IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 435/20

In the matter between:

FOOD AND ALLIED WORKERS UNION (FAWU) **Applicant**

and

SOUTH AFRICAN BREWERIES (PTY) LTD (SAB) **First Respondent**

SOLIDARITY **Second Respondent**

Heard: **20 May 2020 (Due to Covid-19 lockdown, this matter was heard *via* video conferencing and both parties agreed to this arrangement)**

Delivered: **28 May 2020 (Due to Covid-19 lockdown this judgment was delivered by emailing a copy to the parties and 28th May 2020 is deemed to be a delivery date)**

Summary: Section 189A (13) of the LRA application – where an employer offers to consult in a particular manner and the other consulting party refuses to consult in the proposed manner, completion of the process without the other consulting party does not amount to procedural unfairness. The power of the Labour Court is to judicially manage the process and not to dictate to the consulting parties. In the absence of identifiable procedural unfairness, this

Court has no powers to intervene in the consultation process. Held: (1) The application is dismissed. (2) No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] The irony that belies this matter is that the applicant complains about the efficacy and reliability of the zoom application (a video conferencing application) as a proposed medium to complete the already commenced facilitated section 189A consultation process, yet the urgent application was moved through the same application. The question that arises in this matter is whether conducting section 189 consultation process through zoom application is acceptable or not and if unacceptable, is a continuation of a section 189 consultation using the application amounting to a procedural unfairness. With the advent of the outbreak of the Covid-19 pandemic, the "*new normal"* presented itself. A number of restrictions were put in place by the government of the day with the sole purpose to "*flatten the curve*" of the infection rate. These restrictions adversely affected the way things were normally done. This period, the Covid-19 outbreak, witnessed a barrage of litigation in our Courts.

[2] To state the obvious, this application is one of the offspring of the period. In this application, the applicant seeks, amongst others a relief couched in the following manner:

> "2. Declaring that the consultation process by the first respondent on or about 31 January 2020 in terms of section 189A of the Labour Relations Act No 66 of 1995 was not procedurally fair;
> 3. Interdicting and restraining the first respondent from:

3.1 continuing with the consultation process it commenced on or about 31 January 2020 in terms of section 189A of the LRA without –

3.1.1 further facilitation by the CCMA;

3.1.2 without the physical attendance of the applicant's representatives in such facilitated consultation process; and/or

3.2 implementing or giving effect to the notices of termination issued to their members of the applicant between 25 April 2020 and 30 April 2020; and

3.3 issuing or implementing any further notices of termination of employment due to the operational requirements of the first respondent, until first respondent has complied with the obligation to follow a fair consultation process;

4. compelling the first respondent to comply with a fair procedure as contemplated in section 189 and 189A of the LRA;

5. directing the first respondent to reinstate dismissed employees until it has complied with a fair procedure; alternatively

6. granting the appropriate compensation."

[3] The relief sought is opposed by the South African Breweries (Pty) Ltd (SAB). In opposing the relief sought, the SAB contended that there was a material non-joinder of the Employee Representatives (ER), one of the consulting parties. Further, it was contended that the application is not urgent on the basis that the applicant delayed in approaching this Court for a relief. Given the view I take at the end of this judgment, it shall be academic to pronounce on these preliminary points. I had informed the parties that a separate ruling on them was unnecessary, at the time they were raised, because the view I took at the time was that factually, the points were inextricably intertwined with the merits of this application. On proper reflection of the matter, I arrived at a conclusion that they do not merit any further consideration.

Background facts pertinent to this judgment

[4] Papers relevant to this matter ran into thousands of pages. The majority of which related to the facilitated consultation process that commenced in January 2020. During argument, the applicant's counsel succinctly highlighted the procedural concerns relevant to the present dispute. Such necessitates a recount, in this judgment, of only the pertinent facts surrounding the procedural concerns. Upfront, those concerns may be summarised as follows: (a) the issue of the number of the affected employees, which in the submission of the applicant's counsel affects the timing of the dismissals; (b) the acceptance of the organogram and its population; and (c) the continuation of the facilitated consultation using zoom application.

[5] Briefly, in and around January 2020, the SAB found the need to restructure its business operations. That prompted it to contemplate dismissal based on operational requirements. A section 189 (3) notice was then issued. Given the number of affected employees, the SAB requested facilitation of the consultation process. A facilitator was appointed. The said facilitator facilitated few meetings without any hindrance barring jurisdictional challenges, which the facilitator ruled on.

[6] Following the declaration of the state of disaster by the President of the country, certain restrictive measures were pronounced, which measures hindered the smooth running of the facilitated consultation process. Such prompted the Commission for Conciliation, Mediation and Arbitration (CCMA) to propose methods by which the facilitated process may continue. One of the proposed methods was the usage of the zoom application. This process of proposing a method saw umbrage being taken by FAWU and culminated in the facilitator recusing himself from the process and a new facilitator being ushered. At the time of the announcement of the restrictive measures and the subsequent national lockdown, parties had agreed on a timetable. One of the facilitated meetings was scheduled to happen on or about 25 March 2020. This scheduled meeting ultimately became the "*straw that broke the camel's back*".

[7] Proposals were *inter alia* that the scheduled meeting take place through the zoom application or that the process be canned until the restrictions are

removed. The applicant, for what appears to be incontrovertible, opted for the proposal of canning the process until the end of the lockdown period. Due to that impasse, the applicant did not participate any further. As a result, the present application was conceived. Correspondence were exchanged in February/March reflecting that there was a need to consult further on the organogram that was proposed by the SAB. In the course of the consultation process, the SAB began to populate the structure and employees were requested to express interests. There is a dispute between the parties as to whether the population of the structure is the product of the consultation process. It is common cause that when the SAB requested facilitation, it stated in the request form that the affected employees were about 500. It is further common cause that the number doubled in the early stages of the process.

[8] This application was launched on or about 8 May 2020. As pointed out above it is opposed by the SAB. Solidarity, though cited as a party chose not to enter the fray. There are certain allegations made in this matter which are attributed to it. However given my view at the end, nothing much turns on those allegations.

Evaluation

[9] At the centre of this dispute lies the question whether there was any procedural unfairness. Both counsel submitted that on the question whether there is procedural fairness on not, this Court must pass a value judgment. I do not necessarily agree. The basis of my disagreement would become apparent in the course of this judgment. I tend to agree that when dealing with the elastic concept of fairness itself, a value judgment may be called into action. However, when it comes to a particular type of fairness, like procedural fairness, regard must be had to the provisions of the Labour Relations Act[1] (LRA).

[10] The LRA does not afford the phrase procedural fairness a specific meaning. To that end, section 188 (2) dictates that any person considering whether or not

[1] No 66 of 1995, as amended.

dismissal was effected in accordance with a fair procedure, is obligated to take into account any relevant code of good practice issued in terms of the LRA. This implies that this Court in determining that question must seek refuge from the code of good practice.

[11] A code of good practice on operational requirements was issued. The code does not do much more other than referring back to the provisions of section 189 of the LRA. A conclusion to be arrived at is that any process that complies with section 189 and section 189A of the LRA is bound to be procedurally fair. The code suggests that a consultation would be regarded as proper, if an opportunity to meet and report back to employees is provided; the opportunity to meet with the employer is provided and the request, receipt of information and consideration thereof is provided.

[12] On the other hand section 189 of the LRA, first requires contemplation and thereafter an obligation to consult. The section directs what must happen in the consultation process. In subsection 189 (2), the consulting parties are obliged to engage in a meaningful joint consensus seeking process, which is aimed at reaching consensus on appropriate measures listed; the method of selecting the employees to be dismissed and the severance pay. Therefore, a consultation would be compliant when there is evidence of attempts to reach consensus on (a) the listed appropriate measures; (b) the method for selecting employees and (c) the severance pay. In a facilitated process, the expectation is that a CCMA commissioner would guide and navigate the parties through the consultation process[2]. In *Steenkamp v Edcon Limited*[3], Basson AJ, writing for the majority stated the law as follows:

> "Where a retrenchment exercise involves a large number of employees, section 189A of the LRA applies. This section not only strives to enhance the

[2] Section 189A (6) of the LRA empowers the Minister after consultation with the *NEDLAC* and the Commission to make regulations relating to amongst others powers and duties of facilitators. Chief amongst those powers is the powers to decide any issue of procedure that arises in the course of meetings between the parties and a decision of a facilitator in respect of any matter concerning the procedure for conducting the facilitation, including the date and time of meetings, is final and binding.

[3] (2019) 40 ILJ 1731 (CC) at para 46.

> effectiveness of the consultation process by providing for the appointment of a facilitator…"
> (My own emphasis)

[13] It is clear that where a facilitator is appointed the consultation process is bound to be effective and enhanced. Ideally, this Court does not expect procedural lapses and/or complaints where a facilitator is involved. The point I wish to put forward is that in a facilitated process, this Court expects less of section 189A (13) applications due regard being had to the powers of the facilitator and above all the expertise of the facilitator[4]

[14] Having considered the above statutory framework, it is thus important to consider the applicant's procedural complaints. I do so hereunder.

The issue of the numbers

[15] This Court fails to understand and appreciate the nature of this complaint in the context of this application. In the founding affidavit, the case made with regard to the numbers issue is as follows:

> "14. SAB has embarked upon section 189 process in circumstances where it contends that the operational requirements dictate that the services of a large number of employees be terminated. Initial notices indicated that about 500 employees would be affected, but ultimately more than 1200 employees were affected.
> (My own emphasis)

[16] It is unclear whether the applicant's complaint is that the section 189 (3) notice is defective and as such procedural unfairness happened. The applicant compares the initial (500) and the ultimate (1200). Surprisingly, in the heads of argument filed on behalf of the applicant nothing is said to advance this complaint. Not a single legal submission has been made in support of that

[4] Clause 8 (1) of the facilitation regulations provides that the Commission must maintain a panel of facilitators consisting of commissioners and other persons.

complaint. In response to the allegation in the founding affidavit, the SAB testified that the number 500 was referring to the number of employees it contemplated to retrench. This position was laid bare in the consultation meeting of 24 February 2020. This testimony remains unchallenged in reply.

[17] During oral submissions, the applicant's counsel sought to link the complaint to the issue of the timing of the dismissals. Still, this submission did not dictate logical sense to me. However the LRA deals with the issue of the timing under section 189 (2) (a) (iii). It provides for an attempt to reach consensus on the appropriate measures to change the timing of the dismissals. The proposed timing of the dismissals in terms of the retrenchment notice was 30 April 2020. If the applicant wished to have that timing changed, it would make such a proposal and the consulting parties would attempt to reach consensus on the proposed change. The other way of looking at the numbers complaint is that the applicant suggests that the SAB is withholding information with regard to the exact number of employees to be affected.

[18] In terms of clause 5 (1) of the facilitation regulations, a facilitator has powers if there is a dispute about the disclosure of information to after hearing representations, make an order directing an employer to produce documents that are relevant to the facilitation. Therefore, a party may not be heard in a section 189A (13) application complaining about non-disclosure, if that party has not exhausted the remedies available for disclosure.

[19] Section 189A (7) provides that if a facilitator is appointed and sixty days lapses after the date on which the retrenchment notice was given, an employer may in its discretion issue a termination notice. There is no dispute in this matter that the contemplated 60 days has elapsed. Of course the legal implications thereof is that the SAB may issue termination notices. With the above statutory obligation, this Court fails to appreciate any procedural unfairness in this regard.

[20] Section 189 (2)(c) obligates an employer to disclose all the relevant information which should include the number of employees likely to be affected and the job categories in which they are employed. Therefore, the issue of numbers fall under the requirement to disclose relevant information. In the retrenchment notice, the likely number was disclosed. Thus, *prima facie*, the SAB has complied with its statutory obligation. Assuming that the applicant was not satisfied with that disclosure, section 189 (4)(a) provides that the provisions of section 16 of the LRA finds application with regard to the disclosure. It is common cause in this motion that the applicant did not make use of the section 16 procedure. Accordingly, I arrive at a conclusion that no procedural irregularity has been shown to exist in this regard.

The issue of the organogram

[21] The gripe of the applicant is that the organogram was implemented without any agreement and or, as it is being put during oral submissions, consultation over the issue. It does appear that the applicant's case is that the population of the structure amounted to the selection criterion. When it comes to selection criteria, the law obtains as follows. Section 189 (3) (d) obliges an employer to disclose in writing the proposed method for selecting which employees to dismiss. With regard to that the SAB stated as follows:

> "The Company will first attempt to reach consensus with you on the proposed changes. Depending on the progress made during the consultations, we may propose that affected employees apply for vacancies that they are interested in, stating your preference per position, if any. However, affected employees should only apply for vacancies where they meet the minimum requirements to do the job. We propose to select the best candidate for the job based on the job profile; taking into account skills; historically agreed performance ratings; qualifications and experience. We welcome any alternative proposals from you" (My own emphasis)

[22] On the basis of the above, the statutory requirement was met. Further, section 189 (2) (b) requires the consulting parties to engage on the method for selecting

the employees to be dismissed. Lastly, section 189 (7) obligates an employer to select employees to be dismissed according to selection criteria that have been agreed to by the consulting parties or if none is agreed upon, criteria that are fair and objective. Having proposed a selection method, the SAB must strive, during a consultation process, to reach an agreement on the proposed method. According to the SAB an agreement on the proposed method was reached. The applicant disputes that. The issue is not so much that the criteria was agreed upon, but whether it was consulted upon. Undisputed correspondence reveals that after the consultation meeting of 24 February 2020, on 25 February 2020, the SAB forwarded consultation presentations for Supply, Logistics, Sales and Procurement.

[23] On 5 March 2020, in a consultation meeting, the SAB presented the broad proposed redeployment process, which included the sharing of the list of vacancies and new positions for the impacted employees to apply in order to unlock the redeployment opportunities from 06 March 2020. Undisputed correspondences reveals that on this proposed redeployment process – employees applying for positions as *per* the proposed selection criterion – the other consulting parties stopped the population of the lists to enable them to consult their members first and they would revert by 11 March 2020. Following that on 12 March 2020, the SAB populated the expression of interest with regard to the vacancies.

[24] In most of the undisputed correspondences, in the penultimate paragraphs the following is stated: "*we are conscious of the fact that the proposed structures are still subject of consultations and does not in any way suggest that the structures have been finalised*". It is on this basis that the applicant suggests that the issue of the organogram was not finalised and as such there was procedural unfairness. I shall return to this point later in this judgment. The issue of a structure or organogram is not a method of selection. Even if the structure was the method of selection, on the undisputed evidence, the proposed structure was the subject of consultation. Section 189 (2) does not aim for an agreement. But if an agreement is reached, good for the consulting parties. Accordingly my conclusions are that no procedural unfairness has been shown

to exist on the issue of the organogram. I agree with Mr Van As, appearing for the SAB, that if the applicant takes a view that the selection criteria ultimately employed was not agreed upon or is unfair and not objective, such is a matter of substantive fairness and not procedure.

The issue of the zoom application.

[25] Elsewhere in this judgment, I referred to this issue as the straw that broke the camel's back. I also stated that the outbreak of Covid-19 ushered the *new normal*. Zoom as an application precedes the outbreak of Covid-19. It is just that it was not conveniently used and if used it was used in a parsimonious fashion. The LRA does not prescribe the form which the consultation process must assume. In section 189 one observes traces of a consultation by correspondence – section 189 (6) (b). It would not be incongruous to conclude that a consultation process may fairly be undertaken through correspondence[5]. The difficulty here is that normally, consultation takes a form of physical meetings. However, when the *new normal* presents itself, it does not follow that the commanded consultation can no longer happen.

[26] With the *new normal* – lockdown period during Covid-19 pandemic – zoom is the appropriate form in which meetings can take place. What is involved in this period is the health and safety issue. Thus the usage of the zoom application is not panoply. It is a necessary tool to ensure that restrictions like social distancing as a measure to avoid the spread of the virus are observed. Much as the applicant has its convenient preferences, those preferences are self-serving and are ignorant of the bigger issue of health and safety. Therefore, in my view, there is nothing procedurally unfair if a consulting party suggests the usage of the zoom application or some other form of video conferencing. This accords with the *new normal* and is actually fair. The appointed facilitator, who

[5] The ILO Committee of Experts has noted the value of holding such consultations, as "consultations provides an opportunity for an exchange of views and the establishment of a dialogue which can only be beneficial for both the workers and employer." See *Thomas v BNP Paribas Real Estate Advisory and (Pty) Management UK Ltd (EAT)* where it was confirmed that meaningful consultation entails early stage consultation; providing adequate information; time to respond and genuinely considering the response.

possesses powers to make a final and binding ruling on procedure was not averse to the zoom application. In an attempt to demonstrate the inefficacy and unreliability of the zoom application, the applicant's counsel pointed to an incident where Mr Van As's screen hanged and his connectivity to the proceedings was compromised as one of the difficulties that are raised by the applicant with the zoom application. To that I say anywhere where technology is employed, even in a physical meetings, where a presentation to be made on a projector fails, it is expected of teething problems to emerge. However such would not relegate the technology to obsoleteness to a point of any form of unfairness. In my view, the applicant's complaint of procedural unfairness in this regard is lacking in merit.

Incomplete consultation process

[27] The applicant placed a huge premium on the decision of *Aunde South Africa (Pty) Ltd and Others v NUMSA*[6]. The applicant relies on what the Labour Appeal Court (LAC) said at paragraph 40 of the judgment. What the applicant does not emphasise is that there was a turn of events, which the LAC labelled a "*dramatic turn*". The dramatic turn that presented itself in that matter was when the company refused to continue with a facilitated consultation process on the basis that a new staring was in town. Briefly the facts in *Aunde* were that during a facilitated consultation between the company and NUMSA, a rather startling proposal was made by the company to terminate the services of the affected weekly paid employees and re-hire them on minimum level rates of pay and conditions of service prescribed by the MIBCO Main Agreement.

[28] To this proposal NUMSA stated that it was an extraordinary and a drastic measures and it was opposed to it. Due to the impasse on that proposal, the consulting parties agreed to shelve the issue until the facilitated retrenchment exercise is finalised. UASA was representing the interests of monthly paid employees whilst NUMSA was representing the interest of weekly paid employees during the said facilitated process.

[6] [2011] 10 BLLR 945 (LAC).

[29] The consultation process continued as agreed, and on 21 December 2009, Aunde concluded a recognition agreement with UASA in terms of which UASA became the sole bargaining representative at the company. On 22 January 2009, UASA and the company concluded an agreement on the rejected proposal to terminate and re-hire weekly paid employees. Owing to that and using section 23 (1) (d) of the LRA, Aunde terminated the consultation process with NUMSA. It took a view that it was no longer obligated to continue to consult with NUMSA. Therefore, the facts of *Aunde* are distinguishable to the facts obtaining in this matter. What was said in paragraph 40 of the judgment does not apply in *casu*.

[30] Having stated the above, I return to that statement of the organogram not being finalised. The principle in *Aunde* does not apply to that statement. What applies is what was said by the LAC in *SAA v Bogopa and others.*[7] There, Zondo JP, (as he then was) formulated the law as follows:

> "[48] …When an employer invites an employee or employees or his or their trade union to consult and the employee(s) or the trade union either rejects or ignores such invitation, or initially participates but later abandons the process due to no fault of the employer, the dismissal cannot be said to be procedurally unfair, if the employee is subsequently dismissed without consultation or without a completed consultation process."

[31] In *casu*, even if it can be said that consultation was not completed on the issue of the structure, it is undisputed that parties were due to still consult on 25 March 2020. The applicant refused to participates for reasons that I have already pronounced on earlier. It is no fault of the SAB that the applicant chose to abandon the process for reasons of the usage of a fair application of zoom. During the oral submissions held on the relegated zoom application, SAB made a "*with prejudice*" offer to continue to consult with the applicant on the remaining topics for consultation and such an offer was outrightly rejected.

[7] [2007] 11 BLLR 1065 (LAC)

[32] When the offer was made, I had pointed out to the applicant's counsel that I was willing to stand the proceedings down to enable her to obtain instructions on the offer. To my utter amazement she instantaneously informed the Court that she was instructed to reject the offer. In *Bogopa*, the affected employees refused an invitation to consult on the basis that the employer had already placed them in a *fait accompli*. Of course, this stance was rejected by the LAC as demonstrated above. The procedure in section 189A (13) is there to ensure that a fair consultation happens with a view to ultimately preserve job security. A party would approach this Court in the ask and quest for a fair process, which ultimately commands to the *audi alteram partem* principle. However, where a party in an open Court rejects an offer to be consulted, such a party cannot lament about procedural unfairness.

[33] For all the above reasons, I am satisfied that the applicant must be non-suited. The application must fail.

[34] In the results, I make the following order:

Order

1. The matter is heard as one of urgency.
2. The application is dismissed.
3. There is no order as to costs.

G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate M J Engelbrecht SC.
Instructed by:	Werksmans Inc, Sandton
For the 1st Respondent:	Advocate M Van As
Instructed by:	Bowman Gilfillan Inc, Sandton.