Employment law update

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Section 189A(13) of the Labour Relations Act

In *National Union of Mineworkers v Anglo American Platinum Ltd and Others* [2013] 12 BLLR 1253 (LC) the applicant, NUM, brought an urgent application seeking the reinstatement of its members who were dismissed by the respondent, Amplats, for operational requirements pending Amplats' compliance with ss 189 and 189A of the Labour Relations Act 66 of 1995 (LRA) or an order for compensation. In addition, NUM alleged that Amplats acted unfairly in that it failed to comply with s 52 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), which requires notice of potential retrenchments to be submitted to the Minister where it is contemplated that more than 500 employees may potentially be retrenched, and for an investigation to be conducted and recommendations made to the Minister.

Amplats commenced a consultation process with the unions in January 2013 after announcing that it was considering retrenching about 14 000 employees. The process was suspended while Amplats' management, the Department of Mineral and Energy Resources (DMR) and the unions embarked on a tripartite process that lasted for an initial period of 60 days, during which all parties were given access to documentation contained in an electronic data room.

The tripartite process was later converted into a bilateral engagement between Amplats and the DMR during which discussions were held on the proposed restructuring and anticipated retrenchments. After this, the second tripartite process commenced and the information from the bilateral process was shared with the trade unions. The parties then entered into a written agreement identifying the number of employees potentially affected by the proposed restructuring, which at the time was identified as being potentially 6 000 employees, and also alternatives to retrenchment.

A revised s 189(3) notice was issued to the potentially affected employees reflecting the revised proposals and it was proposed that the consultation process would run for a further 60-day period. Consultation meetings unfolded with facilitation by a Commission for Conciliation Mediation and Arbitration (CCMA) commissioner and proposals were exchanged. During this consultation period a notice of the potential restructuring was sent to the Minister of the DMR as contemplated in s 52 of the MPRDA. The consultation process was completed in the middle of August 2013.

On 29 August 2013 NUM sent a letter to Amplats stating that it had not been engaged with in a meaningful joint consensus-seeking process. It requested that the process be extended and also queried whether notice had been given to the Minister. Amplats did not extend the consultation period and commenced issuing notices of termination to the employees identified for retrenchment. It was at this point that NUM applied to the Labour Court for urgent relief under s 189A(13) of the LRA.

Van Niekerk J considered the provisions of s 189A(13) and found that its purpose was to provide for the adjudication of disputes involving procedural unfairness in retrenchments at an early stage and that the court has wide powers in this regard. A consulting party may, however, not rely on s 189A(13) to raise complaints about substantive fairness. Thus, the purpose of s 189A(13) is to provide employees with a remedy to approach the Labour Court to set the employer back on track when there is genuine procedural unfairness that goes to the heart of the process.

The purpose is also not for the court to grant a remedy for every complaint about procedural unfairness, since this would open up the process to abuse and serve as a means to thwart the retrenchment process. Van Niekerk J said that he was therefore required to consider the complaints of procedural unfairness holistically to determine whether the overall purpose of the joint consensus-seeking process was achieved by Amplats.

Van Niekerk J considered NUM's allegation that Amplats had not consulted on the selection criteria and severance pay and found that the issue of the selection criteria and severance pay had been on the agenda from the start of the consultation process. Amplats had even agreed to extend the consultation process by one week to consult specifically on these topics. Furthermore, Amplats had tabled proposals relating to severance pay and selection criteria, but NUM had refused to engage with it on these issues as it denied that there was any need to retrench. By the time NUM was willing to engage on selection criteria and severance pay, the lengthy consultation process had already concluded.

In the circumstances, Van Niekerk J concluded that NUM had frustrated the consultation process and simply wanted to delay the dismissals. He held that the remedies in s 189A may not generally be relied on by a party that has frustrated the consultation process or where the issues are raised after the completion of the consultation process. The court was accordingly satisfied that Amplats had complied with its obligations to consult on all issues required in terms of s 189(3), including selection criteria and severance pay.

The application by NUM was dismissed with no order as to costs.

Forfeiture of severance pay

In *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical, Energy, Paper, Printing, Wood and Allied Workers Union* [2013] 12 BLLR 1194 (LAC) the Labour

Appeal Court (LAC) was required to consider the circumstances under which employees are entitled to severance pay. Astrapak implemented a continuous shift pattern to increase productivity and reduce costs. The union's members did not accept the changes and issued a notice to go on strike.

Astrapak responded by issuing employees with a letter in terms of ss 189A and 189(3) of the LRA informing them about the possibility of retrenchment and inviting them to consult on its proposals. Facilitated consultation meetings then took place. Those employees who accepted the changes continued working while those who refused to accept alternative employment on the new shift pattern were retrenched without severance pay.

The union referred an unfair dismissal claim in respect of its members who were retrenched. The Labour Court held that there was an operational rationale for retrenchment and thus the dismissals were substantively fair. However, Mokoena AJ found that the refusal of the employees to accept alternative employment on the new shift pattern was not unreasonable and as such the retrenchees were entitled to severance pay. This was because the alternative was to work on the new shift pattern, which would have resulted in the employees' overtime pay being significantly reduced and the employees earning far less than what they were accustomed to.

The LAC considered that the purpose of s 41(2) of the Basic Conditions of Employment Act 75 of 1997 (BCEA) read with s 41(4) of the BCEA was to promote employment and therefore to discourage employees from rejecting employment, 'simply because they might prefer cash in their pockets in the form of severance pay'. It was also to encourage employers to take the necessary steps to find alternative employment for potential retrenchees.

The LAC considered the fact that all the employees on the new shift system would incur less travelling expenses. It was also considered that, although the employees would receive reduced overtime pay, there was no right to overtime and Astrapak was accordingly not obliged to provide the employees with overtime work.

The LAC found that where employees were offered alternative employment on the same salary or slightly higher salaries on conditions that were not more onerous than their prior conditions, then the rejection of such alternative employment would be unreasonable and they would forfeit their right to severance pay. However, where employees would face reduced salaries, a refusal to accept the alternative employment would not be unreasonable and the employees would be entitled to refuse the offer of alternative employment and seek employment elsewhere. In such circumstances they would not forfeit their right to severance pay.
Astropak was accordingly ordered to pay severance pay to those employees who were retrenched after refusing to accept the offer of alternative employment at a reduced salary. Those employees who refused the offer of alternative employment on the same salary or an increased salary were not entitled to severance pay from Astropak.

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Adopting a flexible and 'situation sensitive' approach to discrimination claims

Solidarity obo Barnard v SAPS (SCA) (unreported case no 165/13, 28-11-2013) (Navsa ADP, Ponnan, Tshiqi, Theron JJA and Zondi AJA)

On two separate occasions, Barnard, a white female was overlooked for promotion despite the respective interviewing panels considering her the best candidate on each occasion.

Subsequent to her second attempt at promotion, Barnard referred an unfair discrimination claim to the Labour Court (LC). The LC found that the actions of the South African Police Service (SAPS) amounted to unfair discrimination and awarded Barnard compensation. Her victory was short-lived as an appeal to the Labour Appeal Court (LAC) overturned this decision.

Barnard approached the Supreme Court of Appeal (SCA) seeking an order to substitute the findings of the LAC with that of the LC.

The facts

In 2005 Barnard applied for the position of superintendent. She was one of seven applicants who were shortlisted and interviewed. Barnard scored the highest at the interviews and was recommended for the position.

The divisional commissioner took the view that appointing a non-designated person to that position would undermine employment equity and hence he withdrew the position. The following year the position was re-advertised and Barnard was again shortlisted along with seven other candidates. The three recommended candidates were Barnard who scored 85,33%, Mogadima who scored 78% and Ledwaba who achieved a score of 74%.

Even though there was an overrepresentation of white females and an underrepresentation of both African males and females at the level of superintendent, the divisional commissioner on this occasion supported Barnard's recommendation to the national commissioner.

In response the national commissioner addressed a letter to Barnard informing her that, despite being recommended, her appointment to the position would not address representivity. Barnard was also advised that the position she applied for was not considered a 'critical post' and as a result thereof, would be withdrawn and re-advertised the following year. In so doing, according to the national commissioner, service delivery would not be compromised in any way.

The LC

In his judgment, (*Solidarity obo Barnard v SAPS* [2010] 5 BLLR 561 (LC)), Pretorius AJ found that when a post cannot be filled by a suitable candidate from a designated group, the promotion should not, in the absence of a satisfactory explanation, be denied to a suitably qualified employee from a non-designated group.

Pretorius AJ further found that the SAPS, through its only witness, could not discharge its onus of proving the discrimination was fair.

The LAC

On appeal (*South African Police Service v Solidarity obo Barnard* [2013] 1 BLLR 1 (LAC)), Mlambo JP, as he then was, set aside the LC's findings.

First, the LAC took the view that discrimination under these circumstances would involve differential treatment between and among people and that, in the absence of anyone being appointed to the postion, no discrimination had taken place.

Secondly (and in contrast to its initial findings), the LAC further held that the discrimination Barnard endured was fair and justified given the objectives of affirmative action as a means of redressing past inequalities.

The SCA

The starting point for the SCA was to consider whether or not the factual matrix gave rise to any form of discrimination and, if so, whether the SAPS established the fairness thereof.

Navsa ADJP found the LAC's view that, in the absence of the post being filled no discrimination had taken place, was flawed. The court held that if there was an African candidate who had the same skills and achieved the same scores as Barnard, there would have been no doubt that such person would have been appointed. It could therefore not be contested that Barnard was not appointed because she was a white female.

Having come to this conclusion the court, in adopting a flexible and 'situation sensitive' approach to the merits, had to decide whether or not the aforementioned discrimination was fair.

The SCA considered the following: First, as a female, Barnard formed part of a designated group. Secondly, recommendations made by an interviewing panel and subsequently supported by the divisional commissioner, while not binding on the national commissioner, served an important function that could not be taken lightly. Deviation from these recommendations must be justified.

In casu the panel strongly recommended Barnard for the post not only because she had obtained the highest score, with her closest rival scoring nearly 10% below her, but also because she was the only person, in their view, who displayed enthusiasm and passion to deal with members of the community who were dissatisfied with the SAPS' service.

Furthermore, the divisional commissioner endorsed Barnard's recommendation and added that her appointment to the position was in the best interest of service delivery. He further advised the national commissioner that by not appointing the candidate who for the past two years was considered the best person for the position, would negatively affect staff moral within the force.

The national commissioner's failure at legal proceedings to adequately explain his decision as to why he did not support the aforementioned recommendations, led the SCA to conclude that he had not 'grappled' with the reasons for such recommendations.

The SCA further rejected the argument that Barnard's appointment would vitiate the SAPS's employment equity plan. To this the SCA held that the numerical targets and equity were not absolute criteria for appointment. If this were the case then one would be adopting a quota system, which the Employment Equity Act 55 of 1998 expressly prohibits.

The SCA further failed to accept, as justification for the SAPS' conduct, that the postion under review was not considered 'critical'. Among the reasons for the court to arrive at this conclusion was the fact that the SAPS could not explain why the position had been advertised three times in the past three years if it was not an important position aimed at enhancing the service of the SAPS.

The court concurred with the findings of Pretorius AJ and, in so doing, upheld the appeal with costs.

Barnard was awarded compensation equivalent to the difference she earned in her current capacity compared to what she would have earned, for a period of two years, had she been appointed to the post.

Note: Unreported cases at the date of publication may have subsequently been reported.

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