

**THE LABOUR COURT OF SOUTH AFRICA,  
(HELD AT JOHANNESBURG)**

Case No: J 1746/19

**NOT REPORTABLE**

In the matter between:

**THE ASSOCIATION OF  
MINEWORKERS AND  
CONSTRUCTION UNION**

**First Applicant**

**THE AMCU MEMBERS AS PER  
ANNEXURE 'A'**

**Second to further  
Applicants**

and

**SISONKE JABULA MINING (PTY)  
LTD**

**Respondent**

**Heard:** 27 August 2019

**Delivered:** 28 August 2019

**Summary:** (S 189A (13) application – alleged failure to engage in meaningful consultation – document detailing names, dates of employment occupations and packages of proposed retrenchees supplied as requested – claim that consultation could not be properly conducted on a whole range of issues until list provided – consultation on final selection of retrenchees unduly curtailed – limited issues outstanding – limited procedural unfairness – limited compensation)

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**JUDGMENT**

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LAGRANGE J

Introduction

- [1] This is an application under section 189A [13] [c] of the Labour Relations Act, 66 of 1995, to reinstate the individual applicants who were retrenched until such time as a fair procedure has been complied with or alternatively that the court find their retrenchments were procedurally unfair and order payment of 12 months' remuneration as compensation.
- [2] In the further alternative, if reinstatement is not granted the applicants seek an order that the procedural fairness of the dismissal should be determined together with any challenge to their substantive fairness of the dismissals.
- [3] The respondent claims that it has conducted a fair retrenchment procedure and accordingly no relief is competent.

Brief overview of narrative

- [4] AMCU submitted wage demands on 7 June 2019 to and thereafter received a section 189(3) notice of retrenchment in a letter dated 1 June 2019, which arrived on 12 June. The respondent claimed that retrenchments were necessitated by cancellation of part of a contract it was working on. Initially the number of potentially affected employees engaged on that contract was identified as 50 in number.
- [5] Consultation meetings were held on 5 July, 12 July, 7 August and 12 August 2019 under the auspices of a facilitator appointed by the CCMA. At the end of each facilitation meeting the facilitator recorded an outcome report essentially setting out briefly in point form the next steps in the process.
- [6] The nub of the union's complaint that the consultation process conducted did not amount to a procedurally fair one was that it only received details of the proposed retrenchees' names, job titles and years of service shortly before the final consultation meeting on 12 August. It further claims that it had been requesting these details from the first consultation meeting on 5 July.

- [7] It claims that until it received these details it could not meaningfully engage with the respondent on the following issues:
- 7.1 the identity of the applicants to be retrenched;
  - 7.2 ways in which the number of employees affected could be reduced;
  - 7.3 avoidance measures;
  - 7.4 ways in which to change the timing of the dismissals;
  - 7.5 ways in which to mitigate the adverse effects of retrenchment;
  - 7.6 selection criteria, and the severance package to be paid to retrenched employees.
- [8] Until the meeting on 7 August when the union was provided with a list of names of those proposed for retrenchment and their packages, there is no evidence in the outcome reports that they had asked for more detail than this. The outcome report of that meeting recorded that management was to submit a complete list of names, job titles and years of service by close of business the following day. The list of proposed retrenchees with the additional information was provided to the shop stewards on 8 August. In argument, the union accepted that the information had been provided by the respondent but maintained that this was too late for it to meaningfully consult on the matters identified above.
- [9] It should also be noted that at the meeting of 7 August it was recorded that the union had made proposals to request an improvement in the retrenchment packages, that retrenched persons be provided with training to be multi-skilled and other issues. It is also common cause that the retrenchment packages were improved. At the next and final meeting on 12 August, it was recorded that the parties would engage further to try and resolve a dispute around, Last-In, First-Out ('LIFO'). In this regard it appears that the union had raised two examples of persons whom it considered ought not to have been retrenched because of their experience. The respondent maintained that using the selection criteria of LIFO subject to skill retention, the selection of these two individuals was justified because they had fewer skills than persons with shorter service than their own.

## Evaluation

- [10] The application was timeously launched having been filed on 19 August, less than five days after 44 employees were retrenched. In so far as urgency might be considered a distinct requirement of such applications, I am satisfied the application was brought timeously in conformity with sections 189 A (13) and 189 A (17) (a) of the LRA
- [11] The essential question is whether the union was denied a proper opportunity to consult in the facilitation process above. As mentioned, the crux of the union's case was that in the absence of the full details of the proposed retrenchees, it could not consult adequately. In fact, it was argued that neither party could consult meaningfully without that list.
- [12] One difficulty with AMCU's approach is that on the evidence of the founding and answering affidavits, I am not satisfied that the union has made out a case that it requested these details from the start of the consultations. It is true they did request a list but the only details that were recorded by the facilitator referred to the names and packages of the proposed retrenchees.
- [13] However, the list with limited details was only provided at the meeting on 7 August, even though the request had been repeated at both the previous meetings in July and even though approximately three weeks had passed since the last meeting in July. This means that until 7 August the union only had a vague idea of the number of employees who might be affected and did not know who had been identified using the selection criteria of LIFO subject to skill retention, nor could it know the amount of the retrenchment packages that the respondent was proposing to pay those retrenched. The only reason advanced by the respondent for not supplying the limited list earlier was that it was still in the process of trying to reduce the number of proposed retrenchees. However, that is a poor reason for not sharing the provisional proposal with the union earlier. The respondent would have suffered no prejudice in disclosing the provisional list and it undoubtedly would have been of some assistance to the union in understanding the scale, identity of retrenchees and to evaluate what level

of compensation retrenchees would be receiving and to evaluate the financial impact of any proposal for an improvement in the packages.

- [14] Had that list been provided sometime before the third meeting, the union would no doubt have realized the limitations of a list that only provided packages and the identity of proposed retrenchees. The union's request for a more detailed list showing the length of service and occupations of those identified, in all probability would have been made earlier. It was strenuously argued by the union that it ought to have been obvious to the respondent that any list ought to have included the details that were only expressly requested at the meeting of the 7 August. By the same token, it ought to have been obvious to the union that it should have requested those details from the start and not just assumed that details which had not been specified would be provided.
- [15] In the end, what is apparent is that the application of selection criteria had not been resolved by the final consultation and had to be deferred until after retrenchment notices were to be issued, which does indicate that additional time to deal with the application of selection criteria had been required and that the parties were unable to consult fully on it by the meeting on 12 August. I note also that even if the union obtained the more detailed list on 8 August there was no working day between then and the meeting on Monday 12 August because Friday 9 August was a public holiday, which it can reasonably be assumed would have limited opportunities for feedback and discussion on the proposed selection before the Monday meeting.
- [16] Nonetheless, I am satisfied that the union was not prevented from consulting on the need to retrench, general alternatives to retrenchment ways to avoid it and the timing of retrenchment because of the late receipt of the provisional list of retrench is and the further more detailed list on 8 August. In the circumstances, I do not believe that more than an extra week would have been required to attempt to reach agreement on the finalization of the list of employees to be retrenched.
- [17] Consequently, I conclude that the consultation process was unduly curtailed by the late provision of information and that it was unfair to

proceed with the retrenchments without attempting to finalize agreement on the selection of retrenchees beforehand even if it is possible that no agreement might have ultimately been reached. Nonetheless, because the deficiency in the consultation process was a limited one I believe that appropriate compensation for such a procedural deficiency should take cognizance of the limited additional need for consultation that was still required.

Order

- [1] The respondent must pay each of the second to further applicants an amount of compensation equal to two weeks' remuneration for the procedural unfairness suffered as a result of the unduly curtailed consultation process.
- [2] No order is made as to costs.

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**R G Lagrange**  
**Judge of the Labour Court of South Africa**

**APPEARANCES**

**APPLICANTS:** P Moll instructed by Larry Dave Attorneys

**RESPONDENT:** Manola Lukhele