IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J 683/2020

In the matter between:

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION **First Applicant**

THE INDIVIDUAL APPLICANTS WHOSE NAMES APPEAR ON ANNEXURE 'A' TO THE NOTICE OF MOTION **Second – Further Applicants**

and

IKAPA COACHES (A DIVISION OF CULLINAN HOLDINGS LTD **First Respondent**

HYLTON ROSS TOURS (PTY) LTD **Second Respondent**

SPRINGBOK ATLAS (A DIVISION OF CULLINAN HOLDINGS LTD **Third Respondent**

Heard: **19 August 2020 (*via* Microsoft Teams)**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 2 September 2020 at …**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] This urgent application was brought before the Court under the provisions of section 189A(13) of the Labour Relations Act (LRA)[1]. The question to be determined is whether an employer is entitled to issue notices of termination, in circumstances where a Facilitator, despite a request by the union, has not been appointed, and where the 60 day period contemplated in section 189A(7)(a) of the LRA has lapsed, and further where no consultations whatsoever had taken place.

[2] The first applicant, SATAWU seeks an order reinstating its members (Second to further applicants) (The Employees) into the employ of the first to third respondents (The Employers), until they have complied with a fair retrenchment procedure. A further order sought is to interdict and restrain the Employers from dismissing the Employees prior to complying with a fair procedure. Dismissals in terms of a notice issued on 12 August 2020 are due to take effect from 11 September 2020.

[3] The first order sought by SATAWU is odd, as the Employees are not yet dismissed in view of the notice of termination taking effect from 11 September 2020. The Employers have opposed this application.

Background:

[4] The facts of this case are largely common cause. The Employers' main operations are in the hospitality, leisure and tourism industry. All the three respondents are divisions of Cullinan Holdings Ltd. The Employees consists of Drivers and Guides. Like the rest of sectors of our economy, the Covid-19 pandemic coupled with the declaration of a National State of Disaster with effect from 18 March 2020 and subsequent extensions have been particularly unkind and devastating on the leisure, tourism and hospitality sector. As a result of the

[1] Act 66 of 1995 (as amended). Section 189A (13) provides:
'If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order-
(a) compelling the employer to comply with a fair procedure;
(b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
(c) directing the employer to reinstate an employee until it has complied with a fair procedure;
(d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.'

pandemic, the Employers' businesses had to effectively close down after the cancellation of bookings and tour series by clients including Agents, Tour Operators and private tourists.

[5] Since the beginning of April 2020 and as at the end of the hearing of this application, the Employers have not received any business. In accordance with existing measures to curb the spread of Covid-19, the tourism industry will only be fully operational under Level 1 if and when international travel bans are lifted, and when air-travel returns to normal.

[6] Against the above background, the Employers made an application for the applicable Temporary Employee/employee relief scheme (TERS) benefits, and also offered reduced remuneration to the employees in general. Other employees accepted reduced remuneration whilst others, including the Employees in this case rejected that offer, and demanded to be paid in full.

[7] The Employers issued three separate but identical notices of retrenchment in terms of sections 189(3) of the LRA[2] on 12 May 2020. The detailed notices sets out the reasons for the proposed dismissals, the alternatives considered by Employers prior to proposing the dismissals, the number of employees likely to be affected and the job categories, the proposed method of selection, the timing of the dismissals, the proposed severance pay, assistance that can be offered, and the possibility of future employment. In the first respondent, two out of 18 employees were to be affected; in the second respondent 10 out of 105

[2] Which provides:

"(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-

(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 operation requirements in the preceding 12 months."

employees were to be affected; and in the third respondent, 28 out of 97 employees were to be affected.

[8] In response to the notices, SATAWU on 13 May 2020 acknowledged receipt and undertook to revert on 14 May 2020. It only did so on 15 May 2020, and indicated its intention to exercise its rights to have a facilitator appointed to facilitate the consultations. On the same date, the Employers addressed correspondence to SATAWU proposing a date for consultation. SATAWU's response on 18 May 2020 was to indicate that it would refer the matter to the Commission for Conciliation Mediation and Arbitration (CCMA) for the appointment of a facilitator, which it then did on the same date. The referral was also served on the Employers.

[9] Only on 16 July 2020, and some two months since the referral, did SATAWU make enquiries with the CCMA to establish its status. It is not clear from the applicants' founding papers as to what the CCMA's response was and whether any facilitation will be scheduled in future.

[10] On 21 July 2020, the Employers circulated text messages to the Employees enquiring from them whether they should be sent their UIF documents. SATAWU contends that these messages were essentially confirmation of the Employees' dismissal. The Employers on the other hand states that the enquiries with the employees about the UIF documents were merely with a view to assist them in securing relief funds. On 12 August 2020, the Employers sent notices of termination to the Employees. The terminations as already indicated are take effect from 11 September 2020.

[11] This application was launched on 17 August 2020 following the issuing of notices of termination on 1 August 2020. I am in agreement with SATAWU that this application deserves the urgent attention of this Court in the light of the timeline of the events; the provisions of section 189A(13) and the prohibitive provisions of section 189A(18) of the LRA[3]. Furthermore, section 189A contains

[3] Which provides:
"18. The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii)."

its own time limit and requires only that the application be filed within 30 days of any notice of termination of employment[4]. This application was brought within those time frames.

The submissions:

[12] SATAWU submitted that since it had referred the matter to the CCMA for the appointment of a facilitator under the provisions of section 189A(3)(b) of the LRA[5] on time, the Employers could not issue notice of termination in circumstances where under the provisions of section 189A(7) of the LRA, the parties had 60 days from the issuing of the notice within which to consult under facilitation.

[13] SATAWU further contended that no facilitator was appointed consequent upon the lock-down as the CCMA not being fully functional during that period. To this end, it was submitted that the provisions of section 189A(7)[6] of the LRA did not find application and thus the 60 day period did not apply where a facilitator had not been appointed despite a request. According to SATAWU, the notices of termination issued on 12 August 2020 were not in accordance with procedures, and any consequent dismissal would be procedurally unfair .

[4] Section 189A (17) provides:
(a) An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed.
(b) The Labour Court may, on good cause shown condone a failure to comply with the time limit mentioned in paragraph (a).'

[5] Which provides:
"3. The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if-
(a) the employer has in its notice in terms of section 189(3) requested facilitation; or
(b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice."

[6] Which provides:
"(7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189(3)-
(a) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and
(b) a registered trade union or the employees who have received notice of termination may either –
(i) give notice of a strike in terms of section 64(1)(b) or (d); or
(ii) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11)."

[14] The Employers in opposing the application submitted that there was no basis for granting the relief sought by the applicants, as the procedures were complied with. In this regard, it was submitted that SATAWU was invited for consultations on 15 May 2020, and that nothing thereafter happened. They contend that they had to wait as a referral was made to the CCMA for facilitation, and that attempts at consulting with SATAWU at plant level were successful.

[15] The Employers also contend that and at the time that SATAWU had enquired about facilitation with the CCMA, this was some five days after the 60 day period had lapsed. They had advised SATAWU in a memorandum on 12 August 2020, pointing out that since a facilitator was not appointed and the 60 day period had lapsed, they were entitled to give notices of termination in terms of section 37(1) of the BCEA.

[16] The Employers denied that the CCMA was not functional during the entire period of lockdown after a facilitator was requested, as any facilitation could have been conducted *via* electronic means. Since the facilitation did not take place within the 60 day period, and further since no extension was requested by SATAWU in that regard in terms of section 189A(2), they contend that the provisions of section 189A(7) found no application, and that the applicable provisions in such circumstances were those in section 198A(8)(b)[7] of the LRA.

[7] Section 189A(8) reads:
"If a facilitator is not appointed—
(a) a party may not refer a *dispute* to a *council* or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189(3); and
(b) once the periods mentioned in section 64(1)(a) have elapsed—
(i) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the *Basic Conditions of Employment Act*; and
(ii) a registered trade union or the *employees* who have received notice of termination may-
(aa)give notice of a *strike* in terms of section 64(1)(b) or (d); or
(bb)refer a *dispute* concerning whether there is a fair reason for the *dismissal* to the Labour Court in terms of section 191(11)."

The legal framework and evaluation:

[17] In *Association of Mineworkers and Construction Union and Others v Tanker Services*[8], Van Niekerk J reiterated the trite principle that in relation to procedural fairness of a retrenchment, the LRA contemplates that the consultation process is one in which the parties jointly seek to avoid retrenchment and ameliorate its consequences. It is not a process in which the employer party simply announces the decisions that it intends to implement, and must remain open to persuasion.

[18] Van Niekerk J further stated in *Banks and Another v Coca-Cola South Africa, A division of Coca-Cola Africa (Pty) Ltd*[9] that the wording of the structure of section 189A of the LRA generally envisages that the Court may be asked to intervene at any appropriate stage during a consultation process that has been initiated, or even prior to that, for example, when an employer purports to dismiss employees without commencing any consultation with them or their representatives. Thus in this regard, the Court appears to have been accorded a proactive and supervisory role in relation to the procedural obligations that attach to operational requirements dismissals.[10]

[19] The nature, purpose and functioning of the provisions of section 189A(13) of the LRA as explained by Basson JA in *Steenkamp and Others v Edcon Limited*[11] and the authorities referred to therein can be summarised as follows;

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[8] (2018) 39 ILJ 2265 (LC) at para 22

[9] (J 1114/07) [2007] ZALC 175; [2007] 10 BLLR 929 (LC) at paras 17 - 18

[10] See also *Edcon v Steenkamp and Others* 2015 (4) SA 247 (LAC); [2015] 6 BLLR 549 (LAC); (2015) 36 ILJ 1469 (LAC) at para 20, where it was held that

> "The object of section 189A(13) of the LRA, as appears from a purposive interpretation of section 189A read as a whole and in context, is to separate out procedural issues and to provide a means whereby the consultation and facilitation processes are not undermined by procedural flaws. It offers a useful expedient to the parties to seek the assistance of the court, acting as the guardian of the process, to ensure that the issues are adequately identified, considered and ventilated in the process of consultation or facilitation before it ends. It thus ensures that only disputes about the fairness of substantive reasons and outcomes will generally be subjected to resolution by means of collective action or in a trial involving the hearing of oral evidence."

[11] 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC) at paragraphs 45 – 56; See also *Retail and Associated Workers Union of South Africa v Schuurman Metal Pressing (Pty) Ltd* (C 458/2004) [2004] ZALC 74 (13 October 2004) (Unreported, where it was held;

> "… the aim of section 189A(13) is to provide a remedy to employees to approach the Labour Court to set their employer on the right track where there is a genuine and clear cut procedural unfairness which goes to the core of the process. The section is aimed at securing the process

(a) The LRA provides for a consultative framework within which employees facing possible retrenchment may participate in the consultation process in an attempt to either avoid a possible retrenchment or, where retrenchments are unavoidable, to participate in attempts to ameliorate the adverse effects of such a retrenchment.

(b) Where procedural irregularities arise, the process provided for in section 189A(13) of the LRA allows for the urgent intervention of the Labour Court to correct any such irregularities 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.

(c) The overriding consideration under section 189A is to correct and prevent procedurally unfair retrenchments as soon as procedural flaws are detected, so that job losses can be avoided. Correcting a procedurally flawed mass retrenchment long after the process has been completed is often economically prohibitive and practically impossible.

(d) the intention of section 189A(13) read with section 189A(1) is to exclude procedural issues from the determination of fairness where the employees have opted for adjudication rather than industrial action, providing instead for a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication or industrial action.

(e) In exercising its powers in terms of section 189A(13) of the LRA, the Labour Court thus acts "as the guardian of the process" and exercises a "degree of judicial" management or oversight over the process. The aim is to

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> in the interests of a fair outcome. It follows that not every minor transgression of a procedural nature will invite the benefit of the court's discretionary power to grant a remedy. To hold otherwise would be to open the door to excessive litigation, abuse and unnecessary delay in the process of consultation…"

Also, *Banks and another v Coca-Cola SA - A Division of Coca-Cola Africa (Pty) Ltd* (2007) 28 ILJ 2748 (LC), where it was held;

> "In short, the conclusion to be drawn from the wording of s 189A is that this court appears to have been accorded a proactive and supervisory role in relation to the procedural obligations that attach to operational requirements dismissals. Where the remedy sought requires intervention in the consultation process prior to dismissal, the court ought necessarily to afford a remedy that accounts for the stage that the consultation has reached, the prospect of any joint consensus-seeking engagement being resumed, the attitude of both parties, the nature and extent of the procedural shortcomings that are alleged and the like. If it appears to the court that little or no purpose would be served by intervention in the consultation process in one of the forms contemplated by s 189A(13)(a), (b) and (c), then compensation as provided by para (d) is the more apposite remedy"

proactively foster the consultation process by allowing parties to seek the intervention of the Labour Court on an expedited basis to ensure that procedural irregularities do not undermine or derail the consultation process before it ends.

(f) The section affords the court a broad range of powers, broad discretion to make orders and issue directives.

[20] In the light of the above principles, it is apparent that at the core of this dispute are the provisions of section 189A(7) and 189A(8) of the LRA. It can be accepted that after the notice in terms of section 189(3) was issued, and flowing from a request for facilitation from the CCMA, the Employers' correspondence of 15 May 2020 requesting a date for consultations with SATAWU, nothing akin to a consultation took place. The issue is whether in such circumstances, and where the 60 days period has lapsed, the Employers were at liberty to issue notices of termination.

[21] The provisions of section 189A(7)(a) of the LRA permits the employer to give notice to terminate the contracts of employment in accordance with section 37(1) of the BCEA after the expiry of 60 days from the date of the section 189(3) notice of invitation to consult. This is in circumstances where a facilitator was appointed, and where the consultation process has been exhausted. Section 189A(7)(b) on the other hand permits a union to either issue a strike notice or refer a dispute of unfair dismissal to this Court.

[22] However, in circumstances where a facilitator was not appointed, under the provisions of section 189A(8)(a) of the LRA, a party may not refer a dispute to the Council or CCMA unless a period of 30 days has lapsed from the date on which the notice in terms of section 189(3) was given. Under section 189A(b)(i) and (ii), once the periods mentioned in section 64(1)(a) have lapsed, the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the BCEA, and/or the union may give a strike notice in terms of section 64(1)(b) or (d) of the LRA, or refer a dispute concerning the fairness of the dismissal to this Court. Since a dismissal has not taken place, the provisions of section189A(8) (ii) are not applicable

[23] To the extent that SATAWU relied solely on the fact that a referral for the appointment of a facilitator was made, and that no such facilitator was appointed, it cannot be doubted that the obligation remained on it as the referring party to ensure that such facilitation took place. Regulation 2(1) of the Facilitation Regulations[12] provides that not later than seven days after receiving a notice in terms of regulation 2, the Commission must notify the parties in writing of the name of the facilitator, and the date of the first facilitation meeting agreed upon.

[24] As a referring party, SATAWU was obliged to follow up on its referral and to make the necessary enquiries with the CCMA as to when such facilitations could commence. On its own version, SATAWU only contacted the CCMA on 16 July 2020, some two months since the notice in terms of section 189(3) was issued, and a few days after the 60 days contemplated in section 189A(7) have lapsed. There is no indication in its founding papers as to whether before then, any attempts were made to contact the CCMA and make enquiries about its referral, or whether after the enquiries with the CCMA on 16 July 2020, any progress would be made in initiating the facilitation.

[25] The excuse that the CCMA was not fully functional because of the Covid-19 pandemic is a lame one and no substance is attached to it in the absence of any official directive from the CCMA in that regard. Furthermore, it is inconceivable that the CCMA given its important statutory functions, would have remained non-operational during the period of lockdown since April 2020. Even if there was any merit in that excuse, there is nowhere in its papers that indicates that SATAWU had made any efforts to seek an extension under section189A(2) (c) of the LRA. It is therefore apparent that SATAWU was contend to simply refer the dispute for facilitation, and to thereafter do nothing.

[26] Whether the Employers were entitled to issue notices of termination in reliance on the provisions of section 1897A(8)(b)(i) of the LRA is however a different issue. The Employers, even if entitled to issue such a notice in the light of their precarious financial position, have not covered themselves in glory either. Other

[12] 2002, Published under GN R1445 in Government Gazette 25515 of 10 October 2003

than an invitation to consult issued on 15 May 2020, and despite SATAWU not taking the process of facilitation forward, there is nothing in the answering papers that indicates that the Employers took any steps on their own, to either assist in the commencement of the facilitation process or even insist on plant level consultations. It is not sufficient for the Employer to simply contend that SATAWU could have initiated the facilitations *via* electronic/virtual means, when that proposal was not made to them or the CCMA.

[27] It is accepted that the Employers may be burdened by the dire financial circumstances they find themselves in as a result of the Covid-19 pandemic. Be that as it may, a fair and meaningful consultation process as prescribed by section 189 of the LRA is paramount. It is further accepted as stated in *South African Airways v Bogopa and Others*[13] that when an employer invites employees or their trade union to consult, and such an invitation is either rejected or ignored, or where the employees or the union initially participated but later abandoned 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.

[28] In this case however, it cannot in the light of the once off invitation of the 15th of May 2020, be concluded that SATAWU employed obstructive and adversarial delaying tactics or refused to engage in any consultations in circumstances where the dispute had been referred to the CCMA for the appointment of a facilitator. I have already indicated that SATAWU was clearly at fault by not doing enough in ensuring that the facilitation took place. However, it is my view that to allow the Employers to effect the dismissals on 11 September 2020 as per their notice in circumstances where not even one session of consultations took place would clearly defeat the objectives of any form of joint consensus seeking exercise and mutual cooperation in order avoid the retrenchment and ameliorate its consequences, which is called for by the provisions of section 189A of the LRA.

[13] (JA 36/05) [2007] ZALAC 10; [2007] 11 BLLR 1065 (LAC) at para 48; See also *FAWU v SAB (Pty) Ltd* Case number J435/20,(Reportable) delivered on 28 May 2020; *Association of Mineworkers and Construction Union and Others v Tanker Services* (JS148/16) [2018] ZALCJHB 226;

[29] In line with what was stated in *Banks and Another v Coca-Cola South Africa, A division of Coca-Cola Africa (Pty) Ltd*[14] the Court may intervene at any appropriate stage during a consultation process that has been initiated, or even prior to that, or even in circumstances where an employer purports to dismiss employees without commencing any consultation with them or their representatives.

[30] In the light of the above conclusions, taking into account the conduct of both parties since 12 May 2020 when the notice in terms of section 189(3) of the LRA was issued, and further taking into account the powers vested in this court under the provisions of section 189A(13) of the LRA, it is my view that an appropriate order would be to compel the parties to engage in a joint consensus seeking exercise, but within strict specific time frames.

[31] I have further had regard to the requirements of law and fairness in regards to the question of costs, and since both parties were not legally represented, there is no basis for any costs order.

Order:

[32] In the premises, the following order is made;

1. The Applicants' non-compliance with the Rules of this Court in respect of the time frames and manner of service is condoned and this matter is heard as one of urgency.
2. The First, Second and Third Respondents are interdicted and restrained from implementing the Notices of termination of the Second to Further Applicants issued on 12 August 2020, subject to the orders under (3) and (4) below.
3. The parties are ordered to agree on dates within which a proper consultation can take place, either on their own or under facilitation under the provisions of section 189A(3) or (4) of the Labour Relations Act.

[14] *supra*

4. Any consultations/facilitation as mentioned in (2) above shall be finalised within 30 (Thirty) days from the date of this order, and depending on its outcome, the parties may exercise their rights under the provisions sections 189A(7) or (8) of the Labour Relations Act.

5. There is no order as to costs.

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Edwin Tlhotlhalemaje
Judge of the Labour Court of South Africa

Appearances

For the Applicants:	Mr. L Tooka, SATAWU Official
For the First – Third Respondents:	Mr. H Hendrikse, (Industrial Relations Specialist).