IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J1754/19

In the matter between:

SASBO-THE FINANCE UNION OBO RAPULA MADIBA **Applicant**

and

NEDBANK GROUP LIMITED **Respondent**

Heard: 11 September 2019

Delivered: 04 October 2019

JUDGMENT

MABASO, AJ

Introduction

[1] The applicant, SASBO – The Finance Union acting on behalf of Rapula "Madiba" (the applicant) approached this Court on 26 August 2019 seeking an order against Nedbank Limited (the respondent) that it acted unfairly by issuing the letter dated 26 July 2019 without issuing a notice in terms of section 189(3) of the Labour Relations Act[1] (LRA), and a notice as prescribed by the Respondent's Retrenchment policy (the policy) and for failure to appoint a facilitator as per the policy. Further, that the respondent be ordered

[1] No. 66 of 1995, as amended.

to comply with the period of 60 days as per its policy, and that the respondent be ordered to initiate and then continue with a meaningful joint consensus-seeking process as envisaged by section 189 read with 189A of the LRA.

[2] The respondent in opposing this application raised preliminary points, namely that the matter is not urgent and the defences of estoppel and acquiescence.

Preliminary points

Urgency

[3] The respondent contends that the applicant made bald statements in the supporting affidavit with regards to the urgency, therefore, does not comply with the requirements of subparagraph 12.5 of the practice manual of this Court which requires a party to properly set out the circumstances which render the matter urgent and why it should be heard at the time selected by the applicant.

[4] Rule 8 (2) of the rules of this Court requires that a supporting affidavit must state reasons for the urgency, why urgent relief is necessary and reasons thereof and why the normal rules of this Court were not complied with. However, each case has to be decided on its own merits. It is common cause between the parties that the notice that is being challenged was issued on 26 July 2019. This application is in terms of sections 189A(13) read with ss 189A(17)(a) of the LRA which requires an application to this Court to be lodged within 30 days of the issuing of the notice. However, this application can be brought even before the notice is issued. What is required is that as soon as the other party realises that there is a procedural defect in the process, then such party can approach the Court on an urgent basis. The provisions thereof are pre-emptive in that the Court is required to supervise the retrenchment process that is ongoing so that if it is found that such process is not procedurally in line with the provisions of the LRA then the

Court would be in a position to make an order compelling the employer to comply with such provisions.

[5] The Constitutional Court in the matter of *Steenkamp and others v Edcon Limited*[2] held that:

> *"[50] Well procedural irregularities arise, the process provided for in section 189A(13) of the LRA allows for an urgent intervention of the Labour Court to correct any such irregularity as and when they arise so that the integrity of the consultation process can be restored and the consultation process can be forced back on track"*

[6] Taking into account the circumstances in this matter, I conclude that the urgency is statutory created as the Court is required to supervise an ongoing consultation. Therefore, whether a party properly explained in the affidavit the reason for the urgency or not is neither here nor there, because what is required is that an application has to be delivered within a period of 30 days from the date of the issuing of the notice.

[7] In this case, the notice was issued on 26 July 2019 and the applicant approached this Court on 26 August 2019. I, therefore, conclude that the matter is urgent. The point that was raised by the applicant is why the matter was heard on a Friday instead of Tuesday or Thursday as per the practice manual.[3] The matter was scheduled to be heard on a Wednesday, 04 September 2019, but on 30 August 2019 a notice of removal from the roll was delivered by the applicant, the Registrar allocated the day of 11 September 2019. The point is that it is the Registrar of this Court who allocates dates, as correctly submitted by the applicant's representative, thus the applicant cannot be faulted.

[8] I, therefore, conclude that this point *in limine* is dismissed.

---

[2] (2019) 40 ILJ 1731 (CC).
[3] See: Clause 12.3 of the Practice Manual.

Estoppel and acquiesce

[9] The respondent contended that the applicant is not allowed to pursue this procedural aspect as it has participated in the consultation process, it did not raise that the policy was applicable and had been breached. Had it done so as far as back to 23 April 2019 this alleged procedural defect would have been avoided.

[10] Acquiescence simply means a party "abstains from taking action while a violation of their legal rights is in progress". The Supreme Court of Appeal, in *South African Broadcasting Corporation v Coop and others*,[4] summarised estoppel defence thus:

> *"The essentials of estoppel can briefly be stated as follows: The person relying on estoppel will have to show that he or she was misled by the person whom it is sought to hold liable as principal to believe that the person who acted on the latter's behalf had authority to conclude the act, that the belief was reasonable and that the representee acted on that belief to his or her prejudice"*

[11] A party who is claiming estoppel has to both plead and prove it. The estoppel doctrine is a principle which is applicable in our Courts. However, in applying this doctrine, one has to take into account fairness thereof and whether such principle conflicts with any statute, specifically the LRA. Section 210 of the LRA provides that provisions of this Act prevail and if there is a law which is in conflict with it unless if such law expressly amends the Act, the LRA provisions have to be followed.

[12] Section 189A(13) read with 189A(17)(a) of the LRA gives an employee the right to approach this Court when it is of the view that there is a procedural defect in the retrenchment process taken by an employer. What is expected is that an employee has to participate in the consultation, but that does not mean she/he condones the process that is followed. When the consultant

[4] [2006] 1 All *SA* 333 (SCA) at para 64.

party, an employee, detects that the other party is not following a fair procedure they have a right to "walk out" and approach this Court. Therefore, raising these defences will defeat the aforesaid provisions of the LRA especially the requirement of section 189 which is to engage in a joint consensus seeking exercise, which the employee's participation is important and that cannot be construed as waiving rights. The circumstances of this matter do not justify the defence raised by the respondent.

[13] Wherefore, all the points *in limine* are dismissed.

Salient points

[14] Before a meaningful joint consensus-seeking process could take place in terms of section 189(2) of the LRA, subsection (3) provides that an employer must issue a written notice inviting the other party(a union/an employee) to consult with it and disclose in writing all the relevant information, including:

> "(a) the reasons for the proposed dismissals;
> (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
> (c) the number of employees likely to be affected and the job categories in which they are employed;
> (d) the proposed method for selecting which employees to dismiss;
> (e) the time when, or the period during which, the dismissals are likely to take effect;
> (f) the severance pay proposed;
> (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
> (h) the possibility of the future re-employment of the employees who are dismissed;
> (i) the number of employees employed by the employer; and
> (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months".

[15] A checklist compliance with this provision is not necessary, as the Labour Appeal Court in *Johnson & Johnson (Pty) Ltd v CWIU*[5] held thus,

> "… a mechanical, 'checklist' kind of approach to determine whether section 189 has been complied with is inappropriate. The proper approach is to ascertain whether the purpose of the section (the occurrence of a joint consensus-seeking process) has been achieved (cf Maharaj and others v Rampersad 1964 (4) SA 638 (A) at 464; Ceramic Industries Ltd t/a Betta Sanitaryware (supra) at 701G–702H (BLLR); 676B–677C (ILJ); Ex parte Mothuloe (Law Society Transvaal intervening)10 1996 (4) SA 1131 (T) at 1137H–1138D). If that purpose is achieved, there has been proper compliance with the section. If not, the reason for not achieving the purpose must be sought."

[16] The respondent has a policy in place which among other things mirrors the provisions of section 189(3), which furthermore states that *"The company shall accordingly notify the appropriate consultant parties of the aforementioned in its written notice as contemplated in the written notice below".* This policy requires the respondent to issue a notice as stipulated by the LRA.

[17] The applicant contended that the policy applies herein, whereas the respondent suggested otherwise. The respondent confirmed that the policy is available on the intranet, and requires among other things the appointment of a facilitator, however, contends that the union and the respondent have not applied the policy in the past restructuring exercise.

[18] The respondent admits that it did not comply with its policy, and says the information that was exchanged with the applicant amounted to a notice. During argument they correctly conceded that no notice in terms of section 189A (3) of the LRA was issued, however, they contend that they did give a document, titled executive summary, to the union providing reasons for the possible retrenchment, specifying the alternatives, number of employees who

[5] [1998] 12 BLLR 1209 (LAC) at para 29.

might be affected but conceded that the period is not specified in that document and no proposal of severance pay is stated. They contend further that there were discussions which lasted for approximately four months.

[19] It is prudent at this stage to determine as to whether the policy applied to the employee or not. The evidence before this Court indicates that the policy did apply to the employee because he is employed by the respondent, who made no averment as to why it should not apply to him, save to state that they "*substantially complied with the provisions of the retrenchment policy*". Further, even if the policy was not applicable, which I do not accept, the respondent in terms of section 189(3) should have provided the union with the notice inviting the employee to consultation and/or the union on behalf of the employee. I have taken into account averments in the affidavits and am not convinced that substantial compliance has been met especially considering that the LRA provides that there must be a notice and state as to what is to be dealt with in that notice. These are the primary requirements, as the section further states "including". Taking into account the concessions made by the respondent, I do not agree that the respondent has presented an exception as per *Johnson supra*.

[20] The respondent does not make convincing averments about the quality of the meetings that were held between the parties. The onus is on the employer to show that it substantially complied with the provisions of the LRA.

[21] The respondent avers that the process of engagement that it has undertaken, has been the process used since 2013. The applicant, in the replying affidavit, submits that in the past section 189(3) notices have been issued. In support of this averment refers to notices issued on 6 May 2019 and on 24 July 2019 respectively. And there are confirmatory affidavits to this effect. Therefore, the alleged practice of engagement cannot be accepted as correct. In the circumstances, I, therefore, find that the respondent has been issuing notices in line with the provisions of section 189(3) of the LRA and it should do the same in respect of the current matter.

[22] I have considered the prayers in the notice of motion, and I conclude that the following order will be appropriate.

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

Order:

1. The requirements of rule 8 of the rules of this Court are hereby dispensed with, and the application is treated as urgent;

2. The respondent acted in a procedurally unfair manner when it proceeded to issue Mr Modibane with the letter dated 26 July 2019, without issuing a written notice in terms of section 189 (3) of the LRA, inviting the applicant to consult on the information recorded therein;

3. The respondent acted in a procedurally unfair manner when it proceeded to issue Mr Modibane with the letter dated 26 July 2019, without issuing a written notice prescribed in the Nedbank Retrenchment Policy;

4. The respondent acted in a procedurally unfair manner by failing to appoint a facilitator as prescribed by the Nedbank Retrenchment policy;

5. The respondent must comply with the prescribed 60 days period, as recorded in the Nedbank Retrenchment Policy; and more particularly, that the 60 day period shall commence on the issue of a section 189 (3) notice to the applicant/ Mr Modibane; alternatively that the Respondent comply with 60 day period as prescribed by section 189A of the LRA;

6. The respondent is ordered to initiate and then continue with a meaningful joint consensus seeking process as envisaged by sections 189 and 189A of the LRA;

5. There is no order as to costs.

_____

S. Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Adv. C Goosen

Instructed by : BJ Erasmus Pieterse Attorneys

For the Respondents: Adv. H. C. Nieuwoudt

Instructed by : Norton Rose Fullbright