

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1391/19

In the matter between:

NATIONAL UNION OF MINEWORKERS

Applicant

and

BIDVEST PROTEA COIN (PTY) LTD

First Respondent

HARMONY GOLD MINE

Second Respondent

Heard: 5 June 2019

Delivered: 28 June 2019

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] The applicant (NUM), seeks various orders on an urgent basis, including;
- a) That the decision of the second respondent to remove the affected employees of the first respondent from its employ/premises be declared unlawful and set aside;
 - b) That the retrenchment processes initiated under section 189A of the LRA by the first respondent to remove the employees be declared unlawful, null and void, and be set aside;
 - c) That all contractual provisions between the first and second respondents and/or between the first respondent and its members employed by the first respondent which allow for the removal of employees from their employment premises without following dismissal processes within the LRA be declared null and void, against public policy, unlawful and be set aside;

- d) Interdicting and restraining the respondents from executing and/or enforcing retrenchment processes initiated under section 189A of the LRA against the affected first respondent's employees;
- e) Interdicting and restraining the respondents and/or any member of the respondents from executing and/or enforcing the decision to remove the affected first respondent's employees from the second respondent's premises and/or from their employment with the first respondent.

[2] The above urgent relief is sought against the following common cause facts;

- 2.1 NUM represents its members who are employed by the first respondent (Protea) to provide security and other related services to the second respondent (Harmony).
- 2.2 Harmony is in the business of the mining of gold bearing material at various sites throughout the Republic. It entered into various contracts of service with Protea since 2004 for the rendering of security services at its various mining sites.
- 2.3 An essential term of the contract of service between Harmony and Protea is that should the former have any objection at any point in regards to the rendering of further services by any personnel of Protea, it had the right to request the removal of such personnel from its premises. This term is premised on Harmony's concern for the high risk in which it operates its business, and the possibilities of theft of gold bearing material.
- 2.4 In line with the quest to protect its interests, part of the terms of the service agreement is that Protea may be requested to have its employees subjected to polygraph testing when on site, as incidents which regularly bring their integrity, honesty and character generally occurred. Furthermore, Harmony may also request the removal of a security guard for reasons deemed appropriate.

- 2.5 Protea in turn entered into contracts of employment with the employees to render services at various operations of Harmony. Part of the terms and conditions of these contracts of employment are that employees;
- 2.5.1 Acknowledged and agreed that Protea could transfer them after due consultation to another section or division;
- 2.5.2 That they would submit upon request by Protea and clients, to undergo polygraph, truth verification, lie-detector, alcohol and substance testing.
- 2.5.3 In the event of a failure by the employee of the tests, or failure to undergo such testing, the employee upon a request by the client for his removal from site, may be removed and ultimately retrenched from Protea's employ.
- 2.6 In March 2019, Harmony advised Protea of suspected incidents of theft of gold bearing material at its Target Plant in Welkom. A joint investigation was conducted by Harmony and Protea, the outcome of which revealed that certain of Protea's employees were involved in incidents of theft of gold bearing material in a criminal enterprise engaged in by a number of those employees.
- 2.7 Resulting from the investigations, Harmony requested that all 19 of Protea's employees based at the Target site should undergo polygraph tests. Arrangements were then made for these tests to be undertaken.
- 2.8 On 8 April 2019, consultations were held between NUM and Protea, and it was explained to NUM the reason some of the employees were to be subjected to polygraph tests. On 9 April 2019, the affected employees were notified as to where and when to attend and take the test.
- 2.9 On own NUM's version, the affected employees consulted with it on 19 April 2019 and had agreed not to take the test. As a result, only six out of the 19 employees who are NUM members refused to undergo

the test. The seven other employees who are also NUM members undertook the test and passed, and are currently still at the Target site. One other employee had undertaken the test and failed. After a second attempt, he had passed the test, but was still removed from the site to an alternative position.

- 2.10 Harmony then demanded the removal of the employees who refused to undertake the test. Protea subsequently placed these employees on suspension on 18 April 2019 pending a disciplinary investigation into their conduct, as their refusal was viewed to be in breach of their contractual obligations.
- 2.11 In the light of Harmony's demand to have the employees removed, and following their suspension, Protea then issued section 189A(2) and (3) of the Labour Relations Act (LRA)¹ notices on 26 April 2019. Amongst alternatives to a retrenchment was an offer to place or transfer these employees to other sites in the Northern Cape and Mpumalanga. Some of the offers of alternative sites came with even higher salaries.
- 2.12 Consultations between Protea and NUM were held from 9 May 2019 whilst the affected employees remained suspended. The last consultations before this application was launched was held on 28 May 2019, when the parties appeared to have reached an impasse.

NUM's submissions:

- [3] NUM's seeks to interdict Protea from dismissing the affected individuals for operational reasons pending the determination of the lawfulness of Harmony's demand for the removal of those employees; the lawfulness of the contractual clauses *inter partes* upon which such demand is based, and the lawfulness of the retrenchment processes embarked upon by Protea. In this regard, NUM contends that;

- 3.1 The processes upon which the affected employees are subjected are unlawful and not in accordance with the provisions of the LRA, and that

¹ Act 66 of 1995 (as amended)

Protea and Harmony's conduct is not authorised by any law, as it was procedurally unfair, irrational, arbitrary and capricious.

- 3.2 It is unlawful for Protea and Harmony to structure and arrange their contractual rights in a way which undermines the fundamental protections guaranteed to the employees by the LRA.
- 3.3 To the extent that the right not to be unfairly dismissed is constitutionally protected, this Court is not bound by contractual limitations created by the parties through an agreement, when that agreement conflicts with employees' fundamental rights.
- 3.4 Any clause in a contract between Protea and Harmony which allows the latter to undermine the rights of employees ought to be declared unlawful and against public policy. Accordingly, Protea should not be allowed to invoke such clauses to justify a dismissal of the affected employees.
- 3.5 The fact that the dispute involves a contractual relationship which is not an employment relationship does not mean that the Court should not grant the relief sought if the issue in dispute concerns the rights of employees not to be unfairly dismissed. In these circumstances, the Court is entitled to deal with the matter under the provisions of section 157 of the LRA, thereby developing its jurisdiction to give effect to the LRA.
- 3.6 Protea in this case entered into a contractual relationship with Harmony without ensuring that its employees' security of employment was guaranteed in a way consistent with the right to fair labour practices, and the Court should grant a protection *mandamus* against the unlawful conduct of Protea and Harmony, as they further failed and/or neglected to comply with the LRA in terminating or attempting to terminate the employment contracts of the affected employees.

3.7 On the authority of *TSI Holdings (Pty) Ltd & others v NUMSA*², an illegal demand to have the affected employees removed from the site or to have them dismissed on operational requirements cannot be used to disguise the true reason of the dismissal.

Evaluation:

- [4] To the extent that NUM seeks interim relief declaring certain portions of the commercial contracts between Protea and Harmony unlawful, the requirements for urgent interdictory relief are trite. Thus, NUM must establish that it has a *prima facie* right even if it is open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; that the balance of convenience favour the granting of the interdict, and that it has no other reasonable remedy³.
- [5] Protea opposed the granting of relief on a variety of grounds, including that the matter is not urgent; that the actual relief sought by NUM is in effect final in nature and also not competent; that the Court lacks jurisdiction to dictate contractual terms to commercial parties; and further that the requirements of interim relief have not been satisfied.
- [6] Harmony joins cause with Protea's submissions in contending that the matter is not urgent. It further opposed the application on the grounds that it is not an employer of the affected employees and that the provisions of section 198A of the LRA did not apply to the circumstances of the case. It further contends that NUM has no basis to seek any relief against it; that NUM has alternative remedies in respect of any complaints surrounding the retrenchment process; and further that its joinder to these proceedings was entirely frivolous and without merit, and called for a costs order.
- [7] The principles surrounding urgency under Rule 8⁴ of the rules of this Court are well-established. A determination of whether a matter deserves the urgent

² [2006] 7 BLLR 631 (LAC)

³ See *Setlogelo v Setlogelo* 1914 AD at 221; *Webster v Mitchell* 1948 (1) SA 1186 W

⁴ Which provides;

(1) "A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).

attention of this Court entails a considerations of whether the reasons that make the matter urgent have been set out succinctly in the founding papers and secondly, whether the applicant seeking relief will not obtain a substantial relief at a later stage.

[8] Thus, the basis for allowing parties to dispense with the Rules of Court relating to time periods is to prevent the occasioning of an injustice and involves the balancing of this consideration with that of the rights of parties to a considered opportunity to place their cases before the court⁵.

[9] The provisions of Rule 8 of the Rules of this Court were interpreted in *Jiba v Minister: Department of Justice and Constitutional Development and others* as follows;

“Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and the degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking deviation from the rules”⁶.

[10] This application was launched on 31 My 2019. NUM contends that the matter is urgent on the basis that consultations were held on 9 and 22 May 2019, and had deadlocked on 28 May 2019 when Protea indicated that without a response to its proposals on whether its members accepted the alternative positions or not, it (Protea) would proceed to arrange consultations on retrenchment packages, and thus effectively proceeding with the terminations. NUM further submitted that it is the respondents that have created the urgency by attempting to terminate the employment services of the affected

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- (2) The affidavit in support of the application must also contain-
- (a) the reasons for urgency and why urgent relief is necessary;
 - (b) the reasons why the requirements of the rules were not complied with, if that is the case; AND
 - (c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted”

⁵ See *National Police Services Union v National Commissioner of the National Police Services and Others* (1999) 20 ILJ 2408 (LC); *Commissioner For the South African Revenue Services v Hawker Air Services (Pty) Ltd and Another* Case no: 379/2005 at para 9; *Vermaak v Taung Local Municipality* (JR315/13) [2013] ZALCJHB 43 (12 March 2013)

⁶ (2010) 31 ILJ 112 (LC) at para 18

employees without any lawful basis. It further claims urgency on the basis of the hardship to follow on employees should the terminations be proceeded with.

[11] Protea denies that the matter is urgent, and contends that;

11.1 Since 2004, the applicants knew and understood what the request for an employee to undergo a polygraph and the failure or refusal to undergo such polygraph would result in;

11.2 NUM has already engaged Protea in the retrenchment process since 9 May 2019, and this application ought to have been brought on or after 9 April 2019 when notices to undertake the polygraph test were issued; or when the affected employees were suspended on 18 April 2019, or on 26 April 2019 when the section 189A notices were issued.

[12] I am in agreement with the respondents' contentions that this matter is not urgent, and that in fact, the urgency claimed by NUM is self-created. My reasons in this regard are as follows;

12.1 The commercial agreements between the respondents have been in place since 2004, and the contracts of employment between Protea and the affected employees have equally been in place over a period of time.

12.2 The events that led to a position where Protea and NUM are engaged in retrenchment consultations arose from the investigations into incidents of theft at the Target site in March 2019, and the subsequent consultations with NUM and the affected employees held on 9 April 2019 in regards to the necessity to undergo the polygraph test.

12.3 On or about 9 April 2019 the affected employees were notified of the tests and nothing was done by NUM. Equally so, when the employees resolved not to undertake the test with the express acknowledgement and concurrence of NUM on 19 April 2019, nothing was done to approach this Court.

12.4 The fact that only 7 out of 19 of NUM members refused to undertake the polygraph testing speaks volumes, and the motivation for bringing this application on an urgent basis is blurred. Be that as it may, following their suspension and the subsequent issuing of section 189 notices, NUM did nothing, and instead, voluntarily participated in that process.

12.5 It was only when NUM could not get an agreement in respect of alternative positions that it suddenly thought of approaching this Court.

[13] NUM has not explained the delay between when the affected members were notified to undertake the test, and the date that it approached this Court for intervention. In the light of the above, it cannot therefore be correct as argued on behalf of NUM that the urgency arose on 28 May 2019 with the last meeting of consultations. NUM was willing to engage with Protea in the section 189 of the LRA consultations, and the urgency of the matter cannot clearly arise on the basis that NUM could not secure an agreement on matters related to that process.

[14] Furthermore, as shall be demonstrated in this judgment below, this application appears to be premature in that as things stand, the individual employees remain in Protea's employ, as no dismissal for whatever reason has been effected. In fact, on Protea's version, it has no intention of terminating the services of the individual employees, and that terminations can only take place when the employees unreasonably refuse to consider alternative deployments suggested to them.

[15] To the extent that NUM has not established the grounds upon which this Court should accord the matter any urgency, it follows that the matter ought to be struck off the roll.

[16] Striking the matter off the roll however implies that it will find its way back on the ordinary roll, and it is my view that this application ought to be disposed of on the merits.

[17] The first issue is whether Harmony ought to have been joined to these proceedings. Protea and Harmony contend that the latter ought not to have

been joined as it is not the employer of the individual employees. Throughout its pleadings and heads of argument, NUM had contended that Protea was a labour broker. It was only during argument that it was conceded that Protea is indeed not a labour broker. Other than that issue, it is common cause that Harmony is merely a client of Protea, and that it has no employment relationship with the affected employees. In the light of the facts of this case, clearly there was no basis for Harmony to be joined, particularly in the light of the failure of NUM to demonstrate any clear right to the relief it seeks against Harmony or Protea for that matter as shall be demonstrate further in this judgment.

- [18] A second consideration is that of jurisdiction. It was submitted on behalf of Harmony that NUM's case is not grounded in the provisions of section 5(4) of the LRA⁷, and it was not clear on what basis a declaration of unlawfulness was sought.
- [19] NUM however relied on the provisions of section 157(2)(a) of the LRA⁸ in bringing this application, and contends that the application involves matters of constitutional importance. Reliance by NUM was placed on *Nape v INTCS Corporate Solutions (Pty) Ltd*⁹ for the proposition that the fact that the dispute involved two parties to a contractual relationship, which is not an employment relationship, did not imply that this Court could not grant appropriate relief, as the issue in dispute concerned the employee's rights not to be unfairly

⁷ **Protection of employees and persons seeking employment**

(1) ...

(2) ...

(3) ...

(4) A provision in any contract, whether entered into before or after the commencement of *this Act*, that directly or indirectly contradicts or limits any provision of section 4, or this section, is invalid, unless the contractual provision is permitted by *this Act*.

⁸ **157. Jurisdiction of Labour Court**

(1) Subject to the Constitution and section 173, and except where *this Act* provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of *this Act* or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from -

(a) employment and from labour relations;

⁹ [2010] ZALC 33; (2010) 31 ILJ 2120 (LC) ; [2010] 8 BLLR 852 (LC) at para 79

dismissed. In this regard, it was contended that this Court is entitled under section 157 of the LRA to develop its jurisdiction to give effect to that Act¹⁰.

[20] The provisions of section 157(2) of the LRA have received attention in numerous decisions before the Constitutional Court¹¹. The Labour Appeal Court also pronounced on these provisions, and observed that if the court has the jurisdiction it would have the power to grant an appropriate remedy and that because this Court has the power to grant the remedy, it does not mean that it has jurisdiction to grant the remedy¹².

[21] Significant with the pronouncement however in *Merafong City Local Municipality v South African Municipality Workers Union ("SAMWU") and Another* is that it was specifically stated that;

“Section 157(1) is more of a confirmatory and reference section. It is not itself a primary source of jurisdiction. Instead, it confirms that the Labour

¹⁰ See also Nape at para 80, where it was held that;

“In terms of the judgment in *Gcaba v Minister for Safety and Security & others* [2009] 12 BLLR 1145 (CC) this Court is entitled under section 157 to develop its jurisdiction to give effect to the Act. The court held as follows:

“Section 157(2) confirms that the Labour Court has concurrent jurisdiction with the High Court in relation to alleged or threatened violations of fundamental rights entrenched in Chapter 2 of the Constitution and arising from employment and labour relations, any dispute over the constitutionality of any executive or administrative act or conduct by the state in its capacity as employer and the application of any law for the administration of which the minister is responsible. The purpose of this provision is to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the High Court. In doing so, section 157(2) has brought employment and labour relations disputes that arise from the violation of any right in the Bill of Rights within the reach of the Labour Court. This power of the Labour Court is essential to its role as a specialist court that is charged with the responsibility to develop a coherent and evolving employment and labour relations jurisprudence. Section 157 (2) enhances the ability of the Labour Court to perform such a role.

Therefore, section 157(2) should not be understood to extend the jurisdiction of the High Court to determine issues which (as contemplated by section 157(1)) have been expressly conferred upon the Labour Court by the LRA. Rather, it should be interpreted to mean that the Labour Court will be able to determine constitutional issues which arise before it, in the specific jurisdictional areas which have been created for it by the LRA, and which are covered by section 157(2) (a), (b) and (c).”

¹¹ See *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC); *Fredericks and Others v MEC for Education and Training Eastern Cape and Others* 2002 (2) SA 693 (CC); *Chirwa v Transnet Limited and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC); *NEHAWU v University of Cape Town and Others* 2003 (3) SA 1 (CC); *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng and Others, Head of the Department of Health, Gauteng and Another v Public Servants Association obo Ubogu* [2017] ZACC 45; 2018 (2) BCLR 184 (CC); (2018) 39 ILJ 337 (CC); [2018] 2 BLLR 107 (CC); 2018 (2) SA 365 (CC)

¹² See *Booyesen v Minister of Safety and Security and others* (2011) 32 ILJ 112 (LAC) at para 36; *Merafong City Municipality v SAMWU* [2016] 8 BLLR 758 (LAC) at para 37

Court has jurisdiction in matters where the Labour Court has exclusive jurisdiction in terms of the LRA. It also confirms that the Labour Court has jurisdiction where other legislation provides that a matter has to be determined by the Labour Court. Its main purpose, as derived from its wording within the context of the entire section 157, appears to be to delineate those instances in which the Labour Court would have exclusive jurisdiction. Section 157(2), on the other hand, delineates those instances where the Labour Court would have concurrent jurisdiction with the High Court.”¹³

- [22] Flowing from the above authorities, the first observation to be made is that any reliance on the provisions of section 157(2) of the LRA is clearly misplaced, as there exists no employment relationship between the affected employees and Harmony. The mere fact that reference to any *alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution arising from labour relations* is made in those provisions does not imply that this Court will ordinarily assume jurisdiction over the matter. A case still needs to be made outlining the basis upon which it is alleged that there is threatened violation of fundamental rights flowing from the commercial contracts between Harmony and Protea. While it is true that the current dispute arose from employment, it does not follow without more, that this fact alone entitled NUM to the relief that it seeks.
- [23] To the extent that NUM contended that the contractual arrangements between Harmony and Protea undermined the fundamental rights of its members, the starting point is that the fact that a term in a contract is or may be unfair or may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy. Equally so, it is trite that it is not for the courts to make a new agreement for the parties¹⁴.

¹³ At para 29

¹⁴ See *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) at para 30, and also at para 22, where it was held that;

‘Before these arguments are considered, it is necessary to place the issue in its proper perspective with regard to the legal principles governing contractual obligations. This court in *Sasfin (Pty) Ltd v Beukes* (1989) (1) SA 1 (AD) said:

‘The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power.

- [24] Similarly in this case, it was correctly submitted on behalf of the respondents that this Court lacks jurisdiction to strike down contractual arrangements between an employer and a client, particularly since the alleged unlawfulness or illegality in these arrangements have not been substantiated. The facts of this case are materially different to those in *Nape v INTCS Corporate Solutions (Pty) Ltd*.¹⁵ *Nape*, which NUM heavily relied upon. That case dealt with the question of the right of a labour broker to rely on the provisions of section 189 of the LRA to justify termination of an employment relationship after the client, for unfair reasons, insisted that an employee be removed from its premises. There can be no doubt that the Labour Court's conclusions in *Nape*, that an agreement between a labour broker and the client, which provided the client with the power to remove the employee from its premises for any reason whatsoever, was against public policy and an unlawful breach of the employee's right to fair labour practices in terms of the LRA, were correct. That approach is in line with that in *Lebowa Platinum Mines Ltd v Hill*¹⁶, which set out the principles which an employer should follow when faced with a demand for the dismissal or removal of an employee by a client.
- [25] The distinguishing factors are however that unlike in *Nape*, Protea is not a labour broker as readily conceded on behalf of NUM. The second is that based on the approach in *South African Transport and Allied Workers Union v Khulani Fidelity Security Services*¹⁷ upon which Protea relied, there is nothing unfair, unlawful, or irrational, where there is an agreement such as in this case, which entitled Harmony to request the removal of an employee from its site, if that employee posed a risk to its operations. The agreement between Protea and Harmony was designed for operational reasons, namely to ensure that only people of proven integrity could be maintained at its sites.
- [26] As it was stated in *Nape*, public policy imports the notions of fairness, justice and reasonableness, and would preclude the enforcement of a contractual

One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.

¹⁵ (2010) 31 ILJ 2120 (LC); [2010] 8 BLLR 852 (LC)

¹⁶ (1998) 19 ILJ 1112 (LAC)

¹⁷ (2011) 31 ILJ 130 (LAC)

term if its enforcement would be unjust or unfair¹⁸. In the same vein, the Court in *Nape* appreciated that it was axiomatic that where the demand of the client for the removal of the employee was lawful and fair, the employer (including a labour broker) may properly rely upon the provisions of section 189 of the Act¹⁹.

- [27] Harmony as already indicated is in the business of producing gold bearing material. It is a high risk operation requiring it to be assured that employees on its site are persons of impeccable integrity, who are there to protect its interests. In circumstances where not only based on its agreement with Protea, but also where Protea has concluded contracts which binds its employees to the highest standard of honesty and integrity, and to subject themselves to valid and fair procedures to check on whether they adhere to expected levels of integrity, I fail to appreciate the reason why it would be deemed unfair, if those employees are removed from Harmony's site, when they act in breach of their own contracts of employment, and refuse to undertake polygraph test. The employees cannot complain of unlawfulness or irrationality in a vacuum, without demonstrating how a request to have them removed, rather than being dismissed, is unlawful.
- [28] The difficulty that NUM has in this case is that it seeks to have employees who not only breached their contracts of employment (or were insubordinate²⁰), but also whose integrity is suspect, to be retained at Target site, notwithstanding the operational risks that Harmony has been exposed to following from investigations done into the theft and syndicates aligned to those incidents. Protea could easily have charged and dismissed the affected employees for breach of their contract or insubordination as they refused to subject themselves to polygraph tests. Other employees, who are NUM members had complied with the request and were exonerated. I therefore fail to appreciate how that request can be deemed to be fair and lawful in respect of some, but not all of the employees.

¹⁸ At para 53

¹⁹ At para 73

²⁰ See *Gemalto South Africa (Pty) Ltd v CEPPWAWU obo Louw and others* (JA 54/14) [2015] ZALAC 36; [2015] 11 BLLR 1100 (LAC); (2015) 36 ILJ 3002 (LAC)

- [29] To reiterate, there is nothing illegal, unfair or unlawful, in the contractual arrangements between Protea and Harmony that entitles Harmony to request the removal of employees for operational reasons, especially in a high risk environment such as production of gold bearing material. In any event, the contract between Protea and Harmony does not stipulate that employees must be dismissed, as clearly that is the preserve of Protea. Equally so, there is nothing unfair, where Protea as it has done in this case, embarked on a process of removing the affected employees from Target site as by virtue of their very conduct, they continue to pose an operational risk to its client Harmony, and further where rather than dismissing those employees for misconduct, it chose an alternative route of redeploying them through a process under section 189 of the LRA. If NUM is unhappy with proceedings under the provisions of section 189 of the LRA, it has alternative remedies.
- [30] As matters stand, the affected employees have been removed from the Target site, and lawfully so as they have refused to subject themselves to polygraph testing. They have not been dismissed. Furthermore, there is nothing in the contracts of employment between Protea and the affected employees that states that they will be dismissed if they refuse to undertake polygraph testing. Instead, as in *Khulani*, a provision is made for a retrenchment process to be embarked upon. NUM despite running to this Court for intervention, has engaged Protea in that consultation process. It is apparent that with this application, NUM sought to circumvent the provisions of section 189A(13) of the LRA. To the extent that it has done so, if it still not satisfied with the final outcome of that process, the provisions of section 191 of the LRA are available to it to take the matter further.
- [31] In the end, other than the fact that NUM has not satisfied the requirements for urgent intervention of the Court in this matter, it has also not satisfied the requirements of the relief it seeks. NUM has not established a clear right, particularly a right enjoyed by the affected employees to remain at Target site or to have certain portions of the commercial contract between Protea and Harmony declared unlawful or contrary to public policy. These arrangements between Protea and Harmony do not in any way encroach on the employees'

constitutional rights to fair labour practices. Any irreparable harm contended in this case if interim relief is not granted is clearly contrived, as the affected employees remain employed despite their conduct. It is my view that if at the end of the retrenchment process they find themselves without a job, that would be purely as a consequence of their own conduct. This is so in that the other employees have subjected themselves for polygraph testing and remain employed. Furthermore, the balance of convenience cannot favour the granting of the order sought where the affected employees remain to pose an operational risk to both Harmony and Protea through their refusal to subject themselves to a simple test that would have exonerated them. To the extent that the retrenchment process will reach a point of their dismissal, they have alternative remedies at their disposal

[32] Having had regard to the requirements of law and fairness insofar as a costs order is concerned, it was correctly submitted on behalf of Harmony that since it has no employment relationship with the affected employees, its joinder to these proceedings was unwarranted. Further in the light of the conclusions reached that NUM had not established urgency or satisfied the requirements of the relief it seeks, it is also my view that this application was ill-conceived. In the circumstances, I see no reason why the respondents should be burdened with the costs of this application.

[33] Accordingly, the following order is made;

Order:

1. The Applicant's urgent application is dismissed.
2. The Applicant is ordered to pay to the First and Second Respondents, the costs of this application.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

W Sibuyi SC, instructed by Finger
Phukubye INC

For the First Respondent:

S Lancaster, of Lancaster Kungoane
Attorneys

For the Second Respondent:

J Olivier of Webber Wentzel

LABOUR COURT