IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No.: JA 65/2009

DE BEERS GROUP SERVICES (PTY) LTD — **Appellant**

and

NATIONAL UNION OF MINEWORKERS — **Respondent**

JUDGMENT:

DAVIS JA:

Introduction

[1] On 21 January 2009, four members of respondent ('individual respondents') were issued with notices in terms of section 189 (3) of the Labour Relations Act ('the Act'), inviting them to consult with appellant with regard to their proposed dismissals based on operational requirements.

[2] On 13 March 2009, individual respondents were issued with notices advising them of their retrenchment and that their notice period would run from 22 March 2009 to 23 April 2009. On 22 March 2009, the notice of termination began, some sixty days after the issue of the notices in terms of section 189 (3) of the Act. On 14 April 2009, respondent referred the

dispute to the CCMA for conciliation, that is some three months after the section 189 (3) notices was issued, thirty days after the issue of the notice of termination and nine days before the individual respondents were due to be retrenched.

[3] On 23 April 2009, the individual respondents were retrenched. On 19 May 2009, the conciliation meeting took place at the CCMA which issued a certificate of non resolution.

[4] On 4 June 2009, the respondent sought an order from the court *a quo*:

1. Declaring that the notices of termination issued to the individual respondent on 13 March 2009, to be of no force in effect;
2. Alternatively, directing the company to reinstate the individual respondents, pending compliance of a fair procedure and the requirements of 189 A (8) and the further alternative of awarding the individual respondents compensation for procedural unfairness.

[5] On 9 June 2009, Bhoola J, in the court *a quo,* ordered the reinstatement of the individual respondents. On 24 June 2009 the learned judge then provided comprehensive reasons for her order. It is against this order

that the appellant, with the leave of the court *a quo,* has approached this court on appeal.

The basis of the judgment of the court *a quo*

[6] In arriving at the conclusion that the notices of termination were tainted by prematurity and were therefore invalid and of no force and effect, Bhoola J held that no consensus on the retrenchment of the individual respondents have been reached. It could thus 'not be contended that it was not clear to the employer that consensus had not been reached'. Once consensus was not reached within thirty days of the issue of the notices, pursuant to section 189 (3) of the Act, a dispute of interest automatically existed, which dispute had to be referred to the CCMA for conciliation. Thirty days then had to be allowed to elapse before the requisite termination notices could be issued.

[7] In the view of the learned judge in the court *a quo*, section 189 A(2)(a) had to be interpreted to the effect that compliance with the provisions of section 189 A were peremptory, as a result of which a premature issue of a termination notice, without compliance in terms of section 189 A (8), rendered the notices void *ab initio.*

[8] Dealing with the question of procedural fairness, Bhoola J held that the employer's failure to consult with first respondent was 'a fatal and

irredeemable' procedural error. Hence, on the basis that the notices of termination were invalid and that there was an absence of procedural unfairness, the court found that reinstatement was justified. The key conclusion of the learned judge in the court *a quo* is captured in the following passage:

> "*In the premises, I confirm the orders issued in the three matters to the effect that the notices of termination were issued prematurely… in terms of section 189 A(7) and (8), and are of no force and effect. In addition, the notices issued at Exploration are furthermore invalid on the ground that they were not preceded by compliance with a fair procedure … as required by section 189A(13) read with section 189A(14). In consequence of the orders, for the reasons set out above, the applicant's members are reinstated until such time as valid termination notices may be issued, and, in the Exploration matter, until the respondent has complied with a fair procedure*."

Appellant's case

[9] It was common cause that section 189 A of the Act was applicable to the disputed process and that no facilitator had been appointed to assist in the dismissal process pursuant to section 189 A (3) or (4). Hence it is necessary to turn to section 189 A (8).

[10] Section 189 A (8) provides thus:

> *"(8) 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)."*

[11] Mr Myburgh, who appeared on behalf of appellant, submitted that the court *a quo* had erred in interpreting section 189 A (8) of the Act as meaning that, in the absence of a union doing so, an employer is obliged

to refer a dispute to the CCMA before it can issue notices of termination. In Mr Myburgh's view, the court *a quo* effectively had read into section 189 A(a) a new subsection to the effect:

> "*In circumstances where there is a lack of consensus or a dispute over any aspect of the proposed retrenchment, the employer may not give notice to terminate the contracts of employment in accordance with section 37(1) of the Basis Conditions of Employment Act unless a party has referred a dispute to the council or the Commission*."

[12] Mr Myburgh contended that, if section 189 A (8) was to be read to include the provision which he had set out, it was surprising that the legislature had not used these words to bring clarity to the section. Further, he submitted that section 189 A(8) had to be read together with section 189 A(9) which provides that notice of the commencement of a strike may be given if the employer dismisses or gives notice of the dismissal before the expiry of the periods referred to in subsection (7) (a) or (8) (b) (i).

[13] Mr Myburgh further submitted that this provision must be read together with section 189 A(11) (a), which provides, *inter alia,* that section 64 (1)(b) of the Act applies to any strike. In terms of section 189 A read with section 64 (1)(b) the Act a union must give an employer 48 hours notice of a strike so as to render the strike protected. In Mr Myburgh's view, this

meant that, where an employer dismisses or gives notice of termination before the expiry of the period referred to in section 189 A (8) (b) (i), the union may embark on a retaliatory strike, but significantly it must give 48 hours notice thereof.

[14] The fact that the union cannot call out its members on an immediately protected strike demonstrated that an employer may permissibly act ‘unilaterally’ in the sense of not complying with section 189 A(8) before giving notice of termination.

[15] In the event that the strictures of section 189 A(8) are not followed by an employer, the Act provides in section 189 A(13), read together with subsections (14) and (17), that a union may, *inter alia,* obtain status *quo* relief during the course of a retrenchment, in the event of the employer seeking to terminate hastily without following a fair procedure. If the union seeks relief in terms of section 189 A(13), it is not prevented from thereafter embarking upon a strike as the limitation on strike action contained in section 189 A (10) (a) (i) only applies to referrals to the Labour Court in terms of which a ‘fair reason’ for dismissal is challenged.

[16] Having carefully sketched this architecture, Mr Myburgh submitted that section 189 A(8) fitted into the entire scheme of section 189 A as follows:

1. An employer is required to give notice of a contemplated retrenchment of section 189 (3).
2. Where a facilitator is not appointed, the parties will consult in the ordinary course, for at least thirty days with a view to ensuring compliance with the provisions of section 189.
3. If the employer considers that it has exhausted the consultation process and can defend the fairness of the retrenchment in any litigation, it is entitled to issue a notice of termination, 30 days after the section 189 (3) notice.
4. If it does do so, a union can embark on a retaliatory strike after serving 48 hours of notice, without any referral dispute to the CCMA.
5. A further option, which is available, would be to challenge the fairness of the procedure followed by the employer in terms of a section 189 A (13) application.
6. If the employer is concerned about its prospects of success in such litigation or is concerned about a strike, instead of issuing a notice of termination it may decide to refer a dispute to the CCMA before issuing such notice, in the hope that the latter’s intervention may improve its situation.
7. After a lapse of thirty days, subsequent the referral, the employer would again be in a position to consider issuing notices of termination; and

8. The employer may or may not do so, given that the union could *inter alia* then embark on a retaliatory strike, pursuant to giving 48 hours notice.

[17] On the basis of this interpretation, Mr Myburgh submitted that the appellant was entitled to give notice to terminate the employ of the individual respondents, thirty days after the issue of the section 189 (3) notice, without referring the dispute to the CCMA for conciliation, with the result that the notices of termination were properly issued.

Evaluation

[18] Section 189 A (8) provides that, in the event that a facilitator is not appointed, a party may not refer a dispute to a bargaining council or the CCMA unless a period of 30 days had lapsed from the issue of the section 189 (3) notice and further may only issue the termination notice once the period mentioned in section 64 (1) has elapsed. That period is set out thus:

"*Every employee has the right to strike and every employer has recourse to lock out if:*

(a) the issue in dispute has been referred to a council or a Commission as required by this Act and

(i) a certificate stating that the dispute remains unresolved as been issued; or

> *(ii) a period of thirty days, or any extension of that period agreed to between the parties to the dispute has elapsed since the referral was received by the council or the Commission …"*

[19] In National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd (2006) 27 ILJ 1909 LC, Freund AJ considered the implications of section 189 A (8) read together with section 189 A (2) which provides *inter alia* that an employer must give notice of termination of employment in accordance with the provision of the section. Reading the two sections together, Freund AJ held:

> "*I think it is clear that the lawgiver intended that the employer may only give notice to terminate the contracts of employment if the periods mentioned in s 64 (1)(a) have elapsed*." para 35

[20] Accordingly, where a facilitator is not appointed, section 189 A (8) is the operative provision. Thus:

> "*A well advised employer intent upon giving notice to terminate the contracts of employment as soon as is lawfully permissible is not prevented by section 189 A (8) from giving such notices for any longer than the same sixty day period. To procure this result the employer must ensure that the relevant dispute is referred to a bargaining council or the CCMA as soon it is permissible in terms of*

section 189 A (8) (a), i.e. as soon as thirty days have elapsed from the date on which the notice was given in terms of section 189 (3). Of course, the employer is not obliged to refer the dispute at the earliest permissible moment, but if it fails to do so, the consequence may be that, if agreement is not reached in respect of the retrenchments and the dispute is referred for conciliation, it will have to hold off from issuing notices of termination for the periods mentioned in section 64 (1) (a)." para 36

[21] In my view, this approach, as adopted by Freund AJ, is the only one which is clearly justified in terms of the express wording of section 189 A (8). The section envisages that a period of thirty days must have lapsed from the date on which notice was given in terms of section 189 (3) before the party may refer the dispute to the Council or the Commission. In addition to the thirty day period, there is the further period set out in section 64 (1) (a) which must lapse before the employer can give notice to terminate the contracts of employment. Hence if a dispute existed, the question arises as to whether it should have been referred, that is after the initial thirty day period.

Was there a dispute for the purposes of the section?

[22] The inquiry therefore shifts to whether a dispute of interest automatically existed, in the absence of consensus, which necessitated that it be

referred to the CCMA; that is, on the evidence in the present case, was the appellant faced with a dispute which required it to refer to the CCMA which, in turn, would have triggered off the time periods contained in section 189 A (8), which I have already outlined?

[23] Mr Myburgh submitted that, in order for a dispute to exist it must have been articulated or otherwise manifested itself. In other words, the evidence in the present case did not sustain a conclusion of the existence of a dispute. In this connection he relied upon the decision in Leonie Wiring Systems (East London) (Pty) Ltd v NUMSA and others (2007) 28 ILJ 642 (LC) at para 17-18.

> "*Quite clearly that then requires that, where no facilitator has been appointed, a dispute must first be referred to a council or the commission after a period of 30 has lapsed from the date on which notice had been given in terms of s 189(3) of the LRA. Only once a certificate stating that the dispute remains unresolved has been issued, or a period of 30 days, or any agreed extension thereof, has elapsed since the referral was received by the council or the commission, and a registered union or the employees received a notice of termination of employment, may notice of a strike be given and there then be a strike. Section 189A (11) (a) (i) specifically indicates that s 64 (1) (a) does not apply if a facilitator is appointed in terms of s 189 A. It will be remembered that s 64 (1) (a) of the*

LRA is the specific section which requires that an issue in dispute be referred to a council or commission prior to strike or lock-out action.

I have accordingly concluded that, unless s 189A (9) applies, when a dispute has arisen between the parties, employees are not permitted to have recourse to protect strike action without first complying with s 64 (1) (a) of the LRA, and having referred the dispute to a council or commission. In addition, this referral may only take place 30 days from the date on which a s 189 (3) notice has been given and further only after a registered trade union or the employees have received notice of termination of their employment."

[24] By the time the notices of termination were issued, in the present case, there had been no expression by the parties of conflicting views concerning the retrenchment of the individual respondents, whether in relation to the employer's failure to consult respondent or otherwise. Accordingly, Mr Myburgh contended that there was not a dispute which was capable of being referred to the CCMA for conciliation in terms of section 189 A (8) and hence the appellant was under no obligation to do so. For these reasons, Mr Myburgh submitted that, even if this court was to follow the construction as adopted by Freund AJ in the National Union

of Mineworkers v De Beers Consolidated Mines (Pty) Ltd, *supra*, the time periods were inapplicable in so far as the present case was concerned.

[25] In Leonie Wiring Systems, *supra* at para 26 Nel AJ dealt with the problem of determining whether a dispute exists fo the purpose of a referral:

> "*As soon as an employer and the other consulting party/ies have reached consensus on all the issues underlying the employer's proposed retrenchment, or in the absence of a clear dispute between the parties, or if the employer reasonably believes there was no dispute between the parties, the employer may give notice of dismissal by reason of operational requirements without further ado. Whether any of these circumstances existed at the time that the employee issued its notice of termination will obviously be a factual question to be determined in every case*." para 26

[26] It does not appear that the correctness of this *dictum* was disputed in this case. The question however arises as to whether there was a dispute between the parties which would have required a referral to the CCMA as contended for by respondents. It is to this question that I must now turn.

[27] In his founding affidavit, Mr Rakau states:

> *"Following the issuing of the notices dated 21 January 2009 De Beers Group Services held feedback sessions with employees of*

which information about its plan to restructure was conveyed. Employees were invited to submit their CV's for consideration by the panel established by the respondent to select the employees to be retrenched. On or about 2 March 2009, Messrs Seefane, Nkwana and Mazibuko informed the respondent that they would not submit their CV's because of the non involvement of the union. Mr Raselave submitted his CV in the hope that he would be placed in the respondent's new structure. On 13 March 2009, De Beers Group Service issued notices of retrenchment to the union members named… above."

In the answering affidavit of Ms Madondo, she averred that on 12 or 13 March 2009 and before the termination notices were issued, 'one-on-one discussions' were held between the individual respondents and their respective line managers. Ms Madondo continues:

> "*None of the individual applicants raised any dispute regarding the retrenchment process during these discussions*."

In reply, Mr Rakau states:

> "*These one-on-one meetings were held to discuss arrangements for individual applicants' exit from the company. No consensus regarding the retrenchments had been reached, however, and discussions regarding severance pay and measures to mitigate the adverse affects of the dismissals had not been concluded at the central forum."*

[28] Based on these affidavits, Mr van der Riet, who appeared on behalf of the respondent, submitted that nowhere did the appellant allege that consensus had been achieved before the notice of termination on 14 March 2009. He referred to the referral form which was attached to founding affidavit in which it was stated that the dispute arose on the 13 March 2009 and concerned appellant's decision to retrench four of its employees. The result sought in the conciliation process was that the employer had to agree not to retrench these employees. Furthermore, it was alleged by the respondent that consultations which were taking place between the parties at the Central Forum which had been set up with the purpose to promote communication and engagement on appropriate matters of interest between the parties. The forum comprised respondent's chairperson and the fulltime shop stewards at each specific division together with an equal number of company representatives. It had not concluded its consultations and consensus had not yet been reached.

[29] In order to rebut this line of argument, Mr Myburgh referred to the approach adopted by Nel AJ in Leonie Wiring Systems, *supra* at para 25 where the learned Acting Judge concluded that:

> *"[t]he only sensible interpretation of s189 A (8) is to the effect that its provisions only become operative in the event that, prior to the employer giving notice of termination, there is a dispute which has*

> *arisen between the parties about some or other procedural or substantive aspect of the proposed retrenchment*"

In other words, the notice of retrenchment was given on 13 March 2009, whereas the referral by the respondent to the CCMA for conciliation took place on 14 April 2009, that is 30 days after the issuing of the notice of termination and 9 days before the individual respondents were due to be retrenched. On the basis of the approach adopted by Nel AJ, it was not competent for respondent to act in this fashion and section 189 A (8) does not come to its assistance, as on its own version, the 'dispute' arose after the issue of the termination notices.

[30] This construction is based on two assumptions, namely that a failure to reach agreement on the retrenchment does not constitute, of itself, a dispute and, secondly that the dispute continues for the purposes of this section only from the time of contemplation of dismissal as set out in section 189 (1) of the Act until the issue of a notice of termination of employment. As will be shown below, a rejection of these assumptions may not be necessary to find the existence of a dispute.

[31] In order to determine what constitutes a dispute for the purposes of section 189, read together with section 189 A of the Act, it is important to turn to the purpose of sections 189 and 189A. Section 189 (1) creates a duty upon the employer to consult in the event of a contemplation of

dismissal for operational requirements. Section 189 (2) provides that the employer and the other consulting parties must in the consultation as envisaged by subsections (1) and (3), engage in a meaningful and joint consensus process in an attempt to reach consensus on what is considered to be appropriate measures to deal with the contemplation of dismissal. Thus, subsection (2) gives content to the general duty in terms of section 189 (1), namely that an employer, when it contemplates dismissing one or more employees on the basis of operational requirements must consult either the parties as set out in terms of a collective agreement, the work place forum and the registered trade union, whose members who are likely to be affected by the proposed dismissals or, in the absence of a union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

[32] The section contemplates a dispute, namely that the employees, quite obviously, do not accede to losing their employment and there is then a need for a fair process. Hence a consultation process is designed to ensure that some form of consensus can be reached as how to deal with a problem of a reduction of a workforce based on the employers operational requirements. In this case, no such consensus had been reached as to how to deal with the affected employees. So much is clear from a reading of the founding, answering and replying affidavits. In other words, as at the time that the termination notices were issued on 13 March 2009, an

agreement had not been reached about the dismissals and, accordingly, by implication, a dispute, within the meaning of section 189, remained to be resolved. But the section goes further. In the case of a facilitator not being appointed, a notice of termination can only be issued once a 30 day period has elapsed from the issuing of the initial notice, pursuant to section 189 (3) and a further 30 days has elapsed, as set out in section 189 A(8) (b) (i). In this case the fact that there was a dispute, as I have interpreted it, then once a period of 30 days had elapsed from the date of the issue of the section 189 (3) notice, appellant was in a position to refer the dispute to the Commission. If the further period, as set out in section 64 (1) (a) of the Act had elapsed since that referral, then it would have been competent for the appellant to give notice to terminate the contracts of employment of the individual respondents. That, is, of course, what the appellant failed to do in this case.

[33] The construction of the applicable sections which I have adopted does not mean that a party in the position of appellant is not without remedies. In terms of section 189 A (3), an employer, in its section 189(3) notice, can request the Commission to appoint a facilitator. Once a facilitator is appointed and 60 days have lapsed from the date on which the section 189 (3) notice is concerned, an employer is entitled to give notice to terminate the contracts of employment. The failure to engage a facilitator to assist in the complex problems of dismissals based on operational

requirements means that a party, such as appellant, has chosen to fall within a regime which is less precise, viewed from its point of view, than that which is available once the facilitator is appointed as provided for in section 189 A (7). In a case in which section 189A (8) applies, the employer must be clear that agreement has been reached and thus, as in this case, a dispute is not alive at the time termination notices are issued. If its position on the evidence, is unjustified, then it runs the risk of acting prematurely.

[34] Mr Myburgh submitted that, even if a short notice had been given, it was nevertheless a valid notice, basing his argument on the decision in Honono v Willowvale Bantu School Board and another 1961 (4) SA 408 (A) at 414. That the *dictum* of Hoexter ACJ in Honono clearly is inapplicable to a situation such as the present dispute where, upon the reading of section 189 and section 189 A read together as I have set it out, the notice was in breach of the sections. The relevant dictum in Honono is illustrative of the distinction between the present case and the facts in Honono:

> *"Counsel for the appellant argued that the notice of termination was invalid because it was not served, as required by sec. 10 of the regulations, during the first week of the school quarter. The letter was written on the 18th January, during the first week of the school quarter, but it was served on the appellant only after the lapse of*

that week. It appears that the letter quoted above was registered and sent to the attorney who had previously acted on behalf of the appellant and that it was probably received by the attorney during the first week of the school quarter. There was however no proof that the attorney was authorised to receive notice of termination on behalf of the appellant, and the notice was therefore insufficient to terminate the appellant's appointment on the 31st March, 1958. It does not follow, however, that it had no force and effect whatever. As a result of the conditions of service imposed upon the appellant by the regulations, his position, as far as notice of termination or dismissal is concerned, was equated with that of any common law servant. That being so, it follows from the judgment of Innes, CJ, in the case of Pemberton, N.O. v Kessel, 1905 T.S. 174, that the notice served on the appellant on the 27th January, was sufficient and valid to terminate his appointment on the 30th June, 1958, at the end of the second school quarter."

[35] Citing Brassey *Commentary on the Labour Relations Act* at A 8 – 116, Mr Myburgh submitted that, where there is non compliance with section 189, there is nothing in the section which indicates what should occur if the duty imposed upon an employer is breached. In short the court, in his view, would be at large to consider whether the dismissal was unfair. This submission turns upon the question of the effect that notices of

termination are issued prematurely and hence, contrary to the provisions section 189 and 189 A. In dealing with this question Freund AJ in the National Union of Mineworkers case *supra* at para 40 said:

> "*Section 189 A (2) provides explicitly and in imperative language that the employer 'must' give notice of termination in accordance with the provisions 189 A. It would, in my view, flout. the intention of the lawgiver and the policy underlying s 189 A to recognise the validity of notices given in contravention of s 189 A (8).*"

[36] In short, if the employer fails to comply with the mandatory requirement of consultation in terms of section 189 (2) and moves to terminate the employment in breach of these provisions, than the dismissal must be considered to be invalid and accordingly of no force and effect. A valid notice, as was held by Bhoola J in the court *a quo* at para 50, could only have been issued once the certificate of outcome had been produced. In my view therefore, the declaratory order which was issued by the court *a quo* was justified in terms of the law. For these reasons, the following order is made.

1. The appeal is dismissed with costs.
2. The order of the court *a quo* of 9 June 2009 is confirmed.

DAVIS JA

I agree

WAGLAY DJP

I agree

HENDRICKS AJA

Appearance:

For the appellant	Adv. A.T Myburgh
Instructed by	Perrot Van Niekerk Woodhouse Matyolo Inc
For the respondent	Adv. J.H Van Der Riet SC
Instructed by	Cheadle Thompson Haysom
Date of Judgment:	20 December 2010