department of contravening s 189 of the LRA because it was in the process of contemplating the retrenchment of employees found to be additional to the educator establishment without initiating retrenchment consultations. It asked the department to clarify its stance on complying with s 189 and to persuade it that it was not necessary for the union to approach this court to compel it to comply with s 189 and, if applicable, s 189A. It warned that if the department did not suspend the transfer process of the affected members by 14 November it would approach the court on an urgent basis.

[14] A further letter of demand was issued by Solidarity's attorneys on 11 November 2024, giving the department an ultimatum to halt any transfers of its members pending the resolution of their dispute and demanding a retraction of the notices issued to them and the commencement of retrenchment consultation processes under s 189 and s 189A of the LRA. Solidarity claimed its affected members were required to vacate their positions at the school by 11 December 2024, but the respondents say they were simply asked to remove their personal belongings from the class rooms. The department asserts that although the individuals have been declared additional to the school's establishment, they remain in the employment of the department and retain their salaries and benefits. As this claim was not disputed in a replying affidavit, it must be accepted as correct.

[15] It was also alleged by Solidarity that one of the three educators who was the head of the Afrikaans Department had been replaced by a more junior educator with shorter service and less experience.

[16] On 19 November the application was launched, requiring the respondents to file any answering affidavits by 22 November and enrolling the application for hearing on 26 November.

Urgency

[17] Solidarity characterises its claim as one of urgent interim relief. However, that is perhaps only true in respect of its prayer for alternative relief to stay any transfer of its members, pending the outcome of the dispute it referred to the bargaining council. The relief sought in the form of an order declaring that the decision to designate its members as additional to the school's educator establishment is unfair and that the designation be reversed and compelling the department to embark on retrenchment consultations is final in nature.

[18] Solidarity argues that the application is urgent because processing a grievance, as recommended by the department, will not be sufficient under the circumstances in which the three educators have been asked to vacate their classrooms. Solidarity contends this effectively renders their additional status a finality. Moreover, to the extent that a replacement appointment had been made it was essential to halt the process immediately to avoid having to try and unscramble the proverbial egg at a later stage. The date of any arbitration hearing to determine the transfer dispute was indeterminate, and the affected members would be compelled to participate in the matching and placement process in the meantime, which might be unecessary.

[19] The school and the department dispute the urgency of the application. In particular, they argue that there was no justification for requiring an answering affidavit to be filed within two court days of the founding papers being filed. It complained that its ability to respond comprehensively because of the extent of the consultations necessary to do so, meant that its answering affidavit did not do justice to the issues raised.

[20] Solidarity did not provide any reason for the highly abbreviated time period it gave the respondents to oppose and answer the founding papers. The application could just as well have been enrolled on 29 November or even 2 December 2024. Even if there is a degree of urgency in trying to have the matter determined before the year-end, that did not warrant the time frames dictated by Solidarity.

[21] Consequently, I am not satisfied that Solidarity has justified the degree of urgency with which it launched this application.

[22] In relation to the question of halting the transfer process pending the outcome of the dispute referred to the bargaining council, I agree that it might not be finalised by the year end, but the department still runs the risk of an adverse award upsetting any decision it has made in that regard, even if its actions are not stayed pending the outcome. I am not persuaded that the dispute referred by Solidarity does not provide a suitable remedy, which does not need to be bolstered by an order of interim relief.

[23] In respect of the main relief sought, namely to compel the department to embark on retrenchment consultations under the LRA, based on the fact that there is a prospect of retrenchment if there are not sufficient alternative placements to accommodate all currently employed staff, the question is whether the remedy of challenging any proposed retrenchments will be compromised by not compelling the department to embark on a s 189 process now. That turns on when the right to be consulted over possible retrenchments arises.

[24] It appears that the prevailing view of the courts is that the mere fact that an employer envisages that a restructuring exercise might lead to retrenchment is not sufficient to trigger the obligation to initiate consultations under s 189 or s 189A. In *Continental Tyre SA (Pty) Ltd v National Union of Metalworkers of SA*[1], the Labour Appeal Court summarised the current position:

[1] (2008) 29 *ILJ* 2561 (LAC)

"[27] In Atlantis Diesel Engine (Pty) Ltd v NUMSA 1995 (3) SA 22 (A) at 28F; (1994) 15 ILJ 1247 (A) Smallberger JA held that the duty to consult arose when 'the employer having foreseen the need for it, contemplates retrenchment. This stage would normally be preceded by a perception or recognition by management that its business enterprise is ailing or failing; a consideration of the causes and possible remedies; an appreciation of the need to take remedial steps; and the identification of retrenchment as a possible remedial measure'. That judgment however did not engage with the wording as employed in s 189 of the Act based as it was on the Labour Relations Act 28 of 1956.

[28] This court in General Food Industries Ltd v Food & Allied Workers Union (2004) 25 ILJ 1260 (LAC) considered the relevant provisions of the Act as follows:

'An employer is entitled to take the provisional decision to consider the possible retrenchments of employees on his own, without any input from the employees or the union. But he is not allowed to make a final decision before consulting with the trade union or employees involved. In practice an employer will first sense the need to retrench at managerial level and a decision in principle will be taken. However, the employer must consult once it contemplates a dismissal of employees for operational requirements.'

Furthermore, in Enterprise Foods (Pty) Ltd v Allen & others (2004) 25 ILJ 1251 (LAC) at para 23 this court confirmed that the word 'contemplates' A does not exclude an employer 'developing a preliminary approach upon which a decision may be based'. As Martin Brassey Commentary on Labour Relations Act A8–91 writes: 'An employer is entitled to consider whether a new scheme or structure might be viable before initiating the process of consultation.'"

[25] Even though Solidarity might justifiably speculate that the matching and placement process using new vacancies created by annual educator staff attrition, might not suffice to accommodate all the remaining educators in the reduced staff establishment, it is fair to say on the founding and answering affidavits that the department has not reached the stage where it is actively contemplating

embarking on retrenchments. Accordingly, it would be premature at this stage to require it to invoke the consultation requirements of the LRA. Solidarity also fears that the identification of staff as additional to staff establishments has the effect of pre-determining which staff might be selected for retrenchment. However, the issue of selection criteria for retrenchment is something that the department would still have to consult unions over with a view to reaching consensus if it contemplated retrenchments. Fair selection criteria might result in educators who still occupy posts on the establishment being identified as possible candidates for retrenchment rather than staff declared additional to the staff establishment. There is no *a priori* connection between an educator being additional to a staff establishment at a school and that person being selected as a candidate for retrenchment. Consequently, the declaration of educators as additional to the staff establishment is not tantamount to pre-determining fair selection criteria and there is no justification for the court acting pre-emptively at this stage.

[26] In light of the discussion above, I am satisfied that the application was premature and brought on insufficiently short notice. Accordingly, it should be struck from the roll.

Costs

[27] There is an ongoing relationship between the parties, and it would not be appropriate considering the requirements of law and fairness to make a cost order in this matter.

Order

1. The application is struck off the roll for lack of urgency.
2. No order is made as to costs.

R Lagrange

Judge of the Labour Court of South Africa.

Parties' representatives

For the Applicant	D J Groenwald instructed by SVS Attorneys
For the First and Second Respondents	De Villiers-Jansen SC instructed by the State Attorney, Cape Town.