IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

NOT REPORTABLE **CASE NO. J861/05**

In the matter between:

NATIONAL UNION OF MINEWORKERS **Applicant**

And

HARMONY GOLD MINING COMPANY LTD **Respondent**

J U D G M E N T

TLALETSI A J:

Introduction

1. This is an urgent application filed on notice of motion in terms of sections 189A (13) and 14 of the Labour Relations Act 66 of 1995, as amended ("the LRA"). The applicant is seeking an order on the following terms:

1.1 Directing the respondent to reinstate the applicant's members purportedly dismissed by the respondent on 19 April 2005 until it has complied with a fair procedure.

1.2 Interdicting the respondent from giving notice to terminate the contracts of employment of the applicant's members until the period mentioned in section 64(1) (a) of the LRA have elapsed in respect of the dispute referred to the Commissioner for Conciliation, Mediation and Arbitration ("the CCMA") in terms of section 64(1) read with section 189A (8) (a) of the LRA on 20 April 2005;

1.3 Interdicting the respondent from dismissing the applicant's members pending the resolution of the dispute referred to the CCMA in terms of section 24 of the LRA on 20 April 2005;

1.4 Awarding the applicant's members compensation;

1.5 Directing the respondent to pay the costs of the application.

2. The application is opposed by the respondent. I accepted the agreement by the parties that this matter is urgent. The application was therefore heard on 26 April 2005.

Factual background

3. On 2 April 2004 the respondent gave notice in terms of section 189(3) of the LRA that it was considering downscaling its Free State Operations. The notices proposed that notice of retrenchments be given to affected employees on 2 June 2004 or any sooner date that may be agreed upon. The notice outlined inter alia, the reasons for the proposed downscaling and dismissals, alternatives considered, proposed method for selecting employees to be dismissed, severance pay and assistance to employees. The notice further advised the

applicant that the respondent is requesting the appointment of a facilitator in terms of section 189A (3). The compliance of this notice with the LRA is not in dispute.

4. On 7 April 2004 applicant's General Secretary ("Mantashe") suggested that the parties should agree not to embark on consultations with CCMA facilitation. The suggestion was accepted by the respondent. On 16 April 2004 a Joint Task team was appointed to investigate the viability of various mines/shafts. During the beginning of April 2004 restructuring and downscaling meetings were held between the parties together with other affected trade unions.

5. An agreement was concluded by the parties on "The Operational Performance Improvement and the 2004 Restructuring Process of the Free State Operations". The preamble of the agreement states the purpose as being to minimise retrenchments and to focus on securing current jobs and creating future opportunities. It addresses inter alia, issues relating to Continuous Operations (CONOPS), termination of contractors' services, voluntary retrenchments and reskilling, retraining and redeployment.

6. On 6 July 2004 the applicant applied for facilitation to CCMA. It further agreed with the respondent for the appointment of a private mediator. In order to give effect to this agreement the parties agreed to the appointment of Thandi Orleyn ("Orleyn") to be a facilitator/mediator. The CCMA did not appoint a facilitator. Under the mediation of Orleyn the parties as well as Solidarity Union signed a Memorandum of Understanding which in its preamble provided for the implementation of the Restructuring Principles Agreed at the Joint Forum established by the parties, to avoid compulsory retrenchments as a result of the restructuring process with the company, and to resolve the dispute with organised labour. The memorandum provided inter alia, for the implementation of the CONOPS at Randfontein, Elandsrand and Masimong. An agreement on CONOPS was not reached at the Free State Operations.

7. On 8 September 2004 the respondent gave written notice of its intention to implement forced retrenchments at the following Free State Operations: Welkom 1, Marriespruit 3 shaft, Eland Mine and Bambanani Mine. The notices referred to section 189A (8) and provided for thirty days during which the implementation of the decision to implement the retrenchment and the final terminations of

employment of employees at the mine can be discussed.

8. On 10 September 2004 applicant gave notice of a primary strike at Bambanani, Matjabeng and Welkom 1, and a secondary strike at all the respondent's Free State Operations due to commence on 6 October 2004. The demand by the applicant was that the respondent should withdraw the retrenchment notices unconditionally. After a meeting of the parties' representatives, the applicant forwarded a draft Memorandum of Understanding to the respondent, proposing that all notices that have been served by 'management' dated 8 September 2004 including the April notices be unconditionally withdrawn with immediate effect, and that the proposed strike action by the applicant be withdrawn unconditionally as well.

9. On 5 October 2004 the parties entered into another agreement. The respondent withdrew its retrenchment notices that have been served for forced retrenchments at Welkom 1 mine, Merriespruit 3 shaft, Eland Mine and Bambanani Mine. The notices for the consultation processes regarding restructuring at Ernest Openheimer Hospital, Asset Protection Services, Joel Plant, Virginia Plants and Free State 2 Plant were withdrawn with immediate effect. The notices of possible

strike action at the Free State Operation on 6 October 2004 were withdrawn as well. According to the Memorandum the purpose of the agreement was to jointly identify and implement alternatives to accommodate 5000 excess employees at the company's Free State Operations and to prevent forced retrenchment. The parties agreed further that any surplus labour at any shaft will be transferred to other shafts that have similar vacant jobs to that of the employees whose jobs are redundant and that should placement opportunities not be available at other operations , other avoidance measures be explored and implemented at operational level in line with the various retrenchment agreements as well as the agreed principles on restructuring at national and regional level, and that placement opportunities outside the company be pursued to accommodate surplus employees.

10. During October and November 2004 meetings were held between the respondent and the applicant's branch committees in the Free State and also at regional level for restructuring and to implement transfers, reskilling and CONOPS. There seem to be a dispute about what if anything, that was achieved at these meetings. The respondent contends that the applicant in the Free State, has done nothing to

implement the various agreements reached by the parties, and instead has done everything to frustrate the agreed measures to minimise retrenchments and to save jobs. On the other hand applicant denies any move and intent on its part to frustrate the agreed measures to minimise retrenchments and to save jobs. They argued that the respondent has in a letter of 14 March 2005 acknowledged the constructive role that have been played by the applicant. Termination of the CONOPS by the applicant's members is also denied by the applicant. They place the blame at the door of the respondent and its officials.

11. On 1 December 2004 the applicant delivered a list of demands. Included in the demands listed, applicant called on the respondent to stop all the disadvantages caused by the CONOPS. The respondent responded to these demands made by the applicant by a letter dated 7 December 2004. On 15 December 2004 applicant referred a dispute regarding these demands to the CCMA. On 21 December 2004 the parties entered into a Memorandum of Understanding. The parties recorded their agreement to enter into urgent and meaningful discussions as from 3 January 2005 to address the CONOPS premiums and related matters with respect to the Free State

Operations. The parties further agreed that the applicant will withdraw the notices of termination of the CONOPS agreement, and the working 'arrangement', and that applicant's members in the Freegold Operations will be given a ten days break over the Christmas period.

12. During the period from 3 to 14 January 2005 a series of meetings were held by the parties' representatives. Some of the matters that were discussed related to the CONOPS, losses suffered by the respondent and certain shafts that were to be closed by the respondent. The parties could not reach an agreement on these matters. The parties agreed to hold a meeting on 17 March 2005. On 14 March 2005 the respondent issued notice of intention to implement forced retrenchments and to close Welkom 1 Mine. In this notice the applicant was further informed that notices of termination of employment of affected employees in terms of section 37 of the Basic Conditions of Employment Act no : 75 of 1997 ("BCEA") will be issued on 15 April 2005. The applicant sent a letter on 16 March 2005 in which it rejected the contents of the notice and suggested a meeting to be held on 23 March 2005 for the purpose of clarifying the contents of the letter. A meeting of 17 March 2005 was held as

planned. However nothing of significance was achieved at this meeting. After this meeting the applicant delivered a strike notice to the respondent as the issues that formed the basis of the strike were no resolved. The meeting of 23 March 2005 also, did not resolve the parties' dispute. The applicant's members embarked on a strike which lasted from 23 March 2005 to 7 April 2005. On 29 March 2005, 12 April 2005 and 15 April 2005 further meetings were held. No resolution was reached at these meetings. Of significance from these meetings is that the respondent held the view that the issuing of the retrenchment notices were a continuation of a process started by a section 189(3) notice issued on 2 April 2005. The applicant's view however was that the process that was started by the section 189(3) notice of April 2004 came to an end when the parties concluded the agreement of 5 October 2004. In this agreement, they argued, the respondent agreed to withdraw the April 2004 notice.

13. On 19 April 2005 the respondent issued retrenchment letters to applicant's members terminating their employment with effect from 19 April 2005. On 20 April 2005 the applicant referred two disputes to the CCMA. The first dispute is referred in terms of section 189A (8) (a) of the LRA and the second dispute relate to the interpretation

and application of the agreement concluded on 5 October 2004.

The issues

14. The applicant contends that:

14.1 The notices of retrenchment issued on 19 April 2005 are premature and unlawful in terms of section 189A(8)b read with section 189A(2)(a) of the LRA;

14.2 the respondent failed to consult the union promptly when it contemplated dismissing employees for reasons based on its operational requirements;

14.3 the respondent made a final decision to dismiss without engaging the applicant in a proper consultation process;

14.4 the respondent failed to engage in a meaningful joint consensus -seeking process with the applicant ;

14.5 the company failed to make proper disclosure of information to enable the applicant to participate meaningfully in consultations, and

14.6 the consultation process initiated on 2 April 2004 was finalised when the parties reached agreement regarding alternatives to avoid compulsory retrenchments on 5 October 2005.

15. The respondent on the other hand contends inter alia that,:

15.1 The retrenchment notices are not premature and unlawful, and

that applicant waived its right to refer any dispute to the CCMA by its conduct and its notices to embark upon a strike in September 2004;

15.2 That a facilitator was appointed in terms of section 189A (4) of the LRA after the applicant had asked that the CCMA appoint a facilitator, and section 189A (8) therefore does not apply;

15.3 That extensive consultations were entered into assisted by the facilitator and constructive agreements were reached as a result of the process which made it possible for a number of compulsory retrenchments to be avoided;

15.4 That applicant deliberately breached the agreements or frustrated the implementation of the agreements;

15.5 That the respondent did not infringe on any of the rights of the applicant's members;

16. A useful summary of the provisions and objective of section 189A of the LRA can be found in **National Union of Metalworkers of SA and others v SA Fine Engineering and others (2004) 25 ILJ 235 8 (LC**) where Murphy AJ had the following to say at 2361 C-H :

[6] "Section 189A was inserted into LRA by the amendments with the aim of meeting the demands of various stakeholders for a more efficient method for handling disputes about operational requirement dismissals. Its structure and objective are commendable. Therefore it comes as something of a surprise that two years after its enactment there exists little in the way of

judicial commentary on its purpose, scope and application. As this case demonstrates, litigants will accordingly be well advised to proceed with caution when embarking upon a journey through its unchartered waters.

[7] Section 189A sets out to accomplish several objectives. First and foremost it bestows on employees in significant operational requirement dismissals a choice between industrial action and adjudication as the means of attempting to resolve the dispute. To minimize avoidable strikes and litigation, the section allows for the possibility of compulsory facilitation by the CCMA, if either the employer or a consulting party representing the majority of employees targeted for dismissal requests it. Otherwise the parties are free to agree to voluntary facilitation (s 189A (3) and (4)). The appointment of a facilitator suspends the employer's right to dismiss for 60 days. After the period has expired the employer may give notice of termination of employment. Once the notice of termination is given, the employees have the choice of either embarking on lawful industrial action or referring a dispute regarding substantive fairness to the Labour Court-(s 189A(7). Once there is referral to the Labour Court the right to strike is no longer available. Equally, if no facilitator is appointed, neither party may refer a dispute to the relevant bargaining council or the CCMA for 30 days from the date of a s 189A (3) notice....."

17. It is important to determine in which 'pigeon hole' of section 189A, the process followed by the parties can be located. It is common cause that in the sections 189(1) and (3) letter of 2 April 2004 the respondent recorded its desire to have the facilitator appointed by the CCMA, and that an application form (LRA 7.20) was attached to the notice. The applicant adopted the attitude that there was no need for the facilitator to be provided by the CCMA and the parties agreed to form a Joint Task Team to investigate the viability of the mines.

Although the applicant at a later stage applied for facilitation by the CCMA a further agreement was reached as proposed by the respondent, that the mediation process should be outside the auspices of the CCMA. The reason provided by the respondent was to prevent them from declaring a formal dispute and thus triggering the 30 days notice period for compulsory retrenchments. It was on this understanding that Orleyn was appointed privately by the parties and not by the CCMA. Throughout the involvement of Orleyn, it is clear from the correspondence and the conduct of the parties that she was not appointed within the contemplation of section 189A. The process adopted by the parties falls within a situation where a notice of 2 April 2004 was issued and a facilitator was not appointed by the CCMA. Therefore the provisions of section 189A(7) in terms whereof the employer may issue notice to terminate the contracts of employment in accordance with section 37(1) of the BCEA, after the expiry of the 60 days from the date on which notice was given in terms of section 189(3) of the LRA, does not find application.

18. What is important is the fact that although Orleyn was not appointed by the CCMA, she engaged the parties in a process of mediation in an effort to avoid retrenchment. This process culminated in the

conclusion of some agreements which includes the agreement of 5 October 2005. This agreement according to the applicant, brought to an end a process of consultation which was triggered by the 2nd April 2004 notice, and which notice they argue, was also withdrawn by the respondent in terms of this agreement. Should this interpretation of the agreement be correct it simply means that there is no notice in terms of section 189(3) which is in existence and for the respondent to proceed with the retrenchment a fresh notice (which may recognise the process and progress archived up to that stage) may have to be issued, and the parties should be free to exercise the rights available to them in terms of section 189A, including the time periods prescribed in section 189. On the other hand the respondent's contention is that the 5 October 2004 agreement did not bring to an end a process triggered by the April 2004 section 189(3) notice and, in the event that it is found that the facilitator was not appointed in contemplation of section 189A, the respondent is entitled to trigger the time period prescribed by merely giving notice of intention to issue termination letters in terms of section 37(1) notice.

19. It is critical that the status of the 2nd April 2004 notice as well as the correct interpretation of the collective agreement of 5 October 2004 be

determined in order for one to be in a position to decide which procedure is available to the respective parties. It is common cause that there is a dispute about the interpretation of the collective agreement which has been referred to the CCMA by the applicant on 20 April 2005. This referral was effected a day after the letters of termination were issued by the respondent. This court is precluded by section 24 of the LRA from adjudicating a dispute about the interpretation and application of a collective agreement. In the agreement of 5 October 2004 the parties have prescribed a dispute resolution process to be followed in case of dispute, and this process is in line with what the applicant has done on 20 April 2005. furthermore there are reasonable prospects that the CCMA may uphold the applicant's interpretation of the collective agreement despite the respondent's arguable contention.

20. It is abundantly clear from the correspondence between the parties that when the termination notices were issued, already a dispute (as a matter of fact) had already arisen. Each party stuck to its interpretation and understanding of the collective agreement. Despite this fact, the respondent elected to bulldoze its views by effecting dismissal instead of referring a dispute to the CCMA in terms of

clause 8.1 of the agreement. The fact that the dispute was only referred after the dismissals should therefore not deny the applicant's members adjudication of the dispute.

21. Another aspect which has an impact on the process followed is whether it can be said on the whole, that the process followed by the respondent in affecting the retrenchments was fair. In the notice served on 14 March 2005 the respondent requested inter alia, the applicant to make suggestions and or provide ideas to minimise the impact of restructuring at an urgent meeting to be scheduled. In the final termination letter the following is said at paragraph 10 and 11 thereof:

"10. *However, as was stated during the course of the meetings, we were at all relevant times amenable to discuss with yourselves measures to minimise the number of retrenchments, and to ameliorate the effect of such retrenchments on members. We repeat our offer in this regard, even though members may have received notices of retrenchments. Were are still prepared to discuss with yourselves the application of identified measures to minimise the number of retrenchments. So, for instance, do a number of vacancies exist at shafts which are not affected by*

the proposed retrenchments. A list of such positions are annexed hereto marked Annexure "A". Should you wish to consult with us on this issue, we would be pleased if this could be done as a matter of urgency, in order for affected employees to be placed in vacancies applying the principles of relevant skills required for the vacant position, and length of service of employees.

11. *In addition, Annexure "A" includes the total number of contractors within Harmony. In this regard, we wish to record that management is of the view that the issue of contractors had been addressed on an ongoing basis with your trade union during the consultation process. Relevant information had also been provided on previous occasions, and in accordance with agreements reached."*

22. I am persuaded by the argument on behalf of the applicant that the respondent admits on their own that the process of consultation is in itself incomplete. It is evident from the above quoted passages that on the termination letter further information is still being supplied and the employer is still offering to consult after the retrenchment process. One does not know if the process suggested after the dismissals will in

any way alter the final decision already taken before the consultation process is finalised. On this basis alone, it is clear that a fair retrenchment procedure had not been followed before the decision to dismiss had been finally taken. I am not of the view that the applicants should be blamed for the different views they held about the process. The respondent's decision to rush through the process is in my view not justified. Although one may accept that should the process be protracted indefinitely it will have financial implications on the respondent, one cannot overlook or compromise the applicant and its members of their constitutional and statutory rights. Had the matter been referred for dispute resolution as prescribed by the agreement, or had the parties applied for the appointment of the facilitator by the CCMA despite their divergent views on the process up to that stage, any financial loss could have been minimised and this application avoided.

23. I am satisfied that the applicant has established a clear right and the dismissal of its members has caused them irreparable harm. The only satisfactory remedy available to them is to order that a fair procedure be followed.

Costs

24. What remains is the question of costs. Both counsel have submitted that it is only fair that costs should follow the results. I am persuaded by these submissions.

ORDER

In the result I make the following order:

1. The respondent is ordered to reinstate the applicant's members dismissed on 19 April 2005 until it has complied with a fair procedure;
2. The respondent is interdicted from giving notice to terminate the contracts of employment of the applicant's members until the periods mentioned in section 64(1)(a) of the Labour Relations Act 22 of 1995 (" the LRA") have elapsed in respect of the dispute referred to the Commission for Conciliation, Mediation and Arbitration (" the CCMA") in terms of section 64(1) read with section 189A(8)(a) of the LRA on 20 April 2005; and
3. The respondent is ordered to pay the costs of this application.

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P TLALETSI
ACTING JUDGE OF THE LABOUR COURT

APPEARANCES

FOR THE APPLICANT : ADV. J.G VAN DE RIETS SC

(Instructed by Cheadle Thompson

&

Haysom Attorneys)

FOR THE RESPONDENT : ADV. G C PRETORIUS SC

With him ADV. F G BARRIE

(Instructed by Brink Cohen Le Roux

Inc.)

DATE OF HEARING : 26 APRIL 2005

DATE OF JUDGMENT : 06 MAY 2005