DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

14/2/2020
DATE SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 149/20

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA (NUMSA) obo MEMBERS	**First Applicant**
SOUTH AFRICAN CABIN CREW ASSOCIATION (SACCA) obo MEMBERS	**Second Applicant**
and	
SOUTH AFRICAN AIRWAYS (SOC) LTD (IN BUSINESS RESCUE)	**First Respondent**
LES MATUSON N.O.	**Second Respondent**
SIVIWE DONGWANA N.O.	**Third Respondent**
AVIATION UNION OF SOUTH AFRICA (AUSA)	**Fourth Respondent**
NATIONAL TRANSPORT UNION (NTM)	**Fifth Respondent**
SOUTH AFRICAN AIRLINE PILOTS ASSOCIATION (SAAPA)	**Sixth Respondent**

SOUTH AFRICAN TRANSPORT AND	
ALLIED WORKERS UNION (SATAWU)	**Seventh Respondent**
SOLIDARITY TRADE UNION (SOLIDARITY)	**Eighth Respondent**
NON-UNIONISED EMPLOYEES	**Ninth to Further Respondents**

Heard: **13 February 2020**

Delivered: **14 February 2020**

Summary: Application to compel consultation and or follow a fair procedure in terms of section 189A (13) of the LRA. Parties are in dispute as to whether a dismissal has been contemplated within the meaning of the provisions of section 189 of the LRA. The issue whether the application was authorised within the contemplation of section 133 of the Companies Act not dealt with given the view taken at the end. Conclusions – a dismissal was not contemplated and the duty to consult did not arise. The procedure contemplated in section 189A (13) of the LRA is unavailable to the applicant. There is no basis to declare any action to be unlawful and to issue an injunction. Held (1): The application is dismissed. Held (2): There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This opposed application rotates on two fulcrums. The first is whether this Court is authorised to entertain this application despite the gag

imposed by section 133 of the Companies Act[1]. The second is whether the employer has contemplated retrenchment to give rise to the obligation to consult within the meaning of section 189 (1) of the Labour Relations Act, 1996, as amended ("the LRA"). Given the view I take at the end it is unnecessary to decide the first issue. The first point was raised as a jurisdictional point. In truth, it is not, it is, in my view, the issue of authorisation. This court retains jurisdiction under section 189A (13) of the LRA on applications of this nature. I take a view that once a conclusion is arrived at that no dismissal is contemplated, that is the end of the matter for the applicants.

Background facts

[2] It is unnecessary to meticulously deal with all the facts of this matter. For the longest of time the South African Airways ("SAA") has been ailing and limping financially. It depends on bail outs from the government. In an attempt to address its quandaries, the management of SAA opted for a section 189 process, which would have seen around 900 employees losing their jobs. Whilst the section 189 process was on course, a strike action hit the SAA. Such an action culminated into a collective agreement which deferred the retrenchment process to sometime in January 2020.

[3] During the deferment period, the Board of SAA resolved to invoke the provisions of the Companies Act. Around December 2019, SAA went into business rescue within the contemplation of the Companies Act. One of the decisions taken by the business rescue practitioners, which ignited the present application, was to cancel certain routes operated by the SAA. The decision was taken and announced around 06 February 2020. What further ignited and fast-tracked the present application was the briefings that occurred in order to explain the impact of the decision to cancel the routes. According to the applicants, employees in Durban and Cape Town were informed that as a result of the decision to cancel the routes, come 1 March 2020, the employees would be dismissed for

[1] Act 71 of 2008

operational reasons. Owing to that, the applicants took a view that the business rescue practitioners are intent to dismiss their members without following the provisions of section 189 of the LRA. Given that view, on 09 February 2020, the applicants launched the present application, to be heard on 13 February 2020. Some respondents, filed notices to abide. However, SAA opted to oppose the application. After listening to arguments, judgment was reserved to be delivered on 14 February 2020.

Evaluation

[4] As pointed out above, this Court retains jurisdiction to entertain applications of this nature by virtue of the provisions of section 189A (13) of the LRA. The first issue, requiring an interpretation of section 133 of the Companies Act, shall not decidedly be entertained in this judgment, since my conclusions on the factual question whether retrenchment is contemplated is dispositive of this matter either way.

[5] It is common cause that in November 2019, SAA contemplated a dismissal for operational reasons. It is also common cause that the process was deferred in respect of certain categories of employees and in others, it was simply never proceeded with after SAA went into business rescue.

[6] It is further common cause that SAA went into business rescue in December 2019. Once a company undergoes business rescue, certain legal implications arise. One such implication is the temporary supervision of the company and the management of its affairs, business and property. A person known as a business rescue practitioner ("the BRP") is appointed to oversee a company during business rescue proceedings. During business rescue, the terms and conditions of the employees are insulated.

[7] As part of the duties of the BRP is the development of a business rescue plan. In the business rescue plan, the BRP may contemplate retrenchment of employees. Section 136 (1) (b) of the Companies Act, obligates the business rescue plan to subject itself to the provisions of

section 189 and 189A of the LRA. In other words, if retrenchment is contemplated in the plan published by the BRP, such retrenchment would be subjected to the provisions of the LRA. In this matter, there is no business rescue plan that has been developed suggesting engagement in a retrenchment process. On this basis alone, there is merit in a submission that this application is premature. A company that is under business rescue, can only contemplate retrenchment in a statutory document known as a business rescue plan. In my view, the retrenchment process contemplated by SAA before business rescue proceedings has since become obsolete.

[8] Regard being had to the salutary provisions of section 136 (1) (b) of the Companies Act, if the business rescue plan would suggest a retrenchment process, sections 189 and 189A would have to kick in. Since there is no business rescue plan in place, it is only speculative to suggest that a retrenchment exercise would be considered.

[9] It appears to be the applicants' view that the notice of 6 February 2020 contemplates retrenchment. In my view, it is not. However, of importance, the notice is not a business rescue plan, nor was it contended in argument that it is. The bulk of Mr Ngcukaitobi's, who appears for the applicants, argument was that retrenchment was contemplated. This assertion that SAA contemplates retrenchment is vehemently disputed by SAA. If a business rescue plan was presented, it would be easy to deal with this dispute of fact. The contents of the business rescue plan would have presented a *res ipsa loquitur*. Thus absence of a business rescue plan resolves the dispute in favour of SAA.

[10] It becomes unnecessary to apply the *Plascon-Evans* rule. However, with reference to the replying affidavit, the applicants persistently make the point that this Court must on the basis of that return a finding that SAA contemplated retrenchment. To this, firstly, it is trite law that in motion proceedings a party makes its case in the founding papers. Confronted with this principle, the applicants' counsel argued that such a case is foreshadowed in their founding papers. I disagree. What was

foreshadowed in the founding affidavit, which is pertinent to the issue in the dispute of fact, was the following:

> "62 The aforesaid announcement invariably includes imminent massive dismissals and it is reiterated that the first, second and third respondents are on record that mass retrenchments are imminent.
>
> 63 In fact, employees based in Durban and Cape Town were subsequently addressed by their local management and advised of the fact that they were to be retrenched as from March 2020...
>
> 64 Since the deferment of the section 189A consultations on 22 November 2019 no attempt whatsoever was made to restart such consultations..."[2]

[11] This case as foreshadowed in the paragraphs above seeks to suggest that the retrenchment was contemplated and recorded in the announcement. I already found that the announcement is not a business rescue plan. Further, it seeks to suggest that some "local management" have orally contemplated retrenchment which is to occur from March 2020. The pleaded case specifically distances the "deferred" consultation process from this alleged contemplated retrenchment. Differently put, this Court must not be under an illusion that the announcement was a restart of the deferred process. On their own version, there is no connection between the announcement and what occurred before the deferment. Therefore, I accept and agree that there is no connection between what SAA did before business rescue and the announcement by the BRP.

[12] Assuming for a moment that the announcement equates to a business rescue plan, then in line with section 189 (1), the employer, being SAA must firstly, in regard to the textual meaning of the section, contemplate dismissal for reasons based on its operational requirements. The evidence of SAA is that it has not. The Applicants' counsel urged this

[2] See the founding affidavit at page 21.

Court to reject this evidence regard being had to the objective facts. I am not persuaded. In my view, no court of law can contemplate a decision to dismiss on behalf of an employer. A contemplation must be an unequivocal business decision of an employer. There are judgments of this Court and the Labour Appeal Court which decreed that a commercial rationale of an employer cannot be second-guessed by a Court of law. That being the case, how can this Court say to SAA, as a Court I am entitled to conclude that you are contemplating dismissal for operational reasons. That would be nothing but judicial overreach.

[13] It ought to be remembered that an employer is entitled to undergo certain processes, which in the eye of a third party like this Court perhaps and or the applicants may attract the duty to consult. That is not the consultation envisaged in section 189 (1) of the LRA. The one envisaged in that section requires the SAA to formulate a view that it must dismiss some of its employees. Once that view is formulated, which is a contemplation[3] in my view, then the duty to consult arises. The dictionary meaning of the word contemplates is to look at attentively and thoughtfully, to consider carefully and at length or to have in mind as an intention or possibility. Therefore, how can a court conclude that SAA contemplates dismissal? It cannot, even if it accepts the invitation of the applicants' counsel to conduct an objective evaluation.

[14] The myth that must be dispelled with adequate immediacy is that it does not axiomatically follow that an announcement of cancelling routes in of itself is written the word "retrenchment" in bold all over it. The announcement notice said amongst others the following:

> "In line with SAA's commitment to take urgent action to conserve cash, and create a viable platform for a successful future, key measures need to be implemented now.
>
> These measures include targeted changes to the route network..."

[3] See *Atlantis Diesel Engine (Pty) Ltd v Numsa* 199 (3) SA 22 (A).

[15] It is not difficult to fathom that the announcement to change the route network was actuated by the need to conserve cash and to create a viable option for a successful future. It is not smoke and mirrors as contended for by the applicants' counsel. To a point that this Court rejects the evidence that no retrenchment is contemplated by an act of the cancellation of routes. At a superficial level, one may wrongly conclude that cancellation of routes inevitably leads to possible dismissals. However, what the LRA requires to bolster the superficial thinking, is the unequivocal careful consideration and a possible intention to dismiss on the part of the employer as a result.

[16] The applicants' counsel correctly conceded that if there is no contemplation to dismiss, the legal duty to consult does not arise. On the facts of this case, as presented, this Court comes to a palpable conclusion that SAA has not contemplated dismissal and as such the duty to consult does not arise.

[17] The section 189A (13) procedure, is reserved for consulting parties. Since I hold a view that the duty to consult has not manifested itself, it follows that this application must fail. With regard to costs, this Court retains a wide discretion. I do not believe that a cost order is warranted in this matter. The case relating to a contractual right to be placed on the training lay-off scheme was not pursued with any vigour before me. However, in terms of the applicants' notice of motion its fate was dependent on the Court compelling a consultation process.

[18] In summary, it is this Court's conclusion that SAA has not contemplated dismissal and the duty to consult within the contemplation of section 189 (1) of the LRA did not arise. The procedure in section 189A (13) is available to consulting parties and since the duty to consult has not arisen, the powers of this Court to compel a fair procedure and or interdicting and restraining SAA are severely circumscribed.

[19] For all the above reasons, the application must fail.

[20] In the results I make the following order:

Order

1. The application is dismissed

2. There is no order as to costs.

G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances

For the Applicants:	Mr T Ngcukaitobi
Instructed by:	Minnaar Niehaus Attorneys, Port Elizabeth.
For the Respondent:	Mr A Redding SC with him Mr V Mndebele
Instructed by:	ENS Attorneys, Sandton.