Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: J385/16 & J393/16

In the matter between:

SOLIDARITY obo BD FOURIE & OTHERS	**First Applicant**
and	
VANCHEM VANADIUM PRODUCTS (PTY) LTD	**First Respondent**
NATIONAL UNION OF METALWORKERS (NUMSA) obo MEMBERS	**Second Respondent**
LIEBENBERG DAWID RYK VAN DER MERWE *N.O.* in the capacity of BUSINESS RESCUE PRACTITIONER	**Third Respondent**
AND	
NATIONAL UNION OF METALWORKERS (NUMSA) obo	**First Applicant**

MEMBERS

and

VANCHEM VANADIUM PRODUCTS (PTY) LTD — **First Respondent**

LIEBENBERG DAWID RYK VAN DER MERWE *N.O.* in the capacity of BUSINESS RESCUE PRACTITIONER — **Second Respondent**

Heard: 15 March 2016

Delivered: 22 March 2016

Summary: (s 189A(13) – interdict to compel further consultation or alternatively to declare retrenchment procedurally unfair – consultation process fair – new cause of action launched late – S 131 of the Companies Act)

JUDGMENT

LAGRANGE J

Introduction

[1] NUMSA and Solidarity independently launched applications under section 189A (13) of the Labour Relations Act, 66 of 1995 ('the LRA') which were consolidated on 3 March 2016. For ease of reading, the unions will be referred to from time to time as the applicants and employer ('Vanchem') and the business rescue practitioner, Mr Van der Merwe, as the respondents.

[2] The common relief sought by both union parties is a declaration the retrenchment of their members on 26 January 2016 had been procedurally unfair and that they should be reinstated pending the completion of consultations as contemplated in section 189 of the LRA. In the alternative, they sought compensation for the dismissals. In NUMSA's

replying affidavit, a new cause of action was raised based on section 136 the Companies Act, 71 of 2008. In essence, NUMSA claims that the BRP, who was appointed on 17 November 2015 could only retrench employees in terms of an approved business rescue plan, which did not exist at the time they were retrenched. In the main the union's representations on the merits do overlap though they engaged with the respondent to differing degrees.

Summary chronology of events

[3] Vanadium's difficulties first arose in April last year when the Mapochs mine, which supplied Vanchem with its iron ore, went into business rescue and ceased operations. By May 2015, Vanchem had exhausted its own stockpiles of ore and issued a notice of layoff to its employees in terms of the MEIBC main agreement.

[4] Mapochs mine had ceased production when its main client Evraz Highveld Steel stopped production and was also placed in business rescue in April 2015. Highveld steel had consumed two thirds of the mines production and Vanchem had taken the balance. With the closure of the mine, Vanchem was left without a supply of the right quality of vanadium bearing iron ore which it needed. The only other sources of this type of ore are from mines belonging to Vanchem's competitors, which unsurprisingly were not prepared to provide it with an alternative stable supply of ore. The future of the Mapochs mine is intimately bound up with the future of Highveld Steel which owns a majority stake in the mine.

[5] A temporary arrangement was made during August 2015 in terms of which Vanchem was able to obtain substandard ore from the mine which required additional processing. To offset the additional costs incurred by the processing, Vanchem proposed a wage cut of 30%, which it claims was necessary to make this short term solution viable. This was not acceptable to NUMSA. As a result, when its existing ore reserves ran out in September 2015 Vanchem ceased production.

[6] Prior to sending out a notice on 28 August 2015 in terms of section 189 of the LRA, Vanchem claims it was losing R49 million a month.

[7] On 1 September 2015 Vanchem applied for CCMA facilitation of the 189A process. It also met with NUMSA the same day and again on 8 September 2015, during which it claims it discussed not only the short-term arrangement but also the long-term viability of Vanchem and the potential retrenchments. It claims that NUMSA representatives would not engage with it on these issues, though Solidarity did provide responses to its proposals.

[8] On 17 September 2015, litigation over the layoff arrangement was postponed on the understanding, *inter-alia* that, NUMSA and Vanchem would engage with each other in meaningful consultations with a view to concluding the process by 10 October 2015.

[9] On 23 September, the first facilitation meeting took place. After a dispute about the inclusion of nonunionised members in the process, which was resolved when Vanchem agreed to consult with them separately, after NUMSA threatened to leave the meeting if non-union members remained in it. Vanadium made a presentation on the wage reduction proposal and a proposal to retrench 51 employees which would reduce the savings needed on wages to 20% instead of 30%. Apart from the immediate short-term proposal, it is apparent from the minutes that the presentation covered the other items contained in the section 189 notice and that afterwards the unions had an opportunity to engage further with the company, which they did though the inputs they made only addressed some of the issues raised for consultation. NUMSA was also represented by an independent financial consultant at that meeting and the general Secretary, Mr I. Jim attended as well. The meeting adjourned for the unions to consider the proposals made.

[10] A second facilitation meeting took place on 7 October. At that meeting the company resented a revised proposal which involve the retrenchment of approximately hundred and seven employees, but without any reduction in the terms and conditions of employment of the remaining employees. NUMSA then floated a proposal of using the government-sponsored Training Layoff Scheme (‘TLS’) as an alternative to Vanchem’s proposals, and the meeting was adjourned on the basis that the possibility of

implementing TLS would be investigated further. There was also some discussion about further disclosure of financial information to the union's financial consultant who had already presented a report to the union based on his initial examination of the company's financial records. The union had not given permission for a copy of his initial report of July 2015 to be released to the company at that stage. The meeting adjourned on the basis that all the parties were committed to finding a final solution as soon as possible.

[11] Discussions proceeded on the possibility of introducing a TLS as an alternative to retrenchment, which took place under the auspices of a subcommittee, which Solidarity did not participate in. Two meetings of this committee took place on 19 and 23 October

[12] On 29 October the third facilitation meeting took place. After further clarification about the TLS, Vanchem agreed to participate in such a scheme. Thereafter there were further discussions about the prospects of securing an alternative ore supply and the possible sale of Mapochs mine to Vanchem. Extensive discussion was also held about the possibility of offering voluntary severance packages.

[13] The last formal facilitation meeting took place on 23 November. By that stage the business rescue practitioner ('BRP') had been appointed and he mandated the CEO of Vanchem to attend the meeting with a view to concluding the 189A process. However despite telephonically confirming with the BRP his authority to continue with the process, both Solidarity and NUMSA refused to continue with the facilitation in the absence of the BRP attending. Consequently the meeting was abandoned. It is apparent that at the close of the meeting all the unions requested bilateral meetings with the BRP before the next consultation meeting. Vanadium was amenable to such meetings taking place but requested that a common date be found because of the BRP's commitments.

[14] However, Vanchem claims it was of the view that the formal s189A facilitation process had been brought to an end and consultations continued between the unions and the BRP. Thus on 7 December a meeting was held with the employee's committee in terms of the

companies act. At the meeting the BRP impressed on the representatives that it was likely Vanchem would be liquidated and dismissals for operational reasons would be unavoidable to prevent that happening. Accordingly, it was proposed that the plant be mothballed until such stage as a viable alternative ore supplier could be found. It was recommended that voluntary severance packages should be considered.

[15] On 9 December the CCMA rejected Vanchem's application to participate in a TLS apparently because of concerns about its ability to resume operations. Vanadium claims it never received formal notice of this rejection.

[16] On 10 December 2015, this court ruled that the MEIBC main agreement was not applicable to the layoffs implemented by Vanchem with effect from 12 September 2015, which were accordingly unlawful. The court ordered the reinstatement of the laid off employees status to what it was before the layoffs were implemented. That decision is the subject matter of a pending leave to appeal. Depending on the outcome thereof, Vanchem's contingent liability for wages during the period of the layoff will vary between R4 million and R18 million per month, but NUMSA acknowledges that for the period of any further consultations, Vanchem will not be able to pay employees based on current cash resources, but that this did not mean that further consultations would be pointless.

[17] The following day, the BRP engaged NUMSA's attorney of record who had been involved in the consultation process to discuss the possible liquidation of Vanchem and ways to avoid it. NUMSA's financial consultant was also roped into the process of discussing the voluntary severance program with the BRP. On 14 December the BRP provided NUMSA with a memorandum setting out the proposal regarding the Voluntary Severace Packages ('VSPs'). Shareholders were not prepared to NUMSA indicated it support for it. There followed an urgent meeting on 16 December attended by NUMSA's attorney, the financial consultant, the general secretary of NUMSA and other NUMSA representatives. According to Vanchem the meeting lasted the whole day and canvassed alternatives and the dismissal of all employees, but the general secretary was

adamant that retrenchments were non-negotiable. As an alternative, he sought to pursue the TLS application and to attempt to secure a supply of ore in discussions with the CEO of Highveld Steel.

[18] On 17 December, the BRP conveyed to NUMSA's attorney of record the need to implement short time to avoid the immediate demise of the company.

[19] By 8 January 2016, Vanchem had received no feedback on any of the issues raised at the meeting on 16 December and wrote to the union expressing its concern. An agreement was reached with NUMSA's attorney that parties would reconvene during the week of 11 January 2016 to consult further over the VSP, any other proposals, the need to immediately reduce costs and the possibility of dismissals. On 12 January 2016 a consultation took place between the BRP and Solidarity officials during which developments since December were outlined and the need to reduce costs urgently and retrench as the only reasonable alternative to liquidation was presented to them. Increasingly frantic communications to place with NUMSA representatives, but as late as 14 January the union was convinced that developments that Highveld steel would make it possible for the company to survive and would not debate the VSP proposal.

[20] A follow-up consultation with Solidarity took place on 15 January and the union expressed no reservations about Vanchem's intention to end the consultation process and issue termination letters. On the same day, the BRP received confirmation from Highveld steel that it was unable to commit to any supply of iron ore until the pending bid for it was finalised, which was doubtful that stage. A further meeting with management of Mapoch's mine on 21 January revealed that even if a rescue plan for Highveld Steel was implemented, the mine would not resume operations for several months. The BRP then issued retrench notices on 26 January.

The applicants' contentions

[21] NUMSA contends that the 189A process was effectively suspended while the TLS option was explored. After Vanchem went into business rescue on 17 November 2015, the major concerns of the union was the absence of the BRP from the succeeding facilitation meeting and the "dramatic disclosures" made by Vanchem in support of its decision to go under business rescue "relevant to its sole source of iron ore and the concomitant impact those facts had on the original business rationale disclosed in the formal section 189 A notice." In essence, NUMSA maintains that the original consultation process was not premised on a massive reduction in the workforce, but on making a temporary adjustment to cope with the increased cost burden of processing lumpy ore.

[22] NUMSA claimed in its founding affidavit that the company's retraction of any commitment to pay severance pay in terms of its own policies, which it mentioned in its answering affidavit of 7 December 2015 in the short time dispute was an issue that was never previously discussed and the failure of Vanchem to continue with the 189A process prevented that issue being canvassed. Similarly, even though the BRP indicated he was willing to discuss the re-employment of workers if operations resumed, subject to agreement on applicable conditions of service, this issue was also never discussed and the dismissals took place without such undertakings being made. Further, working hours were increased in January 2016 from three days to 6 days per month under the contested short time arrangement which indicated that the situation might be improving. NUMSA also expressed concern over retrenched employees who had been taken back on contract to perform operations connected with the production of chemicals for Sasol, without any discussion on who should have been offered those positions. Lastly, the union argues that as the BRP is to table his rescue plan at the end of the month, that implies that there is a future for the company and that is something which the unions ought to have been consulted on in the context of section 189. The union contends that by issuing the termination notice on 26 January the BRP deprived it of its consultation rights under section 189.

[23] Solidarity similarly maintains that no formal or substantive consultations took place after the meeting on 23 November did not proceed. It also contends that after the BRP was appointed, the process had been suspended pending the establishment of the TLS, but at no point had the parties agreed that the CCMA process would be abandoned. The discussions which did take place with the BRP did not involve a consultation process about the issues set out in section 189 (3) but focused on the economic challenges facing Vanchem. It also complains that prior to the decision being announced there was no consultation about it with the unions. Likewise, there was no consultation about the company's inability to pay retrenchment packages or notice pay at the time of retrenchment, before the decision was taken. One of the issues it claims the company ought to have consulted on was the performance of maintenance and care operations by any of the affected employees.

[24] Vanadium, for its part, concedes that when it embarked on the process in August, it was unaware of how badly things would deteriorate, but in any event it points out that in the notice of retrenchment it made it clear that all employees might be affected by the restructuring. Further, it points out that it was obvious to all concerned in September, that it could not continue operations without a reliable source of ore once its stockpile was depleted. It also makes the point that nothing prevented the unions from applying In this regard, NUMSA believes that a solution which might reduce if not eliminate such liability might be found in the government-sponsored training layoff scheme ('TLF') and that other alternatives can be explored such as employee share schemes. Vanadium also points out that the applicants failed to request any extension of the consultations as it was entitled to under section 189A(2)(c) and (d) which states:

> (c) the consulting parties may agree to vary the time periods for facilitation or consultation;
>
> (d) a consulting party may not unreasonably refuse to extend the period for consultation if such an extension is required to ensure meaningful consultation."

Evaluation

[25] What is apparent from the all events described in brief above is that whatever the understanding of the parties was when the union's brought an end to the meeting on 23 November 2015, by mid-December the unions were aware that the company was seriously considering liquidation, the employment implications of which must have been obvious. That is not to say that the unions did nothing, but it is clear that they focused their attention on two issues. The central issue was what could be done to at least prevent a complete cessation of operations for an indefinite period, or worse still a complete closure. That involved finding a viable alternative source of the right quality of ore. Secondly, NUMSA focused on the prospect of a TLS providing temporary relief for its members, although it seems that perhaps at that stage this was already a non-starter because the CCMA had decided to turn the application down.

[26] Secondly, it ought to have been obvious from the frantic communications by Vanchem in the first half of January that time was running out for avoiding taking a decision that would impact on most workers because it involved the cessation of operations. If the unions believe that the 189A process under the auspices of the CCMA was incomplete nothing prevented them from either trying to extend that formal process or from insisting on the conclusion of consultations under section 189 on issues which they felt had not been properly canvassed.

[27] Thus, for example, the issue of severance pay was already a matter on the table and if the unions felt that the company ought to have discussed any changes in its severance pay policies which had referred to in its answering affidavit of 7 December 2015, nothing prevented the unions from raising this with the company soon thereafter. That is not an issue which had to wait until late January before it was raised. In any event, it appears that discussion of that issue would have been difficult because NUMSA was giving mixed messages on its willingness to even engage on voluntary severance packages. I accept that there were issues which relate directly to the consequences of the retrenchment which could have fruitfully been discussed further such as the future re-employment of

retrenched workers. However, that is an issue on which Vanchem had originally made proposals and it is not clear why NUMSA never attempted to respond on the issue. It is unclear on the papers when the BRP indicated his willingness to discuss re-employment of workers if operations resumed so, it is difficult to know if there was time to engage him on this issue before the decision to retrench was announced on 26 January. Even if the termination happened without a formal conclusion to the discussions, there is no suggestion by NUMSA that it attempted to engage with the BRP on this issue before then, or that there was no opportunity to do so. Likewise, if the BRP indicated he was willing to discuss the re-employment of workers if operations resumed, there is no evidence that NUMSA attempted to engage him on that issue. Likewise, there is nothing to indicate that the union had attempted to engage the BRP on the employment of retrenchees on contract work and that such an approach had been rejected. Lastly, the mere fact that the BRP was due to present a business rescue plan did not mean the union had been prevented from making proposals which could have been incorporated in that plan. However, none of the alternatives proposed by the union which attempted to address the fundamental problem confronting the business or to ameliorate the position of the employees had come to fruition and it is not obvious what other proposals they still wished to discuss but had been prevented from placing on the table.

[28] It is important to note that nearly two months elapsed between the last formal consultation meeting under the auspices of the CCMA and the retrenchments. Even if one allows for the fact that nothing was likely to happen for about three weeks after mid-December, there was ample time for the unions to raise issues they felt had not been adequately canvassed and to insist on further consultations on them with a view to reaching consensus.

[29] As regards whether Vanchem can be said to have acted fairly, it is clear that it provided significant access to financial records to NUMSA's advisor and that it did attempt to table alternatives to forced retrenchment, but these were unpalatable to the unions. Vanadium also ultimately responded positively to the proposal to apply for a TLS and did not close the door on

NUMSA's efforts to reopen the issue of Mapochs continuing to supply it, even though the prospect of any success in that regard seemed slight by then. Vanadium also presented its proposals on all issues from the start of the consultation process and continued to make an effort to engage the unions as the situation became more dire from mid-December. The fact that these engagements did not take place under the auspices of the CCMA did not mean they were insubstantial. That much is evidenced by the fact that union officials met with the BRP and, in NUMSA's case, its general Secretary and attorney were in regular communication with the BRP as things unfolded. There is nothing to suggest that Vanchem or the BRP were reluctant to engage with any issues arising from the consultation process that the unions raised with them. In the circumstances, I am satisfied that Vanchem engaged in a fair consultation process and that the unions did not fully engage with all the issues on the table, but confined themselves to the issues they considered most important. Nothing prevented them from addressing the other issues placed on the table by Vanchem at the same time.

[30] Although the effect of my conclusions is that this is not an appropriate case to order the parties to engage in further consultations, because the employer has not acted unfairly in the conduct of consultations and that ample time was afforded for engaging with Vanchem before the employees services were finally terminated, that does not mean nothing might be gained by both parties from further engagement on the ramifications of the retrenchments in the context of discussions on the proposed business rescue plan under s 144(3)(d) of the Companies Act.

<u>The lawfulness of the retrenchments</u>

[31] NUMSA challenged the lawfuleness of the retrenchments at the eleventh hour by filing an amended notice of motion together with its replying affidavit, on the day the matter was argued. In terms of the previous order of the court, the applicants were to have filed their replying affidavits by 11 March, some four days early. By filing its reply excessively late and raising a completely new cause of action, the union showed disdain for the court's order and its late amendment is an abuse of the urgent court

process. In the circumstances, the amended notice of motion should not be entertained.

[32] If I am wrong in refusing to entertain the new cause of action, I would still dismiss that claim for the reasons below.

[33] The pertinent provisions of section 136 of the Companies Act provides:

> "136 Effect of business rescue on employees and contracts
>
> (1) Despite any provision of an agreement to the contrary-
>
> (a) during a company's business rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that-
>
> (i) changes occur in the ordinary course of attrition; or
>
> (ii) the employees and the company, in accordance with applicable labour laws, agree different terms and conditions; and
>
> (b) any retrenchment of any such employees contemplated in the company's business rescue plan is subject to section 189 and 189A of the Labour Relations Act, 1995 (Act 66 of 1995), and other applicable employment related legislation.
>
> (2) Subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may-
>
> (a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that-
>
> (i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and
>
> (ii) would otherwise become due during those proceedings; or
>
> (b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a).
>
> (2A) When acting in terms of subsection (2)-
>
> (a) a business rescue practitioner must not suspend any provision of-
>
> (i) an employment contract; or

(ii) an agreement to which section 35A or 35B of the Insolvency Act, 1936 (Act 24 or 1936), would have applied had the company been liquidated;

(b) a court may not cancel any provision of-

(i) an employment contract, except as contemplated in subsection (1); or

(ii) an agreement to which section 35A or 35B of the Insolvency Act, 1936 (Act 24 of 1936), would have applied had the company been liquidated; and

(c) if a business practitioner suspends a provision of an agreement relating to security granted by the company, that provision nevertheless continues to apply for the purpose of section 134, with respect to any proposed disposal of property by the company.

(3) Any party to an agreement that has been suspended or cancelled, or any provision which has been suspended or cancelled, in terms of subsection (2), may assert a claim against the company only for damages."

(emphasis added)

S 150(2)(c)(ii) also provides that as part of the information which is contained in a proposed business plan, the BRP must include the following in the section dealing with assumptions and conditions:

(c) **Part C - Assumptions and conditions**, which must include at least-

(i) …

(ii) the effect, if any, that the business rescue plan contemplates on the number of employees, and their terms and conditions of employment;

[34] NUMSA argues that unless the retrenchment of any employees employed at the time business rescue proceedings commence occurs in terms of an approved business rescue plan, then the termination of their services is unlawful because it is in breach of section 136 (1)(a). Vanadium contends that nothing in the section suspends the operation of section 189A and that section 136(1)(b) merely means that retrenchments are contemplated as part of the process, but are subject to section 189 and 189A.

[35] On a proper construction of s 136(1) it seems to me to consist of two distinct parts. Subsection (1)(a) affirms the continuity of existing employees' terms and conditions of employment and subsection (1)(b) obliges the business rescue practitioner to conduct any retrenchment in the business rescue plan in compliance with the relevant provisions of the LRA pertaining to retrenchments. It is the reference to changes occurring in the "ordinary course of attrition" that might be seen as a basis for interpreting the section to provide a guarantee of continuity of employment and not merely the preservation of conditions of employment. If this interpretation is correct, what is anomalous is why subsection (1)(b) was not worded in the form of an exception to subsection (1)(a) rather than simply an additional self-standing provision preserving the rights of employees retrenched under a business rescue plan, to be retrenched only in accordance with the applicable provisions of the LRA. Alternatively, subsection (1) (a) ought to have stated that the prohibitions it contains are subject to subsection (1)(b). In the absence of such qualifications to either subclause, the two provisions are irreconcilable unless the phrase "ordinary course of attrition" is interpreted too include all forms of lawful termination, including retrenchment.

[36] Section 136(2) permits a BRP to suspend obligations owed by the company at that time business rescue proceedings commenced. Section 136(2A) exempts employment contracts from this power of suspension. Once again, the provisions deal with the suspension of obligations, but are silent on the question of the lawful termination of obligations. Considering the section as a whole it seems the primary object of the section was to prevent the unilateral variation of company obligations by a BRP, but to permit the BRP to suspend the performance of certain contractual obligations except those relating to employees. It does not seem to be directed at preventing the lawful termination of obligations including employment contracts. Consequently, I am not persuaded that the provisions of section 136 effectively outlaw any retrenchments taking place except in terms of an approved business plan.

[37] In view of this conclusion, I do not consider it necessary to deal with Vanchem's contention that the labour court has no jurisdiction to

determine the lawfulness of a termination in terms of section 136 of the Companies Act.

Order

[38] The application is dismissed.

[39] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

FIRST APPLICANT:	C Goosen instructed by Serfontein, Viljoen & Swart
SECOND APPLICANT:	M Niehaus
RESPONDENT:	C Watt-Pringle, SC assisted by HM Viljoen instructed by Cowan Harper Attorneys