

REPUBLIC OF SOUTH AFRICA



THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Not Reportable

Case no: J593 /15

In the matter between:

ASSOCIATION OF MINEWORKERS AND

CONSTRUCTION UNION (AMCU)

INDIVIDUALS LISTED IN ANNEXURE "A"

First Applicant

**Second to further
Applicants**

and

BUFFALO COAL DUNDEE (PTY) LTD

First Respondent

ZINOJU COAL (PTY) LTD

Second Respondent

Heard: 14 April 2015

Delivered: 24 April 2015

Summary: Application in terms of the provisions of section 189A(13) of the Labour Relations Act. Application of section 200B. No retrospective application.

JUDGMENT

PRINSLOO, AJ

Introduction:

[1] The Applicants approached this Court on an urgent basis seeking an order in the following terms:

- a. An order declaring that the Respondents have failed to comply with a fair procedure in terms of section 189A(13) of the Labour Relations Act¹ (LRA) and with section 52 of the Mineral Petroleum Resources Development Act² (MPRDA);
- b. Interdicting the Respondents from giving effect to the notices of termination issued on 11 March 2015 which notices of termination take effect on 11 April 2015, until such time the Respondents complied with a fair procedure and complied with the obligation set out under the MPRDA and particular the social and labour plan;
- c. Alternatively if the Court finds that the notices of termination issued to the individual applicants resulted in their dismissal, direct the Respondents to reinstate the individual applicants until there is compliance with a fair procedure and section 52 of the MRPDA, alternatively order the payment of 12 months compensation, further alternatively refer this matter to trial.

[2] The Applicants' cause of action is based on two pieces of legislation namely the LRA and the MPRDA.

[3] The application is opposed.

Brief history

[4] On 22 December 2014 the First Respondent (Buffalo Coal) issued a notice in terms of section 189(3) of the LRA to the National Union of Mineworkers (NUM) and the First Applicant (AMCU). In the section

¹ Act 66 of 1995.

² Act 49 of 2008

189(3) notice Buffalo Coal explained that it operated under increasingly difficult financial circumstances for the past two years and undertook a number of restructuring measures in order to support and turn around its financial position. The initiatives Buffalo Coal implemented are set out in the section 189(3) notice.

- [5] The section 189(3) notice is an 18 page document setting out in detail the reasons for the proposed dismissals, the alternatives considered by Buffalo Coal before proposing the dismissals, the number of employees likely to be affected and the job categories, the proposed method of selection, timing of the dismissals, proposed severance pay, assistance offered and the possibility of future employment.
- [6] Also on 22 December 2014 the Second Respondent (Zinoju) advised the Department of Mineral Resources (herein referred to as the DMR) that Buffalo Coal issued a section 189(3) notice to commence a retrenchment process.
- [7] On 23 December 2014 Buffalo Coal requested facilitation through the Commission for Conciliation, Mediation and Arbitration (CCMA). Mr Ndaba was appointed as facilitator and on 14 January 2015 the CCMA set down the section 189A facilitation for 20 January 2015.
- [8] On 20 January 2015 the first consultation meeting was attended by the facilitator and representatives of Buffalo Coal, AMCU and NUM. There was no interpreter available and in the absence of an interpreter NUM and AMCU were unwilling to proceed with the meeting, whereupon it was postponed and rescheduled for 30 January 2015.
- [9] At the second meeting on 30 January 2015 Buffalo Coal provided the unions with its financial statements. A copy of the Social and Labour Plan (SLP) was also provided. Buffalo Coal indicated that it had no obligation to comply with the obligations set out in the SLP. AMCU rejected this on the basis that Buffalo Coal was the majority shareholder of Zinoju. The two trade unions requested further information, which Buffalo Coal

undertook to provide by 4 February 2015. Most of the meeting was spent taking the unions through the section 189 notice.

- [10] On 3 February 2015 the facilitation process continued and AMCU raised the issue that the DMR had issued a directive to Zinoju to comply with the SLP. Buffalo Coal once again adopted the attitude that it did not have to comply with the SLP.
- [11] On 4 February 2015 Buffalo Coal responded to the question posed by AMCU on 30 January 2015 and indicated that Zinoju would not be participating in the section 189 process as it is not retrenching any employees.
- [12] On 5 February 2015 AMCU addressed a letter to Buffalo Coal recording that it failed to comply with the provisions of the MRPDA and the SLP.
- [13] On 7 February 2015 the NUM indicated that they would proceed to participate in the section 189 consultation process.
- [14] A third consultation meeting was scheduled for 9 February 2015. AMCU once again raised the issue that Buffalo Coal had to comply with the obligations set out in the SLP, however Buffalo Coal persisted with its stance that there was no need for it to comply with the SLP and further that it had no obligations under the SLP. Most of this meeting was spent to deal with the relationship between Buffalo Coal and Zinoju and the respective obligations under the SLP and section 189 of the LRA.
- [15] AMCU proposed the formation of a task team to look into the restructuring and retrenchments required at Buffalo Coal's Magdalena underground operations (MUG). Mr Ndaba directed that the task team be set up and that a meeting be set up with the DMR.
- [16] On 10 February 2015 the task team was set up and on 11 February 2015 the terms of reference were agreed to. AMCU proposed that a technical mining expert should accompany and assist the task team. The proposal was accepted and on 16 February 2015 the task team met. On 17 and 18 February 2015 the technical mining expert appointed by AMCU went

on a detailed site visit with other members of the task team. The expert was granted access to technical and financial information to enable him to provide a comprehensive expert assessment to the task team. The task team subsequently produced a report on 19 February 2015.

- [17] On 23 February 2015 the fifth consultation meeting, facilitated by Mr Ndaba, took place. Officials from the DMR attended this meeting. The parties had to study and consider the task team's report and the meeting was adjourned to 24 February 2015. AMCU requested Zinoju's financial statements, which were provided and AMCU proposed an extension of the consultation process to take advice on the financial statements provided.
- [18] The parties met on 24 February 2015 for the sixth consultation meeting and it was agreed that the task team would continue to meet over the period 25 – 27 February 2015, although the consultation process under the LRA had come to an end. AMCU made verbal proposals to alleviate the dismissals and the task team met over the agreed period. On 11 March 2015 the proposals from AMCU were made in writing. AMCU proposed that LIFO be applied as selection criteria.
- [19] On 25 February 2015 the task team produced a further report. The report concluded that MUG was in a dire financial position.
- [20] The LRA consultation process as well as the extended period for the task team came to an end when the parties on 2 March 2015 agreed to a special meeting to consider the task team's latest report and recommendations. At this meeting measures to avoid dismissal were discussed.
- [21] The period between 2 and 10 March 2015 was utilised as a deliberation period to consider and address the verbal recommendations made by AMCU on 24 February 2015. On 10 March 2015 the final decision on retrenchment was taken and subsequently on 11 March 2015 the retrenchment notices were issued. Also on 10 March 2015 AMCU

objected to the termination of the employees services and proposed that the consultations continue and the facilitation process be extended.

[22] On 11 March 2015 AMCU raised a number of issues in relation to the section 189 consultation process.

[23] AMCU filed this application on 19 March 2015 and the matter was enrolled on an urgent basis on 14 April 2015.

The purpose of section 189A(13)

[24] Section 189A(13) reads as follows:

“If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order —

(a) compelling the employer to comply with the fair procedure;

(b) interdicting or restraining the employer from dismissing an employee prior to complying with the fair procedure;

(c) directing the employer to reinstate an employee until it has complied with the fair procedure;

(d) make an award of compensation, if an order in terms of paragraphs (a)–(c) is not appropriate.”

[25] In *Banks and another v Coca-Cola SA - A Division of Coca-Cola Africa (Pty) Ltd*³ the Court summarized the role of the Court in a section 189A(13) application as follows:

“In short, the conclusion to be drawn from the wording of s 189A is that this court appears to have been accorded a proactive and supervisory role in relation to the procedural obligations that attach to operational requirements dismissals. Where the remedy sought requires intervention in the consultation process prior to dismissal, the court ought necessarily to afford a remedy that accounts for the stage that the consultation has reached, the prospect of any joint consensus-seeking engagement being resumed, the attitude of both parties, the nature and

³ (2007) 28 ILJ 2748 (LC).

extent of the procedural shortcomings that are alleged and the like. If it appears to the court that little or no purpose would be served by intervention in the consultation process in one of the forms contemplated by s 189A(13)(a), (b) and (c), then compensation as provided by para (d) is the more apposite remedy”.

The urgent application

[26] The Applicant approached the Court on an urgent basis in terms of the provisions of section 158(1)(a)(i) to (iv) and section 189A(13) of the LRA, seeking the relief as set out in its notice of motion.

[27] AMCU identified four broad complaints namely:

1. Notices of retrenchment were issued to the individual applicants (the employees) on 10 March 2015 where the Respondents failed to follow a fair procedure;
2. The Respondents failed to comply with the provisions of the MPRDA in particular the obligations set out in the social and labour plan submitted thereunder;
3. The Respondents excluded Zinoju from the consultation process on the basis that it is not the employer of the employees;
4. The parties have not consulted over the issues as set out in section 189(2)(a)(iii), (iv), (b) and (c) of the LRA.

[28] These issues are pertinent in deciding this matter.

The liability of the First and Second Respondents

[29] It is prudent to deal with the liability of the Respondents before the merits of this application are considered.

[30] Buffalo Coal is the holding company and Zinoju is a 70% owned and controlled subsidiary of Buffalo Coal. Zinoju is the holder of the mining rights and Buffalo Coal performs the mining operations.

- [31] As the mining rights holder Zinoju had to submit a SLP to the DMR in accordance with Regulation 46 of the MPRDA.
- [32] Regulation 46 of the MPRDA requires that the SLP must contain processes pertaining to the management of downscaling and retrenchment which must include the establishment of a future forum, mechanisms to save jobs and avoid job losses, mechanisms to provide alternative solutions and procedures for creating job security where job losses cannot be avoided and mechanisms to ameliorate the social and economic impact where retrenchment or the closure of the mine is certain.
- [33] The SLP provides for the establishment of a future forum that is constituted as agreed and consists of management representatives and workers or their representatives. If discussions with the future forum had been exhausted and job losses cannot be avoided, the provisions of section 189 and 189A of the LRA will be implemented and a consultation process will be initiated with the relevant employee and representative organisations.
- [34] The contracts of employment of the employees are with Buffalo Coal.
- [35] AMCU seeks that Buffalo Coal and Zinoju be regarded as co-employers and that they be held jointly and severally liable to the Applicants, as the obligations set out in the SLP would be rendered nugatory if Zinoju is not regarded a co-employer.
- [36] The Respondents' case is that Buffalo Coal is the employer and Zinoju is nothing more than the holder of the mining rights. Buffalo Coal as the employer has the statutory obligation to comply with section 189 and 189A of the LRA and there is no such obligation on Zinoju.
- [37] AMCU seeks to invoke the provisions of section 200B of the LRA, as amended, to hold Zinoju liable as a co-employer.

- [38] Section 200B has been inserted by section 40 of the Labour Relations Amendment Act⁴ and reads as follows:

Liability for employer's obligations

- (1) For the purposes of *this Act* and any other employment law, 'employer' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of *this Act* or any other employment law.
- (2) If more than one person is held to be the employer of an employee in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of *this Act* or any other employment law.
- [39] It is important to mention the fact that Section 200B came into operation on January 2015.
- [40] Mr Watt-Pringle for the Respondents submitted that section 200B does not apply in this case for two reasons. Firstly the operation of section 200B is not retrospective and secondly there was no intention or effect to defeat the purposes of the LRA.
- [41] Mr Watt-Pringle submitted that the section 189 process was triggered when Buffalo Coal anticipated retrenchment and the process commenced on 22 December 2014 when the section 189(3) notice was issued and also when Buffalo Coal requested the appointment of a CCMA facilitator on 23 December 2014. The consultations and eventual retrenchment that followed in 2015 were a continuation of the process that commenced before section 200B became operational.
- [42] The Respondents submitted that had it not been for the provisions of section 200B, Zinoju would not be party to this application and since it cannot apply retrospectively, it cannot apply *in casu*.

⁴ Act 6 of 2014

- [43] Mr Watt-Pringle further submitted that even if section 200B applies to Zinoju and if it is deemed to be a co-employer with Buffalo Coal, the implication would be that it could be held liable jointly and severally with Buffalo Coal for non-compliance with sections 189 and 189A of the LRA. Section 200B does not bear the implication that Zinoju must consult pursuant to sections 189 and 189A.
- [44] Mr Boda for the Applicants and in addressing the issue of the retrospectivity of section 200B of the LRA referred to the matter of *Bandat v De Kock*⁵ wherein Snyman AJ considered whether the amendment of section 11 of the Employment Equity Act⁶ (EEA) will apply retrospectively as the amended section did not apply when the claim arose and the statement of case was filed but applied when the matter was adjudicated. In *Bandat* the Court concluded that there is nothing in the EEA or the amendment thereof that indicates that it must be applied retrospectively and the procedure prior to the amendment must find application.
- [45] Mr Boda argued that the conduct in the form of consultation and retrenchment was subsequent to the amendment and therefore section 200B should apply and Zinoju should be held to be the co-employer.
- [46] Although the argument put forward by Mr Boda was persuasive, it did not go far enough to convince me that section 200B should apply *in casu* and that Zinoju should be held liable as co-employer.
- [47] I accept the position as set out in *Bellairs v Hodnett and another*⁷:

"There is a general presumption against a statute being construed as having retroactive effect and even where a statutory provision is expressly stated to be retrospective in its operation it is an accepted rule that, in the absence of a contrary intention appearing from the statute, it

⁵ (2015) 36 ILJ 979 (LC).

⁶ Act 55 of 1998

⁷ 1978 (1) SA 1109 (A).

is not treated as affecting completed transactions and matters which are the subject of pending litigation”.

- [48] Even if I am wrong on that, the wording of section 200B does not assist the Applicants in seeking to hold Zinoju liable as co-employer. Section 200B provides that *'employer' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law'*.
- [49] The allegations made by the Applicants are that Buffalo Coal and Zinoju should be held liable jointly and severally because Buffalo Coal is the holding company and Zinoju is a 70% owned and controlled subsidiary of Buffalo Coal and the two entities have the same directors.
- [50] It is evident that section 200B requires more – it requires an intention or an effect to defeat the purposes of the LRA or any other employment law. As already pointed out Zinoju is the holder of the mining rights and Buffalo Coal does the mining operations. Section 200B would apply if a case is made out that the fact that Zinoju owns the mining rights and Buffalo Coal conducts the mining operations was intended to or had the effect of directly or indirectly defeating the purpose of the LRA or any other employment law. No such case had been made out and also for this reason section 200B does not apply. I am therefore of the view that Zinoju is not liable as co-employer.

Exclusion of Zinoju from section 189 consultation process

- [51] The Applicants complain that the Respondents excluded Zinoju from the consultation process on the erroneous basis that it is not the employer of the employees.
- [52] Section 189 and 189A of the LRA place a legal obligation to consult on an employer when it contemplates dismissing employees for reasons based on operational requirements. There is no provision in the LRA that extend the obligation to consult to any party that is not the employer of the employees to be affected by the contemplated retrenchment.

- [53] Having found that Zinoju is not the employer of the employees, there was no duty on Zinoju to consult with the Applicants and to participate in the section 189 and 189A consultation process.
- [54] I do not find any merit in the complaint that the Respondents excluded Zinoju from the consultation process on the erroneous basis that it is not the employer of the employees and that such exclusion rendered the consultation process unfair.

Compliance with the provisions of the MRPDA:

- [55] A further complaint of the Applicants is that the Respondents failed to comply with the provisions of the MRPDA in particular the obligations set out in the social and labour plan submitted thereunder.
- [56] The Respondents' case is that the section 52 of the MRPDA places obligations on the holder of mineral rights when the circumstances arising in section 52(1)(a) and (b) of the MRPDA occur. Zinoju is the holder of the mining rights and submitted that it has complied with those obligations.
- [57] It is not for this Court to determine whether Zinoju has or has not complied with its obligations under the MRPDA.
- [58] In *National Union of Mineworkers v Anglo American Platinum and others*⁸ this Court has held that:

“On the face of it, s 52 does not seek to substitute the procedure prescribed for that established by s 189 or s 189A of the LRA. First, the obligations that s 52 creates are imposed on the holder of a mining right, not the employer of any employees whose security of employment may be affected by the conditions that trigger the requirement to give notice and who may be the subject of any contemplated retrenchment. It is therefore entirely feasible that the holder of a mining right may have obligations in terms of s 52, but no obligations to employees or registered unions in terms of s 189.

⁸ (2014) 35 ILJ 1024 (LC).

Section 52 therefore would appear to address a purpose different to that which underlies s 189 of the LRA, which is the promotion of consensus on the employment related consequences of adverse operational requirements through a joint consensus-seeking exercise. Secondly, s 52 makes no reference to any obligation to consult employees or their representatives about the consequences of any reduction in the profit to revenue ratio or scaling down of the mining operation. The obligation to consult employees and their representatives established by s 52 is relevant only to the timing of notice to the minister. That having been said, s 52(4) acknowledges that the holder of a mining right (to the extent presumably that the holder is the employer of any employees potentially affected by a retrenchment) is required to comply with s 189 or 189A, as the case may be”.

- [59] Buffalo Coal submitted that there is no obligation on it to comply with the provisions of section 52 of the MPRDA as section 52 places obligations on the holder of a mineral right and Buffalo Coal is not the holder of mineral rights.
- [60] In my view the obligations the MRPDA places on the holder of a mineral right remain the obligations of the mineral right holder and do not extend to entities or parties who are not mineral right holders, as contemplated in the MRPDA. In the event that the mineral right holder is also the employer of employees to be affected by a contemplated retrenchment, the position is different, as section 189 of the LRA will also come into play.
- [61] Section 52 of the MPRDA does not place any obligation on Buffalo Coal and I am not convinced that there is an obligation on Buffalo Coal to comply with section 52 of the MPRDA.

Procedural complaints

- [62] The Applicants complain that the Respondents did not follow a fair procedure and failed to consult over specific issues set out in section 189 of the LRA. Although the complaints raised are directed against both

Respondents, I will, in view of my earlier findings, only consider the complaints with regard to Buffalo Coal.

- [63] The complaint about the failure to follow a fair procedure is two fold. Firstly that Buffalo Coal failed to consult about the list of those employees selected for retrenchment. The name list was disclosed only when the letters of termination were issued and that in circumstances where proper consultation over selection criteria, including those affected by the selection, has not taken place.
- [64] Secondly that Buffalo Coal failed to accede to a reasonable request to extend the consultation process in circumstances where alternatives to retrenchment have not been properly considered.
- [65] Buffalo Coal denied that there is merit in these complaints. Mr Ndaba, the facilitator took the parties through every issue referred to in section 189 and the trade unions were invited to consult on those issues in accordance with section 189. There were numerous consultations held and the Applicants only have themselves to blame for failing to make themselves heard at the appropriate time.
- [66] Buffalo Coal pleaded that the section 189(3) notice has fully set out the reasons for retrenchment and other aspects required by the LRA. This notice was issued on 22 December 2014 and the consultation process that commenced in January 2015 was at all times facilitated by the CCMA. On 30 January 2015 the CCMA facilitator dealt with each aspect of the section 189 notice, followed by questions from the unions. On 4 February 2015 Buffalo Coal responded in writing to the questions raised by the trade unions. A number of meetings were held during the period 20 January and 24 February 2015, on which date AMCU for the first time verbally expressed recommendations and proposals. AMCU referred to the task team's identification of potential positions to save jobs. Selection criteria had been discussed and it was accepted that LIFO would be the fairest criteria and following further discussion it was decided that LIFO would be applied to each affected business area. Buffalo Coal submitted

that the method of selection proposed by the trade unions was ultimately used.

- [67] It is further Buffalo Coal's case that the task team convened for a further period, after the consultation process under the LRA came to an end, to consider measures for minimising the adverse effects of the retrenchment process and through this process the number of retrenchments was effectively reduced. On 25 February 2015 Buffalo Coal extended the opportunity to all employees to take voluntary severance packages before 4 March 2015.
- [68] Buffalo Coal submitted that the LRA consultation process was closed on 24 February 2015 and it continued to engage with the trade unions and the task team until 2 March 2015. Buffalo Coal stated that it acceded to requests from the trade unions to extend the period of consultation beyond the statutory 60 day period, despite a significant deterioration in its financial position. Between 2 and 10 March 2015 Buffalo Coal considered the proposals made by AMCU on 24 February 2015, which resulted in a reduction of the number of employees to be retrenched.
- [69] Letters of termination were issued on 11 March 2015, on the same day which AMCU for the first time in writing raised issues in relation to the section 189 consultation process. Buffalo Coal submitted that the proposals so raised were captured on 24 February 2015 and considered further on 2 March 2015 and the issues raised were taken into account and were responded to.
- [70] Mr Watt-Pringle submitted that there is no requirement in the LRA that Buffalo Coal has to consult about the name list
- [71] The further complaint is that there was no consultation over the issues set out in section 189(2)(a)(iii), (iv), (b) and (c) of the LRA.
- [72] The Applicants submitted that there were passing proposals regarding selection criteria, severance pay, assistance the employer proposed to offer, possibility of future re-employment and number of employees to be

retrenched, but consultation on those issues did not begin as the parties were stuck on the issues relating to the SLP.

- [73] In my view the parties were not stuck on the issues relating to the SLP – AMCU was stuck on those issues and to such an extent that it lost focus of the consultation process and the obligation it had to participate in the consultation process. AMCU was stuck on the fact that it wanted Zinoju to participate and that it wanted the SLP to be complied with to such an extent that it lost focus when it was expected to participate in a facilitated consultation process that was legitimate and that was seeking to comply with the provisions of sections 189 and 189A of the LRA.
- [74] It is evident from the papers before this Court that AMCU proposed LIFO as selection criteria and that Buffalo Coal implemented LIFO as selection criteria. The complaint seems to be that there was no consultation on the application of the selection criteria. That is however a substantive issue.
- [75] In its opposing papers Buffalo Coal stated that AMCU had a dilatory approach to the consultation process and engaged in efforts to delay the process. The picture that the papers disclose is one that depicts AMCU as frustrating the consultation process because AMCU spent an inordinate amount of time, even until the final day of consultation, exploring the relationship between Buffalo Coal and Zinoju and insisting on discussing compliance with the MRPDA. AMCU therefore failed to focus on the issues relevant to prevent job losses and to engage in a meaningful joint consensus seeking process within the applicable timeframe.
- [76] In *National Union of Mineworkers v Anglo American Platinum*⁹ the Court found that:

“Finally, it should be noted that it is not generally open to employees or their representatives to rely on the remedies afforded by s 189A in circumstances where they have frustrated the consultation process, or where procedural issues are raised ex post facto, or on the basis only

⁹ Footnote 5

that the employer consulting party has rejected proposals made at the eleventh hour.

It is clear from these authorities that for the purposes of an application such as the present, the proper approach is to judge procedural fairness holistically, and to avoid the approach of a mechanical checklist in relation to each subsection of s 189 and to ascertain whether the overall purpose of the joint consensus-seeking process required by the LRA has been achieved”.

[77] On the papers before me and considering procedural fairness holistically, I am satisfied that Buffalo Coal discharged its obligation to consult with AMCU on the issues as set out in section 189(3) of the LRA.

[78] I am satisfied that Buffalo Coal was entitled to bring the consultation process to an end when it did and to issue retrenchment notices.

Relief

[79] The last issue to be considered is the relief sought by the Applicants.

[80] I will consider the relief sought in light of my findings that Buffalo Coal is the employer that has the duty to consult its employees in terms of section 189 and 189A of the LRA and that it had no duty to comply with the provisions of the MPRDA.

[81] In *Banks*¹⁰ the Court has held that:

“The four remedies established by subsection (13) afford the court a wide discretion. The first two remedies (a compliance order, and an interdict against dismissal) clearly contemplate intervention by the court before a dismissal takes effect, the latter (reinstatement until there is compliance with a fair procedure, monetary compensation) contemplate intervention after an employee has been dismissed. This provision is to be read with the time-limits established by subsection (17). These contemplate intervention by the court at a time that is appropriate given

¹⁰ Supra.

the circumstances of the case, and having regard to the particular remedy that is sought”.

- [82] The Applicants seek an order declaring that Buffalo Coal has failed to comply with a fair procedure in terms of section 189A(13) of the LRA and that it should be interdicted from giving effect to the notices of termination issued on 11 March 2015, taking effect on 11 April 2015, until such time it complied with a fair procedure. Alternatively the Applicants seek an order for the payment of 12 months compensation to each of the employees and further alternatively AMCU seeks that this application be referred to trial.
- [83] The dismissal of the employees however took effect on 11 April 2015 and an interdict against dismissal will have no practical effect.
- [84] Mr Boda however argued that the retrenched employees should be re-instated, as is provided for in section 189A(13)(c) of the LRA, and that there should be consultation with a view to reach consensus on the establishment of a future forum, whether the obligations under the SLP have been complied with, the financial statements of Zinogu, the selection criteria, the list of employees and the timing of the retrenchment.
- [85] Mr Watt-Pringle argued that the employees cannot be re-instated as they cannot retrospectively do what should have been done and this will be detrimental to Buffalo Coal's already weak financial position. Buffalo Coal followed a fair procedure and there is no merit in this application
- [86] In my view the only competent relief at this stage is either to re-instate the employees until Buffalo Coal has complied with a fair procedure or to grant them compensation as provided for in section 189A(13) of the LRA.
- [87] The topics the Applicants want to consult on to reach consensus are set out by Mr Boda in his heads of argument as: the establishment of a future forum, whether the obligation under the SLP had been complied with, the financial statements of Zinoju, the selection criteria, the list of employees and the timing of the retrenchment. I fail to appreciate what

purpose would be served by reinstating the employees and requiring Buffalo Coal to go back to square one and begin the consultation process afresh, more so in view of the topics the Applicants want to consult on and my earlier findings as set out in this judgment.

[88] After a careful consideration of the papers, I am satisfied that there is enough evidence on the papers before this Court to find that the procedure followed by Buffalo Coal was not unfair.

[89] Relief in terms of section 189A(13)(c) or (d) can only be granted if the Court finds that there was indeed procedural unfairness.

[90] In the absence of procedural unfairness this application must fail.

Costs

[91] Costs should be considered against the provisions of section 162 of the LRA and according to the requirements of the law and fairness.

[92] The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In considering whether costs should be awarded, the requirements of law and fairness become applicable.

[93] The requirement of law has been interpreted to mean that the costs would follow the result.

[94] In considering fairness, this Court has held that the conduct of the parties should be taken into account and that *mala fide*, unreasonableness and frivolousness are factors justifying the imposition of a costs order. Another factor to be considered is whether there is an ongoing relationship that would survive after the dispute had been resolved by the Court. If so, a costs order may damage the ongoing relationship.

[95] In *NUM v East Rand Gold and Uranium Co Ltd*¹¹ the Court in considering the requirements of law and fairness with regard to the issue of costs, adopted the following approach:

- “(a) The provision that the requirements of the law and fairness are to be taken into account is consistent with the role of the Industrial Court as one in which both law and fairness are to be applied.
- (b) The general rule of our law that in the absence of special circumstances costs follow the event is a relevant consideration. However, it will yield where considerations of fairness require it.
- (c) Proceedings in the Industrial Court may not infrequently be a part of the conciliation process. This is a role which is designedly given to it.
- (d) Frequently the parties before the Industrial Court will have an ongoing relationship that will survive after the dispute has been resolved by the court. A costs order especially where the dispute has been a bona fide one, may damage that relationship and thereby detrimentally affect industrial peace and the conciliation process.
- (e) The conduct of the respective parties is obviously relevant especially when considerations of fairness are concerned.”

[96] In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and others*¹² it was emphasized that:

“.....unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in

¹¹ 1992 (1) SA 700 (A); (1991) 12 ILJ 1221 (A).

¹² 2012 33 ILJ 2117 (LC).

this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.”

[97] The Applicants prayed for relief and costs and the Respondents prayed for the dismissal of the matter with costs.

[98] Despite the fact that there might be an ongoing relationship, there were other factors to be considered as well and I can see no reason why costs should not follow the result.

Order

[99] In the premises, I make the following order:

99.1 The application is dismissed with costs.

Connie Prinsloo

Acting Judge of the Labour Court

Appearances

For The Applicants : Advocate F Boda

Instructed by : Larry Dave Attorneys

For The Respondents: Advocate Watt-Pringle SC with Advocate van Vuuren

Instructed by : Baker MacKenzie Attorneys

LABOUR COURT