IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO P210/09

In the matter between:

THE NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA (NUMSA) (on behalf of its members employed by the respondent in general and specifically those of its members listed in Schedule 1 hereto) **APPLICANT**

and

GENERAL MOTORS OF SOUTH AFRICA (PTY) LTD **RESPONDENT**

JUDGMENT

VAN NIEKERK J

Introduction

[1] Some years ago, the erstwhile Deputy Judge President of this court observed that however wondrous and mysterious the ways of global capitalism may be for some, for others they bring only cold comfort. (See: Froneman DJP, in Johnson & Johnson (Pty) Ltd v CWIU [1998] 12 BLLR 1209 (LAC) at 1211-G.) Nowadays, the ways of global capitalism may be less wondrous and mysterious (at least for those who ever thought them to be so) but it has brought cold comfort to many. The consequences of the recent crisis brought about in the

global marketplace have been colossal and all-encompassing – they have profoundly affected the lives and personal well-being of most working persons and their families, and the welfare of communities.

[2] The parties to this application (to whom I shall refer as NUMSA and GM) have been directly and adversely affected by the global economic crisis. At the beginning of 2008, GM's four production lines were geared to produce 80,000 vehicles. The forecasted and budgeted production requirements for the year were in the order of 72,600 vehicles. In spite of projected and budgeted production requirements, between January 2008 and June 2008, GM's manufacturing production schedule (MPS) declined to 61,900 vehicles. This represented a reduction of approximately 15% in GM's budgeted production requirements for the year. By July 2008 – and these figures are predicted at the beginning of June – the resultant decline in GM's production requirements was in the order of 24%. Projections for the industry demonstrated a clear decline and it was anticipated that the market for locally produced vehicles would further drop to levels in the order of 50,000 vehicles. As things transpired, the projected production figures as at May 2009 were in fact in the order of 25,000 vehicles per annum. In these circumstances, GM has sought to balance demand for its products with levels of employment, and it is the procedure adopted by GM in doing so that is at issue in these proceedings.

Nature of the application and relief sought

[3] NUMSA applies in terms of s 189A (13) of the Labour Relations Act (the LRA) for the following final relief:

- that the notices of dismissal issued by GM to its members on or about 17 April 2009 be declared invalid, alternatively that they be set aside;
- that GM be ordered to reinstate the dismissed employees; and

- that GM refrain from issuing any further notices of dismissal unless and until it has complied with s 189 and s 189A of the LRA.

[4] The parties agree that the application ought to be decided as the court would decide an application for final relief and in particular, that it is incumbent on NUMSA to establish, *inter alia*, a clear right and that it bears the onus to do so on a balance of probabilities. (See *Nienaber v Stuckey* 1946 AD 1049 at 1054*; Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd & another*_1961 (2) SA 505 (W) at 524 C - D; *Welkom Bottling Co (Pty) Ltd en 'n ander v Belfast Mineral Waters (OFS) (Pty) Ltd* 1967 (3) SA 45 (O) at 56 D - E; *De Villiers v Soetsane* 1975 (1) SA 360 (E) at 362 B; and *Beukes v Crous en 'n ander* 1975 (4) SA 215 (NC) at 219 F.) It is also not disputed that the application is urgent. The parties agree further that those of NUMSA's members whose employment terminated between July 2008 and the present either by mutual consent or by the expiry of fixed term employment contracts, are not affected by these proceedings. I am grateful to Mr Minnaar Niehaus and to Mr Redding SC (with him Mr Wade), the parties' respective legal representatives, for the comprehensive heads of argument prepared by them - I have drawn liberally on both sets of heads in preparing this judgment.

The facts

[5] The facts relevant to this application are largely a matter of common cause – the dispute between the parties centres on the interpretation that is to be given to them. On 1 July 2008, GM issued a notice of invitation to consult in terms of section 189 (3) of the LRA. The notice was directed to all trade unions represented in its workplace, including NUMSA, and to non-unionised employees. In the notice, GM proposed that the consultation process be facilitated, as contemplated by s 189A, by a CCMA commissioner. (Mr Marius Kotze was subsequently appointed as the facilitator.) The clearly stated objective of the notice was to facilitate a process in terms of which GM intended to review its

employment levels so as to coincide with what it termed "…projected production requirements". A number of alternatives to retrenchment that had been considered were recorded, including the release of temporary employees. GM also recorded that it had extended invitations to its employees to be considered for early retirement, and voluntary separation. (The latter, a mutually agreed termination of employment, is known as a VSP.) The notice further recorded that the intended reduction in head count would be effected over a period of "approximately three to four months", and that GM anticipated a reduction of approximately 520 positions.

[6] The first consultation meeting with NUMSA was held on 10 July 2008. NUMSA was informed of the importance of the rebalancing exercise in the context of determining the required manpower levels. Also communicated was the fact that the projected production levels were estimates, about which there could be little certainty.

[7] Following the meeting, in a letter addressed to NUMSA on 18 July 2008, GM sought to address certain enquiries raised during the course of the meeting. In that correspondence, GM emphasised the importance of the rebalancing exercise (in determining employment levels), the fact that market projections were fluid (in a declining market), and that GM was in the prevailing circumstances required to revise its production requirements to correspond with those uncertain market predictions.

[8] A second consultation meeting was held on 4 August 2008. During the course of this meeting, NUMSA specifically emphasised the levels of uncertainty arising out of both the uncertain state of the market, and the fact that the ultimate head count could not (on account of the outcome of the rebalancing exercise) be determined with any certainty. NUMSA however accepted that the parties were required to implement "actions that can mitigate against potential retrenchments". During the course of this meeting NUMSA also recorded its intention to seek legal

advice regarding GM's approach, and the uncertainty arising out of it. However, no challenges were forthcoming.

[9] On 20 August 2008, a letter was addressed to all GM employees outlining the terms on which early retirements and VSP's were offered. The letter records the fact of the two consultation meetings already held, and the prospect of further meetings to be held during the month of August, when the statutory 60-day period would come to an end. The letter also states:

> "We would like to stress to employees that although the Company is required to reduce its manning levels it will consider every viable alternative in order to avoid forced retrenchments, although there is no guarantee that we will be able to do so."

[10] A third consultation meeting was held on 22 August 2008. At this meeting, GM emphasised that the initial estimates (of potential retrenchees) would need to be revised. What was also once again stressed was the fact that the extent of any retrenchments would be directly linked to the rebalancing exercise and that, once this exercise was completed, the information would be shared with NUMSA.

[11] On 26 August 2008 the parties held a further meeting with a view to sharing information regarding the outcome of the initial rebalancing exercise undertaken in respect of the Opel line. The envisaged reduction of personnel was communicated and the point made that if those reductions could not be achieved through VSP's and the release of temporary employees, forced retrenchments would become necessary.

[12] In a letter addressed to NUMSA on 28 August 2008, GM recorded that NUMSA had not submitted any alternatives to counter its proposals in regard to the proposed reduction in employment levels. GM stated that on expiry of the statutory 60-day period the following day, it intended to

proceed with the implementation of its proposals. To the extent that the release of persons on early retirement/VSP failed to achieve the required reduction in employment levels, GM stated that it would proceed with the release of temporary employees. The letter concluded: "*To the extent that any further headcount reduction is required beyond that attained by the release of temporary employees, the Company will proceed with retrenchments* ***on the basis identified during the course of the consultative process***" (my emphasis).

[13] On 3 September 2008, GM wrote a letter to NUMSA and the CCMA in which it responded to issues raised in a letter addressed by NUMSA to GM dated 28 August 2008. The terms of the letter primarily address a demand for the disclosure of information. In the course of the letter, written by Mr Chris Thexton, GM's vice-president, human resources, GM states that:

> *"As you are equally aware, it was necessary that the Company take the necessary decisions in regard to the proposals contained in its s 189 Notice****, without delay, and immediately on conclusion of such process****, given the extremely serious impact upon the Company's business operations, of the dramatic decline which has taken place in the market for the Company's locally produced products"* (my emphasis).

Thexton went on to say the following:

> *"It would however appear that the issue of compulsory retrenchments will not arise given the response which the Company has received to the invitation extended to employees to apply for voluntary separation packages/early retirement".*

[14] Later that month, on 19 September 2008, a newspaper article reported on the VSP and the fact that the "…total number of workers being targeted for the severance packages would reach 1000 by year end."

[15] At the end of September 2008, some 271 employees were released on the basis of the provisional implementation of the first rebalancing exercise, which had occurred between August and September 2008. The provisional outcome of that same rebalancing exercise resulted in the release of a further 137 employees during October 2008. A further provisional rebalancing took place during December 2008 and resulted in the retrenchment of an additional 464 individuals by the end of January 2009. Almost all the employees whose release was confirmed during 2008 (approximately 870 employees) were released either as a consequence of either the VSP exercise, or the expiry or termination of fixed-term contracts of employment. In spite of the release of these employees, however, the continued decline in production nevertheless necessitated the regular implementation of short-time. It also necessitated the implementation of an extended shut-down over the December/January year end.

[16] During January 2009 there was a further and dramatic decline in MPS projections to 34,700 vehicles, a decrease of almost 32,8% below the MPS projections for December 2008.

[17] On 4 February 2009, GM addressed a letter to NUMSA and other unions. The letter, the first formal correspondence on the issue of retrenchments since 3 September 2008 with trade unions represented at GM, is headed “Continuing Implementation of Decision Taken Following Upon the Section 189 Process”. In the letter, GM recalled that after the conclusion of the consultation process during August 2008, it took a decision to implement the steps necessary to achieve a reduction in employment levels, commensurate with business requirements, and in accordance with GM’s stated objectives. The letter records that the applications for early retirement / VSP had not proved adequate to achieve the required reduction. GM proposed a meeting to discuss the posts that it envisaged reducing. Alternatives to forced retrenchments that GM stated would require further

consideration and consultation included the termination of temporary contracts of employment (a measure by that stage already implemented), short time, and the extension of the VSP. GM also proposed a change to working hours that it considered may have the effect of saving a number of jobs.

[18] On 16 February 2009, GM met with NUMSA. During the course of this meeting, GM conveyed information regarding the envisaged reductions and the fact that it was not in a position to identify individuals, given that there was no telling how successful an extension of the VSP process would be. GM also conveyed, on 16 February 2009, a proposal in terms of which employees would work a four day, nine hour week, a proposal which the respondent believed had the potential of saving between sixty and a hundred jobs.

[19] On 20 February 2009, GM addressed a letter to NUMSA and other unions recording the discussion that took place at the meeting held on 16 February. The letter provided information on matters in respect of which information had been sought at the meeting, confirmed that the decline in production requirements had the potential to result in the loss of a further 300 hourly rated jobs, proposed the release of temporary employees, and proposed revised working arrangements in the form of a change in shift pattern.

[20] The parties met once again on 5 March 2009. During the course of this meeting a number of matters were addressed, including the significant decreases in the MPS projections since January 2008. GM also set about explaining how the market decline would necessitate further manpower reductions, the extent of which was, however, to a significant degree impacted by the question whether or not NUMSA were prepared to accept the revised four day, nine hour shift pattern.

[21] On 17 March 2009, GM addressed correspondence to NUMSA raising, in particular, the proposed revised shift pattern and NUMSA's failure to

respond to the proposal. The NUMSA shop stewards council responded on 23 March 2009, rejecting the proposal. On the following day (24 March 2009) the NUMSA regional secretary addressed a further letter to GM expressing "*shock and dismay … by the unprofessional behaviour and a destructive tendency demonstrated by your company…*", a remark seemingly directed at the proposed revised shift pattern.

[22] On 24 March 2009 a further meeting was held between GM and employee representatives, including NUMSA. NUMSA reiterated that its members were not prepared to accept the revised shift pattern. As a consequence of this stance, GM confirmed that it would in the circumstances proceed with the rebalancing of its production lines so as to accommodate the normal five day, eight hour shift pattern. It also indicated that it would thereafter give effect to the retrenchments indicated by the rebalancing exercise. At this meeting, GM also confirmed that the rejection of the proposed shift pattern implied that 370 hourly paid employees were now potentially at risk of retrenchment. NUMSA was also informed that it would be provided with the names of the individuals affected following the application of the selection criteria adopted during the course of the section 189 process.

[23] On 27 March 2009, GM made it plain that in the face of NUMSA's rejection of the proposal on a revised shift arrangement, it would proceed with the re-balancing of its production lines to accommodate the retention of the existing shift system. NUMSA was advised further that the loss of approximately 300 further hourly rated jobs would potentially be increased by a further 100 jobs, if it became necessary to re-balance production lines in order to accommodate retention of the existing shift operation. Paragraph 2.5 of the latter reads as follows:

> *"The company, as indicated, proposes to continue with the release of approximately 200 temporary employees. In addition,*

a further total of 370 permanent hourly and 120 salaried jobs are now affected. Released will be made up of VSP and the balance forced retrenchment (sic)."

[24] In the first week of April 2009, all potentially affected hourly paid and salaried staff members were afforded notice of their potential retrenchment, and further informed (in some detail) of the process to be followed.

[25] On 8 April 2009, NUMSA and other employee representatives received a communication regarding the number of positions affected, and confirming that a list of permanent employees (who faced retrenchment) had been prepared in accordance with the specified selection criteria. NUMSA was also in that notice advised that employees would be released with effect from May 2009. Specific representations were also invited.

[26] That same day (8 April 2009), GM met with NUMSA and other unions with a view to reaffirming the basis upon which selection had occurred. During the course of this meeting, GM again rejected NUMSA's contention to the effect that it had been obliged to recommence a new section 189A process.

[27] The names of all hourly rated employees selected for potential retrenchment were then communicated to representative unions, including NUMSA, on 9 April 2009. The date of release was also communicated, as was the fact that the employees concerned were to be paid in lieu of notice.

[28] By 14 April 2009, GM had already released 120 temporary employees. This was followed (on 16 April 2009) by NUMSA's request for information regarding, *inter alia*, dates of engagement, positions etc. A detailed response followed on 17 April 2009. The majority of the hourly-

rated permanent employees were then released at the end of April 2009.

[29] This application was launched on 15 May 2009, setting the application down for hearing in Port Elizabeth on 25 May 2009. The matter was subsequently transferred to the Johannesburg court, and argued on 11 June 2009.

The law

[30] An application such as the present is a statutory one, and must be considered within a specific statutory context. The starting point is that every employee has the right not to be unfairly dismissed. (See s 185 of the LRA.) Section 188 provides that a dismissal that is not automatically unfair is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity, or based on the employer's operational requirements. The employer must also prove that the dismissal was effected for a fair procedure. The requirements for fair procedure that apply in the case of a dismissal based on a reason related to an employer's operational requirements are elaborated in s 189, and when it applies (as it does in this case), s 189A.

[31] Section 189A was introduced in the 2002 amendments to the LRA, and applies when larger scale retrenchments are contemplated. The consultation process under s 189A remains triggered by a notice issued in terms of s 189(3). For reasons that will become apparent, I quote the section in full. It reads as follows:

> "*The employer party must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including but not limited to -*
>
> *(a) the reasons for the proposed dismissals;*

(b) the alternatives that the employer considered before proposing the dismissals;

(c) the number of employees likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which employees to dismiss;

(e) the time when, or the period during which, the dismissals are likely to take effect;

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the employees likely to be dismissed;

(h) the possibility of future re-employment of the employees who are dismissed;

(i) the number of employees employed by the employer; and

(j) the number of employees that the employer has dismissed for reasons related to its operational requirements in the preceding 12 months."

[32] Under 189A, the issuing of the notice opens a 60-day period for consultation, with the prospect of a facilitator being appointed to assist the consulting parties. As in all retrenchment consultations, the process is one intended to promote what the LRA refers to as meaningful joint consensus-seeking, with a view to reaching agreement on measures to minimise the number of dismissals, how to mitigate the adverse effects of any dismissals, selection criteria and severance pay. During this period, in broad terms, the employer may not give notice of termination of employment, nor may the employee parties to the consultation exercise the right to strike or refer any dispute to the statutory dispute resolution procedures.

[33] One of the innovations introduced by s 189A was to split the adjudication of the substantive and the procedural fairness of a

dismissal effected for reason related to an employer's operational requirements. Section 189A(13) provides:

> *"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 a fair procedure;*
>
> *(b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;*
>
> *(c) directing the employer to reinstate an employee until it has complied with a fair procedure;*
>
> *(d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate."*

[34] This subsection in effect requires this court to determine disputes about the procedural fairness of larger-scale retrenchments within a defined time-frame in motion proceedings, at least where there is no dispute of fact. This court has previously observed that to the extent that this bifurcation may have been motivated by the notion that procedural defects lend themselves to quick and accessible legal proceedings, in practice, a separation of substance and process is often less easily achieved. (See, for example, *NUMSA & others v SA Five Engineering & others* [2005] 1 BLLR 53 (LC) and *RAWUSA v Schuurman Metal Pressing (Pty) Ltd* [2005] 1 BLLR 78). In *Insurance & Banking Staff Association v Old Mutual Services & Technology Administration* [2006] 6 BLLR 566 (LC), Murphy AJ (as he then was) summarised the broad policy considerations underlying s 189A(13):

"According to the explanatory memorandum accompanying the 2002 amendments to the LRA, section 189A was aimed at enhancing the effectiveness of consultations in large-scale retrenchments. It allows for a facilitator to be appointed to put back on track at the earliest possible moment a retrenchment process that falls off the rails procedurally. The overriding consideration under section 189A is to correct and prevent procedurally unfair retrenchments as soon as procedural flaws are detected, so that job losses can be avoided. Correcting a procedurally flawed mass retrenchment long after the process has been completed is often economically prohibitive and practically impossible…So, the key elements of section 189A are: early expedited, effective intervention and job retention in mass dismissals." (at para. [9] of the judgment).

[35] The role of this court is therefore to exercise a proactive and supervisory role in relation to the procedural obligations that attach to operational requirements dismissals. (See *Banks and another v Coca Cola SA (A division of Coca Cola Africa (Pty) Ltd* [2007] 10 BLLR 929 (LC)). The discretion that is conferred on the court is broad, and it must be exercised judicially.

[36] In these proceedings, NUMSA seeks the court's intervention on the basis that GM failed to comply with the requirement of fair procedure when it failed to issue a s 189 (3) notice in February 2009, in respect of the dismissals that it then contemplated. In effect, NUMSA contends that the consultation process initiated in July 2008 came to an end in 2008, and that any retrenchments in April 2009 and beyond ought necessarily to have been preceded by a fresh s 189(3) notice and consultation process. GM contends that the process commenced on 1 July 2008 and which terminated 60 days later was the legitimate basis upon which to effect dismissals for reasons related to its operational requirements which assumed the form of what the parties referred to as a "moving target". The legal issue raised in these proceedings

(which appears to be a novel one) is in essence this: When can it be said that an employer is no longer entitled to effect a dismissal in terms of a consultation process initiated by a s 189(3) notice? In other words, what is the reach of the statutory invitation to consult?

[37] The requirements of section 189 and 189A are not mechanical, nor are they intended to be mechanically applied. To the extent that it is possible to formulate guidelines applicable to the present circumstances, these are to be found, in my view, in the wording of s 189 (3) itself. The notice issued in terms of that section is an invitation to consult. It must set out *inter alia* the reasons for the proposed retrenchments, the number of employees likely to be affected, and the time when or period during which the dismissals are likely to take effect. It follows that a consultation process initiated by a s 189(3) notice must have some *raison d'etre* (usually in the form of some underlying commercial dynamic that may result in a reduction in employment levels), a time scale that is anticipated by the employer within which that reduction is to be effected and the number of employees retrenched in relation to the numbers that the employer contemplated as likely to be the subject of the proposed reduction. In addition (and to state the obvious) each case is fact-specific. The conduct of the parties during and after the consultation process and any other relevant facts must be taken into account in any consideration of when a consultation process, once initiated, might be said to have been brought to conclusion. In short, the proper question to be asked is whether the retrenchments contemplated by GM in February 2009 were reasonably to be anticipated by the notice issued on 1 July 2008.

Application of the law to the facts

[38] The time scale contemplated by the s 189(3) notice issued by GM on 1 July 2008 for the reduction in employment levels was a period of three to four months i.e. from 1 July to end September/ October 2008. That

this contemplation became reality is borne out by the letter addressed to NUMSA on 3 September 2008, when it announced that given the favourable response to the VSP offer, compulsory retrenchments did not appear to be likely, given the response which GM had received to the invitation extended to employees to apply for early retirement and VSP.

[39] Of particular significance is the fact that a period of approximately five months separated the conclusion of the statutory consultation process and the letter addressed to NUMSA on 4 February 2009, in which further compulsory retrenchments were foreshadowed. During this period, there was no further consultation with NUMSA or any other union on further reductions in employment levels, nor was there any communication to NUMSA in terms of which GM stated that it considered the consultation process alive, or in abeyance. On the contrary, GM's position was that the statutory process had come to an end. But the fact remains that at no stage during the five-month hiatus between September 2008 and February 2009 was NUMSA unequivocally advised that GM considered itself at liberty to continue to effect retrenchments based on the consultation held in July and August, let alone any compulsory retrenchments, which GM had been able to avoid. In the papers, there are references to a statement by the CEO of GM made as late as February 2009 to the effect that there would be no more retrenchments. The extent to which this statement was qualified or not is contested, and I take the matter no further than to reiterate that the five-month period between early September 2008 and early February 2009 was, for the purposes of this application, a period during which the prospect of further retrenchments was not substantially pursued and during which all indications were that no further reduction in employment levels would be necessary.

[40] In so far as the numbers of affected employees is concerned, the s 189(3) notice contemplated a reduction in approximately 520 positions over a period of three to four months. During July, this figure was

revised to 582. The rationale proffered was the dramatic decline in demand for the company's products since January 2008, and the need to reduce employment levels to be commensurate with projected production requirements.

[41] Following on the end of the statutory consultation process, by the end of September 2008, a total of 271 employees had been released. In October, a further 137 employees were released. By the end of January 2009, a further 464 employees were released, based on the provisional balancing done in December 2008. Of these employees, 776 had accepted voluntary severance or early retirement packages and 96 were engaged in terms of fixed term contracts that expired. The total number of employees who left GM's employ thus significantly exceeds the number of reductions contemplated by the s 189(3) notice.

[42] Consistent with the terms of the letter dated 3 September, Mr Thexton is quoted in the press as stating that earlier in 2008, a total of 400 employees had left GM's employ in terms of a voluntary separation package, and that a further 300 had recently been offered packages. Thexton is further quoted as saying that the total number of workers targeted for severance packages by year end was 1000. This figure is consistent with the 300 VSP's granted prior to 1 July, together with the 582 positions that GM identified as vulnerable at the outset of the consultation process on 1 July, and lends support to the view that the reduction in employment levels anticipated by the terms of the notice that commenced that process had been met.

[43] GM's letter to NUMSA dated 27 March 2009 records that as part of what GM refers to as the "continuing implementation by GMSA of decisions taken following upon conclusion of the section 189 process", GM proposed to continue with the release of approximately 200 temporary employees, in addition to a total of 370 permanent hourly and 120 salaried jobs. If the number of VSP's were insufficient, the balance of the reductions would be effected by forced retrenchments.

This equates to a total of approximately 700 jobs at stake as at the beginning of February 2009, significantly more than were the subject of the notice issued on 1 July 2008. Bearing in mind that as at 1 July 2008 GM employed approximately 3500 employees and given the scale of the reduction in the number of employees in the latter half of 2008, the proposal made by GM stood to affect a significant percentage of its workforce. In my view, the sheer scale of the numbers affected by the February 2009 proposal to further reduce employment levels warranted the issuing of a fresh s 189 (3) notice and a fresh bout of consultation in terms of s 189 (3).

[44] A factor in GM's favour is the consistency in the proffered rationale for the retrenchment. In the s 189(3) notice, GM cites the need to match employment levels with demand. In the correspondence addressed to NUMSA during February and March 2009, the need to match declining demand for the company's products with employment levels remains the basis on which the reduction in employee numbers is sought. Even then, although the rationale of a need to align employee numbers with demand for its products may have continued to underpin the further consultation initiated by GM in February 2009, the unanticipated slump in demand for GM's products that manifested itself in early 2009 and the scale of that slump are matters that were not contemplated by the terms of the s 189 (3) notice issued on 1 July 2008. For this reason, a fresh notice and period of consultation was warranted.

[45] Taking all of these facts into account, on balance, it is my view that the retrenchments contemplated by GM in February 2009 were not anticipated by the invitation to consult issued on 1 July 2008, and that the consultation process initiated by that invitation came to an end in 2008. It was reasonable for the consulting parties to assume, as NUMSA did, at least by 3 September 2008, that no compulsory retrenchments were contemplated by GM consequent on that invitation. It follows that if GM contemplated further dismissals, as it did in February 2009, it was obliged to issue a fresh notice in terms of s

189 (3). It follows too that GM's failure to do so has the result that the dismissal of those employees who left GM's employ in April 2009 was procedurally unfair.

Remedy

[46] For the purposes of remedy, the persons represented by NUMSA in these proceedings fall into two distinct categories. The first is those employees whose employment was terminated consequent of letters of termination issued on 17 April. I shall refer to these employees as "the dismissed employees". The second category comprises those employees whose dismissal is currently contemplated by GM, but who have not yet been dismissed. I shall refer to these employees as "the remaining employees".

[47] I deal first with the remedy to which the dismissed employees may be entitled. The aim of s 189A(13) is clearly to enhance the effectiveness of the consultation process required in terms of s 189A when an employer contemplates large scale dismissals for operational requirements. Accordingly, where an application is brought in terms of s 189A (13) after the consultation process has been completed (as in the present case), it is in most cases entirely inappropriate for an applicant to use the provisions of the sub-section to seek relief compelling the employer to comply with a fair procedure.

[48] The question that then arises is when NUMSA ought to have taken legal steps with a view to compelling GM's compliance with the provisions of section 189A. This requires a close scrutiny of the facts in relation the timing of NUMSA's application. The following important facts are on the pleadings either common cause or not seriously in dispute:

- On 4 February 2009 NUMSA and other employee representatives were informed of a further dramatic reduction in

the projected demand for the respondent's products. NUMSA were also informed that the GM would pursue alternatives with a view to mitigating the extent of any potential retrenchments.

- GM then met with NUMSA on 16 February 2009, at which time it informed NUMSA about the envisaged reductions and the fact that it was not at the time in a position to identify individuals who were to be retrenched. This on account of the fact that it could not at that stage predict how successful an extension of the VSP process would be.

- During this meeting (on 16 February 2009) GM proposed that NUMSA consider agreeing to a radical revision to the working week, this with a view to an anticipated saving of approximately 100 jobs.

- On 5 March 2009 a further meeting was convened. The effect of the declining market on employment levels was again discussed. So too the fact that the ultimate number of retrenchments would to a significant extent depend upon the question whether or not GM's proposal regarding the revised working week was acceptable.

- That proposal was ultimately rejected on 23 March 2009. At a meeting the next day (24 March 2009) it was then conveyed, inter alia, that 370 hourly paid employees were potentially at risk of retrenchment, and that their names would be provided once GM had applied the relevant selection criteria.

- At the meeting of 24 March 2009 NUMSA plainly adopted the central theme running through the present application: GM was not entitled to simply continue with what it regarded as the original section 189 initiative. This contention was rejected by

GM during the course of the meeting itself, and in a subsequent letter dated 27 March 2009.

- In the first week of April all affected hourly paid and salaried staff members were afforded notice of their potential retrenchment, and further informed (in some detail) of the process to be followed.

- On 8 April 2009 NUMSA was in writing informed of the number of positions affected, and the fact that a list of retrenchees has been prepared. GM also on that day met with NUMSA, which acknowledged that it was on 4 February 2009 aware of the fact that the respondent intended continuing with the implementation of the section 189 process initiated during 2008.

- The names of all hourly rated employees selected for potential retrenchment were then communicated to the representative unions, including NUMSA, on 9 April 2009.

- By 14 April 2009 GM had already released 120 temporary employees. The balance of the individual applicants were released at the end of April 2009, and paid in lieu of notice.

- NUMSA's application was however served on GM's attorneys of record on 15 May 2009.

[49] In terms of section 189A (17), NUMSA's application had to be brought "not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed

[50] What the chronology reveals in respect of the dismissed employees is that NUMSA waited more than three months to advance the very

procedural challenge that it could have advanced during February 2009. On NUMSA's own construction of the facts, it was plainly during February aware that GM believed that it was entitled to continue with the implementation of the process which had commenced in July 2008. This was expressly acknowledged by NUMSA at the meeting of 8 April 2009. (During the course of this meeting NUMSA acknowledged that it was on 4 February 2009 aware of the fact that GM intended continuing with the implementation of the section 189 process initiated during 2008).

[51] At best for NUMSA, its own letter dated 3 March 2009 – which GM disputes having received – charges GM with having acted unlawfully and further disputes its entitlement to once again engage NUMSA without first complying with section 189A. There was thus plainly no impediment to NUMSA's ability to bring the substance of the present application during either February or March 2009. In NUMSA's letter of 3 March 2009 it records, as one of its demands, that the respondent justify its "*…so-called "Continuation of Section 189 Process" which we view as unlawful as NUMSA*"

[52] Even if regard is had to the actual date on which NUMSA were informed that there would be retrenchments and that its members would be affected, (during early April 2009) there is absolutely no explanation as to why NUMSA waited until all its members had already left GM's employ before initiating these proceedings.

[53] A purposive and common sense interpretation of section 189A (as a whole) requires parties to act expeditiously in order that the intention of the legislature may be given effect to. In *Insurance & Banking Staff Association* (*supra*), the court stated:

> *"From a plain reading of the two sections it is clear that the timing of a section 189A(13) application is not connected to the date when the procedural unfairness occurred. The reason for*

that would be to allow parties to continue consultations with the possibility of the flaws being corrected is a relevant consideration as to whether it should be granted. Thus, if the process stands no chance of being corrected before it is completed, then the application may be granted even before the 30 days referred to in sub-section 17(a) commence. No application can be brought without condonation after the 30 days expire." (at para. [11]).

And further-

"Thus, if there is undue delay between the occurrence of the procedural flaw, or if the flaw is formal or insignificant, remedies under subsections (13)(a) – (c) would be inappropriate…In my opinion, therefore, the remedies under section 189A(13)(a) – (c) should not be granted after the retrenchment process is completed and if any of the circumstances in the preceding paragraph obtain." (at paras. [12] and [13]).

[54] Had NUMSA acted expeditiously this court could undoubtedly (and timeously) have provided both parties with guidance at an appropriate stage, and long before GM had actually given notice and/or paid its employees in lieu of notice. If mistaken, GM would also have been afforded the opportunity of correcting any established procedural deficiencies, and of ensuring – in the face of undeniable operational requirements – that it was able to timeously address any procedural concerns. Instead, this court is asked to reinstate employees after they have had the benefit of payment in lieu of notice, and after GM has reorganised its affairs to meet its projected production requirements.

[55] For these reasons, it is not appropriate to order the reinstatement of the dismissed employees, and the remedy to which they are limited is that of compensation. For understandable reasons, neither party was in

a position to argue what amount of compensation, if any, the dismissed employees should be awarded. The terms of the order that I intend to make will address this issue.

[56] In respect of the remaining employees (and in particular those who may potentially be affected by any contemplation of dismissal for reasons related to GM's operational requirements in future), different considerations apply. There remains a prospect that a meaningful search for consensus by GM and NUMSA may have the consequence that innovative solutions might save jobs. I am not so optimistic so as to assume that outcome. Since 1 July 2008, NUMSA has failed to contribute a single proposal that might have the effect of saving jobs at GM. NUMSA's intransigence during the consultation process that occurred in July and August 2008, during the meetings with GM in February and March 2009 and in particular in its correspondence with GM, reflects an institution caught in what Clive Thompson once referred to as a time warp of struggle politics and adversarial relations - a factor that inhibits high performance workplaces in unionised environments. (See Thompson "Labour Management Relations" in Cheadle *et al*., *Current Labour Law 2001* (LexisNexis) at 29-33). In its founding papers, NUMSA concedes that its own internal capacity had a role to play in what it referred to as the "unequal comparative abilities of the parties" To suggest, however, as the deponent to the replying affidavit then does, that third party intervention is necessary given the fact that an employer was "capable of outwitting or outmanoeuvring labour" is nothing less than fatuous. There is little purpose in a trade union participating in a process designed for joint consensus-seeking, as NUMSA did, when its strategy is limited to making allegations of ideological impurity and moral bankruptcy – this is the industrial relations equivalent of fiddling while Rome burns. But it is not for this court to second-guess the outcome of the consultation process, nor to protect its integrity beyond the statutory requirements. I trust that effective intervention by a skilled facilitator might produce a mutually acceptable outcome and achieve one of the important objectives of the

LRA – to provide organised labour with a voice in any restructuring or retrenchment process, and to promote the prospect of consensual outcomes on the vital issue of preserving jobs.

Costs

[57] Finally, in regard to costs, s 162 of the LRA affords this court a broad discretion to make orders for costs according to the requirements of law and fairness. In *National Union of Mineworkers v Ergo* [1992] 4 ALL SA 78, the Appellate Division considered similar wording in the 1956 Labour Relations Act and identified a number of factors relevant in relation to the court's discretion. These include the conduct of the parties, and the impact that any costs order might have on a collective bargaining relationship. The parties to this litigation are parties to such a relationship, and in so far as this matter remains capable of resolution, an order for costs may prejudice that relationship. An order for costs might also prejudice a meaningful search for consensus in any consultation process that GM initiates.

Order

I accordingly make the following order:

1. The dismissal of those of the respondent's employees whose employment was terminated at the respondent's initiative during April 2009 ("the dismissed employees") was procedurally unfair.

2. The amount of compensation (if any) to which the dismissed employees are entitled is to be determined by this court in any proceedings in which the substantive fairness of their dismissal is challenged. If no such proceedings are instituted, an application to determine the amount of the compensation, if any, to which the dismissed employees may be entitled is to be set down on a date to be arranged with the Registrar, subject to any directives as to the further

filing of affidavits and heads of argument that any Judge of this court may direct.

3. Should the respondent contemplate the dismissal of the applicant's members in addition to those dismissed during and prior to April 2009, the respondent shall, prior to issuing any notice of termination of employment, issue an invitation to consult in terms of section 189(3) of the Labour Relations Act and comply with the procedure prescribed by s 189A.

4. There is no order as to costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of hearing 11 June 2009
Date of judgment 17 June 2009

Appearances:

For the applicant : Mr Minnaar Niehaus of Minnaar Niehaus attorneys.

For the respondent: Adv. AIS Redding SC, with him Adv. R Wade
Instructed by Chris Baker & Associates