THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 2024/2016

In the matter between

NATIONAL UNION OF MINEWORKERS	**Applicant**
and	
EZULWINI MINING CO (PTY) LTD	**First Respondent**
SIBANYE GOLD LTD	**Second Respondent**
RAND URANIUM (PTY) LTD	**Third Respondent**
MINISTER OF MINERAL RESOURCES	**Fourth Respondent**

Heard: 13 September 2016

Judgment: 14 September 2016

JUDGMENT

VAN NIEKERK J

[1] This is an urgent application to interdict the first respondent from dismissing any of the applicant's members, for operational reasons, pending the conclusion of the process envisaged by s 52 of the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA).

[2] On 11 July 2016, the first respondent gave notice to the applicant (the union) under s 189A of the Labour Relations Act (LRA) that it intended to close the Cooke 4 mining operation, conducted under the first respondent's mining right. On the same date, the first respondent gave notice to the minister in terms of s 52 (1) of the MPRDA that its profit to revenue ratio had been less than 6% on average for a continuous period of 12 months, and that the operation may be scaled down or ceased, with the possible effect that 10% or more of the workforce could possibly be retrenched in the forthcoming 12 month period. The anticipated closure date was initially 12 September 2016; that date has been extended to 16 September 2016.

[3] The s 189 consultation process has been completed. The 60-day consultative period facilitated by the CCMA in terms of s 189A expired on 11 September 2016. The present application does not concern the first respondent's compliance or otherwise with the LRA; the union does not contend that the proposed retrenchment is unfair. As I have indicated above, what the union seeks is an order interdicting the first respondent from retrenching its members 'pending the conclusion of the process envisaged in s 52'. The crisp issue for decision then is whether the completion of a fairly conducted consultation process under s 189A should be held in abeyance pending the completion of the s 52 process established by the MPRDA.

[4] Section 52 of the MPRDA reads as follows:

(1) The holder of a mining right must, after consultation with any registered trade union or affected employees or their nominated representatives where there is no such trade union, notify the Minister in the prescribed manner-

(a) where prevailing economic conditions cause the profit to revenue ratio of the relevant mine to be less than six per cent on average for a continuous period of 12 months; or

(b) if any mining operation is to be scaled down or to cease with the possible effect that 10 per cent or more of the labour force or more than 500 employees, whichever is the lesser, are likely to be retrenched in any 12-month period.

(2) The Board must, after consultation with the relevant holder, investigate-

(a) the circumstances referred to in subsection (1); and
(b) the socio-economic and labour implications thereof and make recommendations to the Minister.

(3) (a) The Minister may, on the recommendation of the Board and after consultation with the Minister of Labour and any registered trade union or affected persons or their nominated representatives where there is no such trade union, direct in writing that the holder of the mining right in question take such corrective measures subject to such terms and conditions as the Minister may determine.
(b) The holder of the mining right must comply with the directive and confirm in writing that the corrective measures have been taken.
(c) If the directives contemplated in paragraph (a) are not complied with, the Minister may provide assistance to or apply to a court for judicial management of the mining operation.'

(4) The holder of a mining right remains responsible for the implementation of the processes provided for in the Labour Relations Act (Act 66 of 1995), pertaining to the management of downscaling and retrenchment, until the Minister has issued a closure certificate to the holder concerned.'

[5] In the present instance, the first respondent is both the holder of the relevant mining right and the employer of the union's members. The process contemplated by s 52 is one in which the holder of the mining right notifies the minister after one or more of the triggering events has occurred. The board is then obliged to consult with the holder of the

mining right, to conduct an investigation and make recommendations to the minister who may, after consultation with the board and the minister of labour, direct that the holder of the mining right take corrective measures. The holder of the mining right must comply with the directives, failing which the minister may assist the party concerned to comply, or apply for an order to place the mining operation under judicial management.

[6] Ideally, when a notice issued in terms of s 52 contemplates that employees might be dismissed on account of operational requirements, the provisions of the LRA (and in particular s 189) ought to run, as Mr Bruinders SC, the union's counsel put it, 'in sync.' The few reported judgments that have considered the interrelationship between s 189 (and s189A) and s 52 illustrate that this does not happen in practice, and that the s 189 consultation process inevitably reaches its conclusion before the s 52 process has commenced.

[7] The present case is no exception. In so far as the s 52 process is concerned, the union avers that there has been 'a consultation' with the minister, but nothing has come of it. On 19 August 2016, the union's general secretary wrote to the department of mineral affairs (the DMR) to make enquiry as to the steps taken consequent on the s 52 notice. The union did not receive a response. On the same date, the union wrote to the minister requesting him to convene a meeting of all affected parties. No formal written response was ever received from the minister. It would appear that during August 2016, regional representatives of the DMR held meetings with the union, described as 'fact-finding meetings'. The DMR thereafter advised the union that it would make recommendations to the minister within two weeks. The union has not received the minutes of the meeting, nor has the DMR contacted the union since. That notwithstanding, the union submits that the DMR has clearly been investigating the matter in terms of s 52 and that there is no reason to

expect that the minister will not issue directives as contemplated by the section.

[8] In so far as these averments form the basis for the clear right on which the union relies, it should be noted that none of the above interventions are contemplated by s 52. The primary party in that process is the board, which must conduct an investigation and make recommendations to the minister. It is not for the DMR or its regional officials to conduct an investigation, even less is the DMR empowered to formulate recommendations to the minister. Only the minister can issue directives in terms of s 52(3) (a), and then only after receiving the board's recommendations and consultation with the minister of labour and the affected parties. None of these steps have been taken, and it would be fair to say that despite notice having been given on 11 July 2016, the s 52 process has yet to commence, if it going to commence at all.

[9] In *National Union of Mineworkers v Anglo American Platinum Ltd and others* [2013] 12 BLLR 1253 (LC), this court heard an application brought in terms of s 189A (13) to interdict a retrenchment in the face of an incomplete s52 process. In that matter, a s 52 (1) notice had been issued, but the board had not conducted an investigation nor had it made any recommendations to the minister, who, in turn, had not issued any directives concerning corrective measures. The court observed that s 52 and s 189 processes appeared to run in parallel, and that in the absence of any investigation by the board or any recommendations made by the board to the minister and any directives from the minister concerning corrective measures, at least from the perspective of fairness, s 52 is of little relevance (see paragraph 29 of the judgment). In other words, it did not necessarily follow that the failure by the holder of the mining right to comply with s 52 necessarily had the consequence of procedural unfairness. That is not to say that there can be no overlap between the

respective sections - the nature and extent of any overlap is to be determined by reference to the prevailing facts and circumstances (see paragraph 39).

[10] More recently, the Labour Appeal Court has had occasion to consider the interplay, if any, between s 189 and s 52. In *Association of Mineworkers and Construction Union and others v Buffalo Coal Dundee (Pty) Ltd* [2016] 9 BLLR 855 (LAC), the court held that the holder of the mining right (which was not the employer of the affected employees) ought to have been part of the s189 consultation process. The employer for the purposes of s 189 was a contractor engaged to carry out the mining operation. The court made extensive reference to the *Angloplats* judgment and disagreed only with the finding that s 52(4) acknowledges that the holder of the mining right is required to comply with s189 to the extent that the holder is the employer of the affected employees. In other words, the LAC considered that the responsibility referred to in s 52 (4) to implement a s 189 consultation process extends to the holder of a mining right which is not the employer for the purposes of s 189. This is not an issue that arises in the present instance, but I do not understand the LAC to have taken issue with the key finding in *Amplats* that s 189 and s 52 are two separate processes which may become interlinked, and that the completion of the former is not necessarily subject to the completion of the latter.

[11] The question to be determined then is whether the union has demonstrated a clear right to the relief that it seeks. The right invoked by the union is the right of its members to a s 52 process, in particular, to an investigation and recommendations by the board and a consideration of them by the minister and to any corrective measures issued by the minister. What the union contends is that if its members are retrenched, their rights in terms of s 52 will become academic.

[12] The only conceivable legal bases on which the first respondent can be prevented from completing the retrenchment process at this stage is that in the absence of the completion of the s 52 process, any dismissal for operational requirements would either be unfair or unlawful. In regard to fairness, as I have indicated, the union does not contend that the completion of the retrenchment process in the absence of the conclusion of the s 52 process would be unfair. Even if it did, the ratio of *Amplats* dictates that it is not unfair for an employer to complete a consultation process despite a s 52 never having been undertaken or completed. In regard to lawfulness, the establishment of a clear right necessarily demands an express or implied prohibition against a retrenchment before the s 52 process is completed. There is no express provision to this effect either in the MPDRA or the LRA, nor is such a prohibition implied. In the absence of any prohibition on any completion of a consultation process, I fail to appreciate the basis of the union's claim to a clear right to relief. To the extent that Mr Bruinders submitted that the union relies on process-related rights established by s 52 and that the absence of any express or implied prohibition against completing a retrenchment exercise pending the conclusion of a s 52 process was irrelevant, s 52 does not establish procedural rights in any substantive sense. Unlike s 189, which creates clear procedural requirements that can be enforced either by a claim of procedural unfairness or, in the case of s 189A an application in terms of s 189A (13), the union is left to speculate as to what the board might recommend should it ever conduct an investigation, and what the minister might direct, should he act on any recommendation. There is always the prospect, of course, that the board might never make any recommendations. There is also the prospect that the minister might never issue any directives that are concerned with job saving and which impact on the retrenchments. He may elect to issue no directives. To place a moratorium on any retrenchments in these circumstances is plainly unworkable.

[13] No doubt, s 52 was intended to afford the board and the minister, amongst other things, an opportunity to intervene to protect the right to security of employment, or least to ameliorate the employment-related consequences of the financial difficulties confronting a mining operation that gives notice in terms of the section. In the present instance, the intentions that underlie s 52 have not been realised. It would appear that the two principal actors, the board and the minister, have done nothing in response to issuing of the s 52 notice. To the extent that the DMR has intervened, that intervention is not one which is contemplated by s 52. The provisions of s 52 (2) are peremptory – the board *must* consult, investigate and make recommendations. While the minister is not obliged to require the holder the mining right to take corrective measures (subsection (3) (a) provides that the minister 'may' issue directives), it is clear that the minister must at least consider any recommendations are made by the board. The board has a statutory mandate to ensure that there is, in the words of the board's vision, 'coherent and collaborative stakeholder participation in the governance of a competitive and sustainable minerals and petroleum industry'.

[14] If s 52 has been rendered ineffective and hollow in the present case, that is not the first respondent's doing. It would seem to me that any clear right for the purposes of the present application lies against the board and the minister, not against the first respondent, an employer that has on the common cause facts complied with all of its statutory obligations in relation to the fair termination of the employment of its employees.

[15] Finally, in relation to costs, counsel agreed that this is not a matter in which a costs order is appropriate. I agree. The interests of the law and fairness referred to in s 162 of the LRA require each party to pay its own costs.

I make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv T Bruinders SC, instructed by Cheadle Thompson and Haysom Inc.

For the 1st to 3rd respondents: Adv AT Myburgh SC, instructed by ENS Africa Inc.