REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NUMBER: D426/2002

In the matter between

THE MEDIA WORKERS ASSOCIATION

OF SOUTH AFRICA First

Applicant

SOUTH AFRICAN TRADE UNION OF JOURNALISTS Second

Applicant

CHEMICAL ENERGY PAPER PRINTING

WOOD & ALLIED WORKERS UNION Third

Applicant

and

INDEPENDENT NEWSPAPERS (PTY) LIMITED

Respondent

JUDGMENT

PILLAY D, J

1. This is an urgent interdict to restrain the Respondent from altering the terms and conditions of employment of the journalists and others

employed as editorial staff who are members of the Applicants, and certain ancillary relief.

2. The Respondent is a publisher of newspapers under various titles. Following a loss of profits it embarked on a process of restructuring. Before doing so it consulted with the Applicants on 22 June 2001. Consultants were engaged. Through workshops involving employee participation a new editorial structure was developed. It was presented to the Applicants at the end of October 2001. The Applicants were reluctant to continue participating in the process.

3. The Respondent informed the employees by letter dated 16 November 2001 of its obligations to consult in terms of section 189 of the Labour Relations Act 66 of 1995 (the LRA). Consultations with individual employees took place with union representatives being invited and allowed to attend the discussions. These consultations with individual employees were held between November 2001 and February 2002.

4. On 15th March 2002 the Respondent informed its employees of the new structure on 17 March 2002. Hence the urgency of the application.

5. Against this background it was submitted for the Applicants that the changes implemented and sought to be implemented by the Respondent amounted to unilateral changes to terms and conditions of employment. They related *inter alia* to changes in grading, hours of work and career advancement. No longer would the employees work for a particular title. They would constitute a pool which served all the titles. These changes, it was submitted, amounted to matters of individual interest. This invoked a duty to negotiate and to bargain collectively as encouraged by section 1(c)

of the LRA. And, if there was a dispute, it had to be resolved as one of interest and not as a rights dispute.

6. The Applicants denied that the Respondent seriously contemplated dismissing employees because it had anticipated that consensus would be reached on the matters of mutual interest which would have avoided retrenchments. Consequently the changes were, it was submitted, not a matter for consultation and section 189 did not apply.

7. By characterising the changes as being a consequence of operational requirements, the Respondent was limiting the engagement with the Applicants to consultations and evading its duty to negotiate and bargain collectively. Moreover, the threat of dismissal disciplinary action were dangled as a consequence of the employees not agreeing to the changes. This, it was submitted for the Applicants, was unlawful as the Respondent's remedy for Applicants' refusal to accept changes in terms and conditions of service was not dismissal or disciplinary action but to lockout its members.

8. As the Respondent did not contemplate dismissals, its reliance on section was also *in fraudem legis* [*Van Eck NO v Etna Stores 1947 (2) SA 984 (A)*]. The categorisation of the dispute as one in terms of section 189 was aimed at depriving the Applicants and its members of the right to strike which was unconstitutional. So it was submitted for the Applicants.

9. The Respondent contended that the dispute should be characterised as one of rights. It initiated a process of restructuring to meet operational requirements. This inevitably brought about changes to terms and conditions of employment. In so far as such changes and alternative

positions were rejected by the employees they may be retrenched, not disciplined. Such dismissals were not automatically unfair. They did not amount to a demand and matters of mutual interest as contemplated in section 187(1)(c) as alleged by the Applicants.

10. Section 187(1)(c) of the LRA provides:

"A *dismissal* is automatically unfair if the employer, in dismissing the *employee,* acts contrary to section 5 or, if the reason for the *dismissal* is - ….to compel the *employee* to accept a demand in respect of any matter of mutual interest between the employer and *employee*."

11. Whether a dismissal is automatically unfair or a consequence of operational restructuring is a question of fact.

12. "Matters of mutual interest" has been widely defined. Landman J crystallised it to mean "proposals for the creation of new rights or the diminution of existing rights" [*SADTU v Minister of Education & Others (2001) 22 ILJ 2325 (LC) @ paragraph 43.2); Gauteng Provincial Administration v Scheepers (2000) 21 ILJ 1305 (LAC); HOSPERSA v Northern Cape Provincial Administration (2000) 21 ILJ 1066 (LAC) at 1070I-1071D*]

13. This definition conceives some matters of mutual interest to also fall within the ambit of section 189.

14. Whether a demand, instruction, directive or threat to accept changes in terms and conditions of employment relate to matters of mutual interest contemplated in section 187(1)(c) or section 189 is also a question of fact. The first step therefore is to enquire into the reasons for the changes t the

terms and conditions and possible dismissal of the employees. [*SA Chemical Workers Union v Afrox (1999) 20 ILJ 1718 @1719 F-H and @ paragraphs 31-32*]

15. On the facts in this case the primary purpose or driving force underpinning the changes in terms and conditions of employment and possible dismissals is the need to restructure for operational reasons so that the Respondent can adequately resist the negative economic trends. The changes are mooted not as an end in themselves but with the objective of meeting certain restructuring goals.

16. Implementation of section 189 often results in changes in terms and conditions of employment. Such changes are justified if they are made in the course of a *bona fide* retrenchment exercise and as an alternative to retrenchment [*ECCAWU c Shoprite Checkers (2000) ILJ 1347 (LC) @ paragraphs 26-28*; also *Afrox* above]. In this case they were not underpinned by the ulterior motive to dismiss for not acceding to a demand. [*National Union of Metalworkers of South Africa v Fry's Metals (Pty) Ltd (2001) 22 ILJ 701 LC*]. Merely because dismissal was not considered as a probability does not mean that that changes were not brought about in terms of section 189. Dismissal is one, though not a necessary, consequence of restructuring.

17. The Applicants have dissociated the purpose of the changes from the changes themselves. As a result, they have misconceived the dispute as being one of mutual interest in terms of section 187(1)(c) of the LRA.

18. The Applicants' reasons for doing so are not hard to find: If the changes fall outside the ambit of section 189 the Respondent has a duty to bargain

collectively until consensus is reached or the dispute is resolved through collective bargaining and ultimately industrial action. Under section 189 the Applicants have only the right to be consulted. If a dispute arises it must be resolved through adjudication. There is no right to strike under section 189.

19. The Applicants did initiate proceedings which might have enabled them to strike. They referred a dispute to the CCMA in terms of section 64(4) which provides:

"Any *employee* who or any *trade union* that refers a *dispute* about a unilateral change to terms and conditions of employment to a *council* or the Commission in terms of subsection (1)(a) may, in the referral, and for the period referred to in subsection (1)(a)-

(a) require the employer not to implement unilaterally the change to terms and conditions of employment; or

(b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change."

20. After the lapse of the interdict afforded by the section, the parties are free to resort to industrial action. [*Mukwevho & Others v Entertainment, Catering, Commercial and allied Workers' Union 1999 (20) ILJ 1078 (12) C].* However, the Applicants elected not to strike once the interdict expired. The explanation offered from the bar for this election was that the nature of the dispute was in doubt. If the Respondent's contention is upheld then the strike would have been unlawful.

21. It seems to me that the Applicants were unsure about the validity of their own contentions. Having doubts as they did as to whether the dispute was

one of mutual interest entitling them to strike, they cannot now suggest, as they do, that the Respondent should have instituted a lockout. Nor can the Respondent be sanctioned for issuing the notices on 15 March 2002. This was not a violation of the statutory interdict imposed by section 64(4) as the dispute was not about unilateral changes to terms and conditions of employment. Furthermore, these notices were issued only to those employees who had accepted the changes to their employment.

22. The Applicants contended the Respondent undermined collective bargaining by dealing with the individual employees personally to persuade them to accept the changes [*NUM v Ergo (1991) 12 ILJ 1221 (AD) at 1239*]

23. The Respondent denied that its approach to the individual employees undermined collective bargaining. It submitted that it had to do so once the Applicants withdrew from the consultations.

24. As a general principle, an employer should not consult with its employees personally if they are represented by a registered trade union [section 189(1)]. However, if the registered trade union refuses to consult, the employer has little option but to act in terms of section 189(1)(d) and consult with individual employees.

25. That is what occurred in this case. Furthermore, the manner in which the Respondent approached the employees did not undermine collective bargaining. The Applicants were aware of the process and were free to participate. None of the employees were either privileged or prejudiced because of the member of any of the Applicants.

26. The Applicants have accordingly failed to discharge the onus of proving that the Respondent violated the provisions of section 5 of the LRA [*Food and Allied Workers' Union & Others v Pets Products (Pty) Ltd (2000) 21 ILJ 1100 (LC)*]. The Respondent has therefore not violated the employee protections guaranteed in section 5 of the LRA.

27. Allegations about disciplinary action threatened by the Respondent were not sufficiently proved in the Founding Affidavits. Details emerged more fully in the Replying Affidavits. In the absence of a detailed response from the Respondent, I do not make any findings in this regard.

28. Mr Pillemer submitted for the Applicants that sections 188 and 189 were linguistically subservient to section 187(1)(c). This meant that the first enquiry should be to determine whether a dismissal was automatically unfair in terms of section 189(1)(c). If it was then a dismissal for operational reasons cannot take place lawfully.

29. Obiter: I do not agree that section 188 contemplates a mechanical two-staged process. The enquiry is whether facts establish a case for dismissal under either section 188 or 189. However, finding as I have on the facts in this case that the changes in terms and conditions of service and the possible dismissal are a consequence of restructuring in terms of section 189 and not 187(1)(c), I do not have to decide finally whether sections 188 and 189 are subservient to section 187(1)(c).

30. The application is dismissed with costs.

PILLAY D, J

DATE OF HEARING:	26 March 2002
DATE OF JUDGMENT:	27 March 2002
FOR THE APPLICANT:	Advocate Maurice Pillemer S.C.
INSTRUCTED BY:	Chennells, Albertyn & Tanner
FOR THE RESPONDENT:	Advocate G O Van Niekerk S.C.
INSTRUCTED BY:	Shepstone & Wylie