IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1968/18

In the matter between:

NATIONAL UNION OF METALWORKERS	
OF SOUTH AFRICA	**First Applicant**
LIST OF NUMSA MEMBERS	
IN ANNEXURE FA1	**Second to Further Applicants**

and

ANGLO GOLD ASHANTI LIMITED	**First Respondent**
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**Second Respondent**

Heard: **13 June 2018**

Delivered: **28 June 2018**

JUDGMENT

MAHOSI.J

Introduction

[1] This is an application in terms of section 189A (13) read with section 158(1)(b) of the Labour relations Act[1] (LRA) for an order in the following terms:

> '1 Condoning the applicant's failure to comply with the time periods in terms of Rule 8 of the Rues of the Labour Court and ordering that the matter be heard as a matter of urgency;
>
> 2. Ordering the respondents to permit the first applicant to participate fully in the consultation process, as contemplated in section 189(1)(b)(ii) of the Labour Relations Act 66 of 1995 as amended;
>
> 3. Ordering the first respondent to pay the costs of the application alternatively, if the second respondent opposes this application ordering both the first and the second respondents to pay the costs jointly and severally the one paying the other to be absolved;
>
> 4. Granting any further and/or alternative relief.'

The parties

[2] The first applicant is the Nation Union of Metalworkers of South Africa (NUMSA), a registered trade union in accordance with section 96 of the LRA.

[3] The second to further applicants are members of NUMSA identified in annexure "FA1". These employees are employed by the respondent within its South African Region, at its various operations, departments and divisions.

[4] The first respondent is AngloGold Ashanti Limited (AngloGold), a listed company duly incorporated in terms of Company Laws of South Africa.

[1] Act 66 of 1995 as amended.

[5] The second respondent is the Commission for Conciliation, Mediation and Arbitration (CCMA). No relief is sought directly against the CCMA unless it opposes the relief sought in which case cost order will be sought against it.

Material background facts

[6] The facts in this matter are mainly common cause or not in dispute. AngloGold operations in the South African region, historically consisted of Moab Khutsong Mine, Kopanong Mine, Great Noligwa Mine, Mponeng Mine, Savuka Mine, Tau Tona Mine, AngloGold Ashanti Health Services Limited, Mine Waste Solutions, South African Regional Services and South African Regional Metallurgy Services.

[7] During 2015 and 2016, NUMSA began recruiting at AngloGold. Despite its efforts, NUMSA has not secured recognition for the purpose of collective bargaining nor has it secured organisational rights, apart from stop order facilities.

[8] During the middle to late 2017, AngloGold sold the whole or part of its Kopanong mine to Village Main Reef Limited and the whole of Moab Khutsong mine to Harmony Gold Mining Company. On 19 October 2017, AngloGold issued an internal brief that the sale of the Kopanong and Moab Khutsong mines fell within the ambit of section 197 of the LRA.

[9] In an undated letter sent to NUMSA, AngloGold stated that during January 2018 NUMSA had 625 members, but following the sales of Kopanong and Moab Khutsong mines, NUMSA only had 40 members at Off-Mine Regional Services.

[10] Following a retrenchment consultation process, on or about 14 March 2018, AngloGold dismissed several employees including members of NUM, Solidarity, AMCU, UASA and NUMSA. The retrenchment consultation was conducted and AngloGold consulted with NUM, Solidarity, AMCU and UASA. NUMSA was not invited to the said consultation process.

[11] On 9 April 2018, the NUMSA General Secretary, Mr Irvin Jim (Jim) sent a letter to AngloGold imploring it to recognise NUMSA and to engage with it. On 24 April, AngloGold's Vice President responded to the letter by email indicating that the Group Head of Employee Relations would engage with NUMSA at a local level.

[12] On 21 May 2018, AngloGold issued a notice in terms of section 189(3) of the LRA and the said notice was not sent to NUMSA.

[13] On 30 May 2018, AngloGold issued a brief to non-union members advising that the 60-day retrenchment consultation process would commence on 4 June 2018. The brief further advised that recognised trade unions would be actively involved in the consultation process and non-union members were invited to nominate one representative for management employees and one representative for non-management staff.

[14] On 1 June 2018, NUMSA's attorneys of record sent a letter of demand to AngloGold. In the letter, NUMSA's attorneys sought an undertaking that NUMSA would be included in the retrenchment consultation process. In the said letter, NUMSA's attorneys stated that AngloGold was required to consult with any registered trade union whose members are likely to be affected because there was no workplace forum and no collective agreement contemplated by section 189(1)(a) of the LRA.

[15] On 2 June 2018, AngloGold responded by email indicating that it intends opposing any action instituted by NUMSA. On 4 June 2018, NUMSA's attorneys requested for a more detailed response from AngloGold. On the same day, AngloGold's attorneys sent a letter in terms of which they stated, amongst others, that several collective agreements contemplated by section 189(1) had been concluded with each of the recognized trade unions namely, NUM, Solidarity, UASA and AMCU. AngloGold disputes that it has not complied with a fair procedure as it alleges that it is not obliged in terms section 189(1)(a) to consult with NUMSA.

Preliminary Issues

[16] In its answering affidavit, AngloGold raised a number of preliminary issues relating to the application. Before dealing with the merits of the application itself, it is necessary to deal with each of them.

Locus Standi

[17] The first point raised was that the deponent to the founding affidavit did not have the necessary *locus standi* to depose to the affidavit as he was no longer an employee of AngloGold. However, NUMSA delivered to AngloGold a Power of Attorney for the deponent on 12 June 2018. As a result, AngloGold no longer persists with this point.

Applicants before the Court

[18] In its founding affidavit, NUMSA submitted that the second to further applicants were its members who are employed by AngloGold. NUMSA contended that there were 646 of its members within AngloGold's employ.

[19] AngloGold disputed this and submitted that only four of its employees are members of NUMSA, namely IA Mamutle, NE Ntaopane, JL Garekoe and SS Roberts. According to AngloGold, only JL Garekoe and SS Roberts are employed in areas of its operations where employees are potentially affected by possible dismissals based on operational requirement.

[20] In this regard, NUMSA conceded that for the purpose of the final relief sought, AngloGold's version must be accepted.

Mootness

[21] AngloGold submitted that JL Garekoe and SS Roberts are employed as grade 2 security officers at its metallurgical operations. It is common cause that there are 63 grade 2 officers in total. Of this number, AngloGold proposes reducing the headcount by 2 employees. Anglo Gold has further proposed that the principle of last-in-first-out (LIFO) will serve as a selection criterion in the retrenchment process.

[22] It is common cause that JL Garekoe has 34 years' service and SS Roberts has 12 years' service with AngloGold. It is also common cause that there are a number of grade 2 security officers with lesser service than JL Garekoe and SS Roberts. As such, AngloGold submitted that the relief sought by NUMSA is only academic. In the circumstances, AngloGold argued that the entire application is moot and ought to be dismissed.

[23] In this regard, NUMSA submitted that it made a without prejudice settlement proposal that the parties on the basis that AngloGold give an undertaking that no NUMSA member will be retrenched in the current exercise. AngloGold's view was that it could not give the unconditional undertaking sought as this would compromise the entire section 189 process. This is a fair proposition. I do not intend making a determination on the mootness or not of this matter for reasons that will become obvious in this judgment.

Merits of the case

[24] The issue is whether NUMSA should be included in the facilitated consultation process that is already underway between AngloGold and NUM, Solidarity, UASA as well as AMCU. AngloGold contends that it is under no obligation to consult with NUMSA by virtue of the hierarchical consultation process as set out in sections 189(1)(a) of the LRA. It is common cause that AngloGold concluded with each of the recognised trade unions namely, NUM, Solidarity, UASA and AMCU an identical Labour Relations Recognition and Procedural Framework Agreement (Framework Agreement). As a result, it argued that NUMSA, not being a consulting party, has no *locus standi* to bring this application.

[25] Section 189 provides as follows:

> '(1) When an employer contemplates dismissing one or more *employees* for reasons based on the employer's *operational requirements*, the employer must consult-
>
> (a) any person whom the employer is required to consult in terms of a *collective agreement*;

(b) if there is no *collective agreement* that requires consultation-

(i) a *workplace forum*, if the *employees* likely to be affected by the proposed *dismissals* are employed in a *workplace* in respect of which there is a *workplace forum*; and

(ii) any registered *trade union* whose members are likely to be affected by the proposed *dismissals*;

(c) if there is no *workplace forum* in the *workplace* in which the *employees* likely to be affected by the proposed *dismissals* are employed, any registered *trade union* whose members are likely to be affected by the proposed *dismissals*; or

(d) if there is no such *trade union*, the *employees* likely to be affected by the proposed *dismissals* or their representatives nominated for that purpose.'

[26] NUMSA accepts the general principle that section 189(1) envisages a hierarchical consultation process and further that the Framework Agreements are collective agreements. However, NUMSA disputes that the collective agreements are those envisaged by section 189(1)(a) of the LRA. As such, NUMSA contends that AngloGold is required in terms of section 198(1)(c) to consult with it as it is the registered trade union whose members are likely to be affected by the proposed dismissals.

[27] Reference to some of the provisions of the collective agreements AngloGold sought to rely on that are relevant to this application is necessary. The parties agreed as follows:

'2.3 The Agreement will apply to the Parties and provide for mechanisms and infrastructure to enhance consultation, communication and negotiations between the parties on matters of mutual interest, subject to the confines as outlined in clauses 6.5 and 8.4.1.5. The purpose of this agreement is to create an inclusive Labour Relations Recognition and procedural framework for South Africa.'

[28] Clause 13 provides for the formation of the South African Regional Steering Committee (SARSC) composed of management and NUM, AMCU, UASA and

Solidarity. Clause 14 sets out the term of reference of SARSC and it provides as follows:

> ’14.1 The South African Regional Steering Committee (SARSC) will provide a mechanism for management and unions to interact in a structured manner about matters that affect management and the union relations.
>
> …
>
> 14.5 It will act as a consultative and advisory forum for the matters within the scope and mandate of management of South Africa.
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> 14.6 It will seek to achieve consensus through joint problem solving, common goals and shared values.’

[29] Clause 20 provides for the retrenchment procedure and states as follows:

> ‘The Company undertakes to follow procedure applicable in terms of the relevant sections of the Act should dismissals on account of Operational Requirements become necessary.’

[30] NUMSA referred this Court to *Aunde South Africa (Pty) Ltd v NUMSA*[2] in which the LAC dealt with the hierarchy of consultation and stated as follows:

> ‘[32] Where an employer consults in terms of agreed procedures with the recognised representative trade union in terms of a collective agreement which requires the employer to consult with it over retrenchment, such an employer has no obligation in law to consult with any other union or any individual employee over the retrenchment. If such a consultation exercise culminated in a collective agreement that complies with the requirements of a valid collective agreement, all employees including those who are not members of the representative trade union that consulted with the employer are bound by the terms of such collective agreement irrespective of whether they were party to the consultation process or not.

[2] [2011] 10 BLLR 945 (LAC);(2011) 32 ILJ 2617 (LAC)

[31] Thus, where an employer consults with the recognized representative trade union(s) in terms of a collective agreement over the agreed retrenchment procedure, such an employer is *not obligated* in law to consult with any other union or any individual employee over the retrenchment.

[32] It is apparent that the current matter is distinguishable from *Aunde*[3] on facts. In *Aunde,* the appellant excluded the respondent, NUMSA, from consultations on the basis that NUMSA was no longer a union whose members formed the majority of the employees. As such it contended that it had no obligation to consult NUMSA in relation to the retrenchment exercise. In excluding NUMSA, the appellant relied on clause 4.1 and clause 16 which were summarised by the LAC as follows:

> '[37] Clause 4.1 that vaguely states that UASA is recognised as "the sole bargaining representative of the employees in the bargaining unit for all other work related plant level issues, including any need to consult as required by the LRA" should not be considered in isolation and out of context of the entire agreement. Of importance is clause 16 of the agreement which specifically refers to a "Retrenchment Procedure". Clause 16 states that a retrenchment procedure "will be negotiated between the parties as soon as possible". It is common cause that at the time of the dismissal of the respondent's members, there was no negotiated retrenchment procedure between the appellant and UASA in existence. The appellant could therefore not have acted in terms of clause 16 of the agreement.'

[33] In this regard, the LAC found as follows:

> '[38] Section 189(1) of the Act that has been referred to above places a duty on any employer to consult any person it is required to consult in terms of a collective agreement or other persons or structure where there is no collective agreement. It would therefore be unreasonable to interpret clause 4.1 of the agreement in such a way that it included consultation in terms of

[3] *Supra*.

> section 189 (1) of the Act when the procedure required to consult in terms of section189 (1) of the Act had not been negotiated with UASA in particular.'

[34] In the current matter, NUMSA took issue with the body that AngloGold is consulting with over the current retrenchment as it includes further nominees and is facilitated by the CCMA. NUMSA further challenges AngloGold's suggestion that the facilitating commissioner would have the power to rule that a NUMSA representative can be included in the proceedings. In this regard, NUMSA argued that AngloGold can only rely on a collective agreement in the hierarchy of consultation when such collective agreement contains specific negotiation procedure, the consulting parties are identified and when the parties are complying with those agreed procedures.

[35] Clauses 2, 13, 14 and 20 of the collective agreement should be considered in the context of the whole agreement. It is apparent that the collective agreements entered into between AngloGold and NUM, Solidarity, AMCU as well as UASA provides for SARSC to consult over matters of mutual interest and dismissals for operational requirements are matters of mutual interest. Thus, this is an issue in respect of which SARSC must consult over.

[36] It is further apparent that AngloGold undertook to follow the procedure applicable in terms of the relevant section of the LRA should dismissals on account of operational requirements become necessary. The relevant section in this regard is section 189 and 189A of the LRA. Section 189(1)(a) requires AngloGold to consult any person whom the employer is required to consult in terms of a collective agreement, which is NUM, Solidarity, AMCU and UASA.

[37] The fact that the body that AngloGold is consulting with over the current retrenchment includes further nominees and is facilitated by the CCMA is of no consequence. Section 189A(3) provides for the appointment of a CCMA commissioner to facilitate the retrenchment process and although AngloGold is not obligated in law to consult with any other person, it may do so. As such, AngloGold is under no obligation to consult with NUMSA. It follows that NUMSA's

application to compel AngloGold to comply with a fair procedure should be dismissed.

Costs

[38] In terms of section 162 of the LRA, the Court has a wide discretion in awarding costs. The Constitutional Court has recently reiterated in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[4], that costs orders should be made in accordance with the requirements of law and fairness. In this matter, there is no reason why the costs should not follow the cause.

[39] In the circumstances, I make the following order.

Order

1. This application is dismissed with costs.

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D Mahosi

Judge of the Labour Court of South Africa

[4] (2018) 39 ILJ 523 (CC).

Appearances:

For the applicant:	Advocate C. Orr
Instructed by:	Cheadle Thompson and Haysom Incorporated
For the first respondent:	Mr L Frahm-Arp
Instructed by:	Fasken Martineau/Bell Dewar incorporated