Reportable

Delivered 220211

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR 201/2011

In the matter between:

NATIONAL UNION OF MINEWORKERS	Applicant
and	
COMMISISON FOR CONCILIATION, MEDIATION AND ARBITRATION	First respondent
MALAZA N.O.	Second respondent
BHP BILLITON ENERGY COAL SA LTD	Third respondent
UASA	Fourth respondent
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	Fifth respondent

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JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside a ruling made by the second respondent, to whom I shall refer as 'the facilitator'. The facilitator was appointed in terms of section 189A of the Labour Relations Act, 66 of 1995, after the third respondent (the company) issued a notice of retrenchment in terms of s 189(3).

[2] On 3 February 2011, this court made an order under case number J116/2011, an urgent application to interdict the company from proceedings with retrenchment consultations. In terms of the order, the application was postponed to 21 February 2011 for argument on costs. The terms of the order further recorded the parties' agreement that the present application, brought by the applicant under case number JR201/2011, would be heard on an expedited basis, on the same date. Finally, by agreement, the consultation process initiated by the company in terms of its s 189(3) letter and the facilitation process that had commenced was suspended, and the costs of the application reserved.

Factual background

[3] On 1 November 2010, as indicated above, the company gave notice in terms of s189 (3) of the LRA of the contemplated retrenchment of approximately 454 employees. In the same notice, the company recorded that it had requested the first respondent, the CCMA, to appoint a facilitator in terms of s 189A (3) of the Act. In due course, the CCMA appointed the facilitator for the purposes of a meeting held on 24 November 2010. At the meeting, the fifth respondent stated that it objected to the facilitation covering all of the company's operations affected by the contemplated retrenchments. The fifth respondent's position was that it would prefer each operation to be allocated its own facilitation process, on the basis that the operations were autonomous from the company and that each constituted a separate workplace. This view was shared by the fourth respondent. The company informed the facilitator that in its view, the consultation process should cover all of the affected operations. The record of the meeting records the company's representative as having noted that the company is the employer of all of the affected employees, irrespective of the operation in which they are engaged. He stated further that the company preferred not to conduct separate consultation processes at its various

operations and noted that s 189, which regulated the consultation process, referred to ‘the employer’ and not to discrete business units. The applicant raised different issues of the meeting. It objected to the facilitator, who was not the person whose name had appeared on the notice scheduling the meeting. It also recorded the view that the CCM A's involvement was premature. The facilitator adjourned the meeting, stating that he would prepare an outcome report.

[4] The facilitator's report records *inter alia* the following:

> *The argument of AMCU and UASA that they view every operation of BECSA to be autonomous and that each should have its own consultation separate from others seems to me informed by section 213 of the NRA regarding the definition of workplace. The definition of workplace in terms of section 213 of the Act states that workplaces under the same employer will be regarded as separate and if they are independent by virtue of their size, organisation and functions. It is therefore apparent that the argument of AMCU and UASA that they understand BECSA to be a holding operation with autonomous operations will have to be given consideration in making a ruling on this matter.*

Without any further analysis of the issue, the facilitator concludes the report as follows:

> *Each operation of BECSA that is affected by the purported operational requirements must be consulted separately as an autonomous operation as per the definition of the workplace in terms of section 213 of the Act.*

[5] The application to review and set aside facilitator’s ruling is brought in terms of section 158(1) (g) of the LRA. That section empowers this court, subject to section 145, to ‘review the performance or purported performance of any function provided for in this act on any grounds that are permissible in law'. The applicant relies on the Promotion of Administrative Justice Act, 3 of 2000, and contends *inter alia* that the facilitator’s ruling was *ultra vires* his powers in that he was not authorised by the empowering provision, namely s189A (6)(b) of the LRA read with the Regulations published in Government Notice or 1445 on 10 October 2003, to make a ruling as to the level at which consultations should be conducted.

[6] Section 189A(6)(b) of the LRA reads as follows:

"*The Minister, after consulting NEDLAC and are the commission, may make regulations relating to –*

a) ...

b) the powers and duties of facilitators.

‘

[7] The relevant regulations read as follows

4. Powers and duties of a facilitator

(1) Unless the parties agreed otherwise, the facilitator may –

a) chair the meeting between the parties;

b) deciding the issue of procedure that arises in the course of meetings between the parties;

c) arrange for the facilitation meetings after consultation the parties;

d) direct that the parties engaging consultations out facilitated been present.

(2) A decision by a facilitator in respect of any matter concerning the procedure for conducting facilitation, including the date and time meetings, is final and binding.

(3) By agreement between the parties, the facilitator may perform any other function.

5. Power to order disclosure of information

(1) If there is a dispute about the disclosure of information facilitator may, after hearing representations from the parties, make an order directing an employer to produce documents that are relevant to the facilitation.

(2) Sections 189 (4)(b) and 16 (5) and (10) to (14) of the Act, read with the changes required by the context, applied to any dispute concerning the disclosure of information in terms of subregulation (1).

6 Facilitation meetings

1) A facilitator must conduct up to four facilitation meetings with the parties, unless the dispute is settled in a lesser number of meetings or the parties agree to a lesser number of meetings.

2) The Director after consulting the facilitator may increase the number of meetings that a facilitator must conduct with the parties.

3) The number of meetings specified in subregulation (1) does not include any meetings convened for the purpose of the facilitator arbitrating a dispute over the disclosure of information.

[8] The fourth and fifth respondents contend that having regard to the intended purpose of facilitation, the powers and duties of a facilitator should be construed widely. In particular, they submit that the facilitator's powers to decide on any issue of procedure in terms of Regulation 4 (1)(b) should not be restricted to 'housekeeping' arrangements in respect of the facilitation process itself, but should extend to the power to make decisions on the consultation process, especially where the parties to the process are not *ad idem* as to the process to be followed. In the present instance, the parties to the facilitation process had failed to reach agreement on the level that would consultation should be conducted. This issue arose during the course of the facilitation meeting and the facilitator was thus empowered to deal with the matter in terms of Regulation 4 (1) (b). Alternatively, the fourth and fifth respondents contend that to the extent that Regulation 4(3) contemplates the facilitator performing functions by agreement between the parties, there is no bar, in the absence of any formalities, to the facilitator acting in terms of a tacit agreement. On the basis of the record of the facilitation meeting, the third and fourth respondent contended that it was at least tacitly agreed that the facilitator would be entitled to make a decision concerning the level at which consultation should take place

[9] The process of facilitation introduced by s 189A of the LRA is akin to the conciliation process described in s 135 of the Act. This much is evident from the

wording of Regulation 7, which provides that the facilitation, in the absence of agreement, is conducted on a without prejudice basis and that ordinarily, the record of the facilitation may not be disclosed in any court proceedings, nor may any person call a facilitator to give any evidence on any aspect of a facilitation in any legal proceedings. In terms of Regulation 8, a person placed on a panel of facilitators must have a proven knowledge experience and expertise in conciliation, mediation or facilitation of labour relations disputes. In other words, the process is one designed to encourage parties to reach their own agreement, not one in which a third party is appointed to make rulings on substantive issues that may arise during the consultation process. As Clive Thompson has suggested

> *The facilitator's job is to act as a resource to the consultative process. Clearly the first prize is to assist the parties in arriving at a full agreement in relation to the operational needs of the employer and the employment implications for staff (*see Thompson and Benjamin *South African Labour Law*, Juta, at AA 1-519)

[10] This observation is made subject, of course, to Regulation 5, which clearly envisages that the facilitator may make orders in relation to the disclosure of information. These, it would seem to me, are akin to the rulings that may be made an arbitrator acting in terms of s 16 of the LRA; indeed, Regulation 5(2) cross-refers to s 16. Unlike Regulation 5(1), Regulation 4(1) (b) does not empower the facilitator to make orders. He or she may make a final and binding decision on any issue of procedure that arises in the course of meetings convened by the facilitator. The limited scope and nature of those decisions is reflected by the provisions of Regulation 4 (2) which makes specific reference to decisions concerning the procedure for conducting facilitation, "including the date and time of meetings". Included in this category no doubt might be decisions about speaking rights, the adjournment of facilitation meetings, and the like. In other words, but for issues of disclosure of information, the Regulations do not contemplate that a facilitator is empowered to make substantive decisions about the rights of the consulting parties, or the universe within which those criteria must be applied. In the absence of agreement between the consulting parties, these are matters for the employer to determine, in the discharge of the statutory obligation to conduct a fair procedure,

and at the risk of a challenge based on the fairness of its conduct.

[11] In short, in my view, the facilitator was not empowered to make a binding ruling as to the level at which consultations in terms of s 189 should be held. For that reason, the ruling stands to be reviewed and set aside. To the extent that the fourth and fifth respondents rely on a tacit agreement to the effect that the facilitator be empowered to make a binding ruling as to the level at which the consultation meetings would e held, this is not a case that can be sustained on the papers. I need not in these circumstances consider the applicant's further submissions, but I would observe in passing that the basis of the facilitator's ruling, which amounted to an application of the concept of a 'workplace' as defined by s 213 of the Act, is relevant only to the acquisition of organisational rights and the constitution of workplace forums.

[12] I turn now to the question of the costs of the urgent application brought in terms of section 189A (13). The fourth and fifth respondents contend that an application in terms of that section is competent only once it has been shown that the procedure followed by the employer concerning is manifestly unfair. (See *National Union of Metalworkers of South Africa v Greenfields Labour Hire* (2004) 25 *ILJ* 558 (LC), and *Retail and Associated Workers Union of SA v Schuurman Metal Pressing (Pty) Ltd* (2004) 25 *ILJ* 2376 (LC). In particular, the fourth and the respondent contended that the applicant failed to establish that the consultation process followed by the third respondent in accordance with the second respondent's ruling was unfair, to the extent that intervention was warranted. Further, it is contended that the applicant should in the first instance have applied to have the review application heard on an expedited basis.

[13] Section 162 of the LRA confers a discretion on this court to make orders for the payment of costs, according to the requirements of the law and fairness. In *National Union of Mineworkers v East Rand Gold and Uranium Ltd* 1992 (1) SA 700 (A), what was then the Appellate Division of the Supreme Court held that in the exercise of its discretion, the court should take into account the existence of any collective bargaining relationship, and the potential prejudice that an order for costs may present to the parties. In the present instance, I am particularly mindful that a consultation process is underway, and that the parties are statutorily obliged to

engage in a process of meaningful consensus-seeking. I am fully aware of the subtext of the tension (if not rivalry) that exists between the applicant and the fourth and fifth respondents. It is clear to me that an order for costs in the present circumstances will serve only to add to the tension that already exists, and would potentially frustrate the prospect of agreement on the terms of any retrenchment that may result. For this reason, in my view, no constructive purpose would be achieved by making an order for costs in respect of either these proceedings or the urgent application.

I accordingly make the following order:

1. The ruling issued by the second respondent under case number in the 7755 – 10 on 24 November 2010 is reviewed and set aside.

2. There is no order as to costs in respect of the proceedings under case number JR 201/2011.

3. There is no order as to costs in the application brought under case number JR 116\2011

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of application: 21 February 2011

Date of judgment: 22 February 2011

Appearances

For the applicant: Adv JG van der Riet SC, instructed by Cheadle Thompson and Haysom Inc

For the third respondent: Adv R Beaton SC, instructed by Brink Cohen Le Roux Inc

For the fourth and fifth respondents: Adv Grundlingh, instructed by Bester and Rhoodie