IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NO: - P413/2006

In the matter between:-

LEONI WIRING SYSTEMS (EAST LONDON) Applicant

(PTY) LIMITED

and

NUMSA First Respondent

ALISON, F AND OTHERS Second and Further Respondents

JUDGMENT

NEL AJ

1. The applicant herein brought an application seeking urgent interim relief directed at interdicting and restraining the second and further respondents from participating in strike action against the backdrop of a retrenchment exercise subject to the provisions of Section 189A of the Labour Relations Act, 66 of 1995 ("the LRA") and threatened strike action by the respondents consequent thereto.

2. The respondents have filed a conditional counter application. Therein they seek a declarator that the individual respondents are in law entitled to embark upon the threatened strike action pursuant to the strike notice they issued on 27 September 2006, despite the fact that the subject matter of the envisaged strike action had not been referred to conciliation, because the applicant had failed to comply with its statutory obligations in terms of Section 189A(8) of the LRA. In the alternative the respondents seek a declarator that the individual notices of dismissal issued by the applicant to members of the first respondent, advising them of a dismissal with effect from 30 September 2006, are invalid in that they are unlawful for a lack of compliance with the provisions of Section 189A(8) of the LRA. The respondents accordingly seek an order that the applicant be ordered not to give effect to the notices of dismissal and to reinstate the affected employees.

3. After discussions between the legal representatives of the parties, it was agreed that, pending the hearing of this application on 6 October 2006, the threatened strike action would be suspended until Monday 9 October 2006.

4. I heard argument herein from Mr Wade, on behalf of the applicant, and Mr Nieuhaus, on behalf of the respondents, on Friday 6 October 2006. At the conclusion of argument I advised the parties that I would reserve my judgment, but that I would most likely over the ensuing weekend arrive at a decision in

respect of both the applicant's application as well as the conditional counter application by the respondents. I, on Saturday afternoon, 7 November 2006, advised the parties that I had concluded to grant the following order:

1) Dispensing with the time periods provided for by the rules of this Court and ordering that this matter be heard as one of urgency as contemplated in rule 8.

2) That a *rule nisi* be issued calling upon the respondents to show cause, if any, on 9 November 2006 at 10h00, why an order should not be made in the following terms:

(2.1) Declaring that the strike action that the second and further respondents intend commencing on 9 October 2006 would constitute an unprotected strike;

2.2) Interdicting and restraining the second and further respondents from embarking upon the strike action intended to commence on 9 October 2006;

2.3) That the respondents jointly and severally bear the applicant's costs associated with this application;

2.4) Granting the applicant further and/or alternative relief.

(3) That paragraph 2 of this order shall operate as an interim interdict with immediate effect pending final adjudication of this application.

(4) The conditional counter application of the respondents is dismissed and the first respondent is ordered to pay the applicant's costs occasioned by the counter application.

5. I advised the parties that I would provide reasons for my order as soon as it was possible. These are the reasons for my ruling.

6. The facts herein are to a large extent common cause and in summary are that, on account of the applicant's inability to secure major contracts for 2007, a consultative process envisaged by Section 189A of the LRA was embarked upon by the applicant. A notice as contemplated by Section 189(3), read with Section 189A of the LRA, was ultimately issued by the applicant on 5 July 2006. The first consultation meeting between the parties took place on 12 July 2006. During the course of this meeting, it was explained that some retrenchments would take place at the end of September 2006, and that the balance of employees will be retrenched at the end of February 2007. The meeting concluded on the basis that the first respondent ("NUMSA") would revert to the applicant. When NUMSA had failed to revert to the applicant as undertaken by it, the applicant sought a date for a follow up meeting and

confirmed that on the agenda for that meeting would be feedback from NUMSA regarding alternatives to retrenchment. When no feedback was received from NUMSA, the applicant again requested a meeting to be convened for the purpose of receiving a reply as to any alternatives to retrenchment. Instead of agreeing to such a meeting, NUMSA addressed a fax to the applicant on 14 August 2006. In this fax NUMSA stated that it remained firm that they must do everything to save the applicant's plant and that it did not agree that the current production for export to supply the applicant's international market must be taken to Tunisia as suggested by the applicant. NUMSA made a number of proposals and indicated that it had written to Daimler Chrysler. NUMSA stated that their position could be summarised that the applicant had to do everything like NUMSA had done to secure more contracts for the applicant. It was suggested that the applicant put a team together composed of people from both NUMSA and the applicant's management team to start thinking through a process as to how to keep the applicant viable. NUMSA expressed its belief that it had a duty to ensure that they find alternative employment and that it was busy engaging everybody to look for a solution. NUMSA then indicated that, to the extent that the applicant had served on it its Section 189A notice, if the parties failed, as NUMSA put it, to "retain the company", NUMSA would deal with a separation package between the employees and the company. It then proceeded to propose a severance package of four weeks for each completed year of service; leave to be paid in full; two months pay in lieu of notice; a full bonus; some proposals relating to the provident fund of workers; a

R30 000 gratuity; a 5 million rand fund for training and ensuring gainful employment; setting the employees up as a co-operative; and some other proposals relating to what it called a settlement package. It also sought the disclosure of the company's order book, its financial statements, and its management accounts for the last three years and some other ancillary financial related information. On 15 August 2006, the applicant responded, essentially reminding NUMSA that the reason for the contemplated plant closure was not related to short term problems with lack of business or cost constraints, which could be mitigated by retrenchment. It did indicate that, if relevance be shown for the information sought, the applicant would reconsider its stance. Eventually a further consultation meeting was scheduled for 24 August 2006. At this meeting, discussions centred on the applicant's financial/ management accounts and eventually moved on to the severance package. In respect of the severance package, the applicant indicated that, whilst it was willing to consult in respect thereof, it would require the first respondent to motivate the reasons why the applicant should pay a severance package different to that which had been negotiated and agreed to in the Motor Industry Bargaining Council ("MIBCO") Agreement. The NUMSA spokesperson was not in a position to give any motivation for a departure from the agreed severance package other than to say that he did not believe that the MIBCO Agreement was binding in respect of severance packages. NUMSA suggested the setting up of a task team to explore alternatives and the applicant indicated that it was prepared to participate in such a task team on condition that it was not simply

going to revisit that which had been undertaken by the applicant in the preceding years. The meeting concluded on the basis that officials of NUMSA would revert to the applicant. It was understood that NUMSA would revert either with proposals or advise on the subject matter of further consultations. On 31 August 2006, NUMSA addressed a fax to the applicant. As the contents hereof are relevant to the conclusions which I arrived at, I record the contents of the letter in full:

"Dear Sir

RE: SECTION 189A CONSULTATIONS

We refer to these consultations and your letter of 15 August 2006.

After many attempts to convince the company to seriously consider NUMSA's proposals, it is very clear to us that the company will not move. Specifically with reference to retrenchment packages the company refuses to consider anything more than what is in the Main Agreement.

Your letter also clearly states that an analysis of financials will not change the company's position.

It therefore serves no further purposes to go through consultations which cannot change the fact that the plant is going to close in February 2007. Although we do not accept this, it will clearly be better for our members to know their fate and start making other arrangements.

In the circumstances we confirm that all workers will be dismissed on 28 February 2007. Unless the company indicates otherwise within seven days, it will also be accepted that no workers will be dismissed on an earlier date (as was stated in the 189 notice). If the company disagrees you must state who will be dismissed earlier and exactly when.

In respect of the remainder of workers who services terminate on 28

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February 2007, the company is to indicate whether any of these workers will be permitted to leave the company earlier in the event of getting other work and still receive the full retrenchment package. You should agree that giving six months notice of termination of employment can be unfair towards the workers who need to make other plans, but still need to receive their packages.

We propose that employees should at least be allowed to leave beginning 2007."

7. This letter is in my view not a model of clarity. What I am however satisfied NUMSA conveyed to the applicant therein was that it did not believe that further consultations would serve any further purpose. What is further expressly stated therein is that NUMSA confirmed that all workers will be dismissed on 28 February 2007.

8. In response hereto the applicant, in an undated fax which was apparently dispatched on 6 September 2006, advised NUMSA that it would close its export business with effect from 30 September 2006, and a list of employees affected by the closure was attached. The applicant also stated in this letter that the list of affected employees had been agreed to with NUMSA's shop stewards. When it received no response to this fax, the applicant convened a further meeting with NUMSA shop stewards. They were informed of the need to give certain employees notice. The applicant alleged in its founding papers that it engaged these shop stewards with the view to reach agreement on the fact that NUMSA had accepted that retrenchments would take place. The applicant further alleged that these shop stewards acknowledged that NUMSA

had agreed that retrenchments would take place. Thereupon agreement was reached between the applicant and NUMSA shop stewards on the list of individuals to be retrenched on 30 September 2006. However, the shop stewards requested that the list be forwarded to officials of NUMSA for their comments. It was also agreed, so alleged the applicant, that in the event of there being no comment from a Union official by 15 September 2006, the individuals listed would be given notice of their retrenchment. In terms of this agreement, the applicant accordingly on 11 September 2006 sent a fax to NUMSA which read as follows:

"Gentlemen,

Attached is a final list of employees to be retrenched with effect from 30 September 2006. This list has been agreed to with the shop stewards.

Should there be no comment on the names of the employees on the list, by Friday 15 September 2006, it has been agreed with the shop stewards that the attached list of employees will be communicated with accordingly."

The aforementioned allegations in essence stand undisputed on the papers before me at this stage.

9. When no response was received from any of the NUMSA officials, the applicant, on 18 September 2006, gave notice of retrenchment to the listed employees, effective 30 September 2006, as agreed with the NUMSA shop stewards. These retrenched employees were paid severance pay in

accordance with the MIBCO agreement and an additional week's pay in lieu of notice despite them having been given notice in accordance with the provisions of the MIBCO agreement.

10. On 27 September 2006, NUMSA sent a telefax to the applicant. The relevant portions of this letter are that it refers to the applicant's letters of 6 and 11 September 2006. NUMSA alleged that, in these two letters, the applicant had selected employees to be dismissed without discussions with the Union as to who, in the circumstances, should be dismissed first. The letter goes on to allege that it was unfair of the applicant to dismiss permanent employees whilst it kept temporary or fixed term employees in its employ. It concluded by stating that:

> "*Many issues regarding consultation on retrenchment have not been dealt with as a result of the management intransigence in that you have refused to consider all the proposal (sic) put forward by the Union. In this instance we refer you to our letter of 14th August 2006, especially regarding severance package and social security for the retrenchees.*

You should withdraw your notices for the dismissal till we exhaust negotiations or consultation on this matter.

> *Should you continue with the dismissal we will have no alternative but to take further steps*."

11. The next day, 28 September 2006, NUMSA gave the applicant notice that, with reference to the applicant's section 189A notice and subsequent letters of termination of employment, it and its members would embark upon strike

action as from 08h00 on Monday 2 October 2006 in accordance with the provisions of Section 189A in order to compel the applicant to reconsider its decision to dismiss employees.

12. I considered essentially three questions of law in determining the application and counter application. These required being answered under the circumstances herein where the dismissals are for operational reasons and with Section 189A applying. These question are, against the factual background sketched above:

- Are the respondents herein permitted to have recourse to industrial action without first complying, *inter alia*, with Section 64(1)(a) of the LRA by first referring the issue/s in dispute to conciliation?
- Was the applicant (the employer) compelled to refer the matter to conciliation prior to giving employees notice of the dismissal by reason of the employer's operational requirements?
- When, if at all, may employees have recourse to industrial action without first referring the dispute to conciliation?

12. What is clear from Section 189A(3) of the LRA is that, when dismissals are covered by this section, the CCMA must appoint a facilitator to assist the parties engaged in consultations only if the employer has in its notice in terms of Section 189(3) of LRA requested facilitation or if consulting parties

representing the majority of employees, whom the employer contemplates dismissing, have requested facilitation and have notified the CCMA within 15 days of the notice received in terms of Section 189(3) of the LRA. In addition the parties may reach agreement to appoint a facilitator in circumstances not contemplated in Section 189A(3).

13. Sections 189A(7) and (8) of the LRA respectively regulate notice of termination, disputes and strikes, on the one hand if a facilitator has been appointed, and on the other, if a facilitator has not been appointed. Sections 189A(7) and (8) read as follows:

> "(7) *If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189(3) –*
>
> (a) *the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and*
>
> *b) a registered trade union or the employees who have received notice of termination may either –*

(i) give notice of a strike in terms of section 64(1)(b) or (d); or

(ii) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).

(8) If a facilitator is not appointed –

(a) a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of Section 189(3); and

(b) once the periods mentioned in section64(1)(a) have elapsed –

(i) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and

(ii) a registered trade union or the employees who have received notice of termination may –

(aa) give notice of a strike in terms of Section 64(1)(b) or (d); or

(bb) refer a dispute concerning whether

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there is a fair reason for the dismissal to the Labour Court in terms of section 191(11)."

13. Section 189A of the LRA regulates strike action under stipulated circumstances and reads as follows:

> "(9) *Notice of the commencement of a strike may be given if the employer dismisses or gives notice of dismissal before the expiry of the periods referred to in subsections (7)(a) or (8)(b)(i).*"

14. In determining under what circumstances a strike may take place where a facilitator has been appointed, it is quite clear that the first requirement is that the notice of such strike action may only be given after sixty days have lapsed from the date on which the Section 189(3) notice was given and only after receipt by a registered union or the employees of the notice of termination. No reference is made to a dispute having to be referred to the Commission. This clearly is not required, as the involvement of a facilitator appointed by the Commission has had the effect of the matter already having been referred to the Commission. The Legislature saw no reason why any further referral of a dispute to a council or the Commission is necessary. Once a facilitator has been appointed, and 60 days have lapsed from the Section 189(3) notice, the employer, without doing anything further, may give notice to terminate the

contracts of employment in accordance with Section 37(1) of the BCEA. As said, only once a registered trade union or the employees have received this notice, may they either give notice of a strike in terms of Section 64(1)(b) or (d) of the LRA, or refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of Section 191(11) of the LRA. As I have also already stated, there clearly is no requirement, when a facilitator has been appointed, for any further referral of a dispute to the Commission in terms of Section 64(1)(a) of the LRA.

15. I turn to deal with the situation where no facilitator has been appointed. Section 189A(8) does not expressly dictate that, when a facilitator has not been appointed, a dispute must be referred to the council. One sees that a party may not refer a dispute to a council or the Commission unless a period of thirty days had lapsed from the date on which notice was given in terms of Section 189(3) of the LRA. Section 189A(8)(a) must clearly be read in conjunction with Section 189A(11), which makes it patently clear that Section 64(1), in its entirety, applies to any strike or lock-out in terms of Section 189A. Quite clearly that then requires that, where no facilitator had been appointed, a dispute must first be referred to a council or the Commission after a period of thirty days had lapsed from the date on which notice had been given in terms of Section

189(3) of the LRA. Only once a certificate stating that the dispute remains unresolved had been issued, or a period of 30 days, or any agreed extension

thereof, has elapsed since the referral was received by the council or the Commission, and a registered union or the employees received a notice of termination of employment, may notice of a strike be given and there then be a strike. Section 189A(11)(a)(i) specifically indicates that Section 64(1)(a) does not apply if a facilitator is appointed in terms of Section 189A. It will be remembered that Section 64(1)(a) of the LRA is the specific section, which requires that an issue in dispute be referred to a council or Commission prior to strike or lock-out action.

16. I have accordingly concluded that, unless Section 189A(9) applies, when a dispute has arisen between the parties, employees are not permitted to have recourse to protected strike action without first complying with Section 64(1)(a) of the LRA, and having referred the dispute to a council or the Commission. In addition, this referral may only take place 30 days from the date on which a Section 189(3) notice had been given and further only after a registered trade union or the employees have received notice of termination of their employment.

17. The second question which I needed to decide with reference to the particular facts herein was whether an employer, under circumstances of dismissals covered by Section 189A of the LRA, may give notice of dismissal, where no facilitator has been appointed, without first referring the matter to conciliation.

18. Where a facilitator is appointed, I am of the view that an employer may give notice of dismissal after 60 days have elapsed from the date on which notice was given in terms of Section 189(3) of the LRA. That much is clear from Section 198A(7) of the LRA. If a facilitator has been appointed, notice to terminate the contracts of employment may not be given in a period shorter than 60 days from the date on which notice was given in terms of Section 189(3) of the LRA. Once notice of termination is given, it is my understanding of Section 189A(7) that a registered trade union, or the employees who have received notice of termination, may give at least 48 hours written notice of the commencement of a strike. With or without there being a dispute between the parties, where a facilitator is appointed, I do not believe there is any requirement of any further referral to a council or the Commission before an employer may give notice to terminate the contracts of employment or a registered trade union or the employees may give notice of the commencement of a strike. Provided only that 60 days had elapsed from the date on which notice was given in terms of Section 189(3) of the LRA, an employer may issue its notice of dismissal. I will revert to the question whether the existence of a dispute affects this.

19. What, however, is the situation if a facilitator was not appointed? Although Sections 189A(7) and (8) are in my respectful view not entirely clear as to when and whether an employer must or may give notice of dismissal, I am of the view that, where a dispute arises between the parties in respect of any

dismissal covered by Section 189A of the LRA, properly interpreted to give it sensible meaning, Section 189A(8) requires the employer, where a dispute exists between the parties, to first refer the dispute to a council or the Commission. This it may only do after a period of 30 days has lapsed from the date on which notice was given in terms of Section 189(3). By the use of the word "and" it is further clear that, in addition to the period of the 30 days first having had to lapse from the date on which notice was given in terms of Section 189(3), the periods mentioned in Section 64(1)(a) of the LRA have to also lapse before the employer may give notice to terminate the contracts of employment. These additional periods in terms of Section 64(1)(a) are either a period of 30 days, or any extension of that period agreed to between the parties to the dispute, since the referral was received by the council or the Commission. This then has the effect that, as with Section 189A(7), where a facilitator has not been appointed, and a dispute exists between the parties, a period of 60 days has to also have lapsed before the employer may give notice to terminate the contracts of employment.

20. I am accordingly of the view that, where a

dispute has come into existence between the parties, and a facilitator has not been appointed in terms of Section 189A(3) or (4) of the LRA, before an employer may give notice to terminate the contracts of employment, the dispute has to be referred first to a council or the Commission. One sees that Section 189A(8)(a) clearly prohibits the parties from referring a dispute to a

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council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of Section 189(3). I believe it is significant that, unlike Section 189A(8)(a), Section 191 of the LRA, for example, specifically refers to the fact that an "employee" may refer a dispute. I am accordingly of the view that, once a dispute has arisen between the parties relating to any issue where dismissal is contemplated under circumstances covered by Section 189A, either the employer or the employee party may refer the dispute to a council or a Commission. I am bolstered in this view by having regard to the provisions of Section 189A(9) with particular reference to the fact that this section allows the giving of a notice of a commencement of a strike if the employer dismisses or gives notice of dismissal before the expiry of the period referred to in Section 189A(8)(b)(i). This period referred to is that found in Section 64(1)(a). Why I am so bolstered is that Section 64(1)(a) in the first instance dictates that the issue in dispute has to be referred to a council or the Commission. The certificate referred to in Section 64(1)(a) requires a referral to a council or the Commission. The period of 30 days referred to lapses "since the referral was received by the council or the Commission". It is accordingly my interpretation of Section 189A(8) that, when a dispute arises between the parties on any issue in respect of any dismissal covered by Section 189A, such dispute must be referred to a council or the Commission by any one of the parties. Such referral may only take place after a period of 30 days has lapsed from the date on which notice was given in terms of Section 189(3) of

the LRA. Once 30 days, or any extension of that period agreed to between the parties, has lapsed, then only may the employer give notice to terminate the contracts of employment and may a registered Trade Union or the employees who had received notices of termination, give notice of a strike, or refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of Section 191(11) of the LRA. I am also of the view that, where a dispute is in existence between parties to Section 189A procedures, an employer may only issue notices of termination after 30 days had expired from the date of its Section 189 notice and it has referred the dispute to a council or the Commission and the period referred to in Section 64(1)(a) has lapsed.

21. What, however, is the situation if no dispute on any issue has arisen between the parties in respect of the dismissal covered by Section 189A. If I understood the submissions on behalf of the respondents correctly, it was to the effect that, if I were to find that a referral to conciliation is in fact a prerequisite for strike action (where no facilitator has been appointed), then such referral to conciliation by an employer party should in fact equally be a prerequisite for purposes of giving notice of termination. The parties were in agreement that there are no authorities dealing directly with this issue. I could with the time available also find none. Mr Nieuhaus referred me to an article "*Unfair Dismissal – Operational Requirements*" (2004) 25 ILJ 896 by Chris Todd and Graham Damant where the learned authors, in footnote 17 at page 900, stated

with reference to the impact of the enactment of Section 189A on pre-retrenchment procedures in the case of larger scale retrenchments contemplated by this section, that:

> "*…. although this is not expressly stated in the section, it seems that an employer becomes entitled to dismiss only if a "dispute" has been referred to the CCMA, even if there is in fact no apparent dispute in existence*."

22. This interpretation in my view will result in absurdity. Under circumstances where no facilitator has been appointed, I am of the view that the referral to conciliation (whether for the purposes of a strike or to affect a dismissal) only becomes operative in the event that there is, prior to the termination of employment for operational reasons, some or other "dispute" between the employer and the employees regarding either substantive or procedural fairness. One cannot lose sight of the fact that Section 189A does not replace the requirements of Section 189. It exists in conjunction therewith. It self-evidently is still directed at facilitating and achieving consensus on the need, and the method for, terminating employment on account of an employer's operational requirements. Section 189 (2) dictates that "*the employer and the other consulting parties must in the consultation envisaged by sub-sections (1) and (3) engage in a meaningful joint consensus seeking process and attempt*

to reach consensus on" all the issues reflected in this sub-section. It does not make any sense that, in the event of the parties reaching such consensus or agreement thereon, or not disagreeing on any of the issues, that it is still required that the employer should first refer the matter to conciliation before it may effect its intended dismissal on account of its operational requirements. I do not believe it could ever have been the intention of the legislature that, where the parties have in fact reached consensus on all the aspects of a proposed retrenchment, the employer must nevertheless still refer a "dispute" to a council or the Commission, whilst there is in fact no dispute between the parties, and await the lapse of the time periods before it may give notice of dismissal by reason of its operational requirements. Such an interpretation, I believe, would be absurd simply on account of the fact that, if the consensus based objectives sought to be achieved by Sections 189 and 189A of the LRA had in fact been accomplished by the parties, why must any one of them refer the matter to a council or the Commission? The same, I believe, applies whether a facilitator has been appointed or not. If the parties have reached consensus, or agreement, and no dispute exists between them, why must the time periods contained in Section 189A(7) or (8) first lapse before an employer may issue its notice of termination. I am strengthened in my belief that this is the most sensible interpretation of these sections, when no dispute exists, by the fact that, only once such notice of termination has been issued, may the union or employees give notice of a strike or refer a dispute to this court. Strike action is in my view inconceivable without there being a dispute between the

parties. Only a "dispute concerning whether there is a fair reason for the dismissal" may be referred to this court. I believe that only when there is a dispute between the parties is it required that, where a facilitator has been appointed, sixty days must expire from the section 189(3) notice before termination notices may be issued. Thereafter, once notice of termination has been received by a union or employees, strike action or a referral to this court may take place. If there is a dispute between the parties but there is no facilitator, 30 days must first lapse from the section 189(3) notice before the matter must be referred to a council or the Commission if the employer wants to issue its notices of termination. Only once the periods mentioned in Section 64(1)(a) have lapsed, may the employer issue its notice of termination and may the union or employees, after receipt of such notice, give notice of strike action or refer a dispute to this court.

23. I am accordingly of the view that the only sensible interpretation of Section 189A(8) is to the effect that its provisions only become operative in the event that, prior to the employer giving notice of termination, there is a dispute which has arisen between the parties about some or other procedural or substantive aspect of the proposed retrenchment. Section 189A(8)(a) makes it clear that "*a party may not refer **a dispute** to a council or the Commission unless……*" (my emphasis). Clearly, only in the event of a dispute do all the time periods and other requirements kick in and need "a dispute" be referred. The referral is clearly only activated by the existence of a dispute.

24. This ineluctably drives me to the conclusion that, as soon as an employer and the other consulting party/ies have reached consensus on all the issues underlying the employer's proposed retrenchment, or in the absence of a clear dispute between the parties, or if the employer reasonably believes there is no dispute between the parties, the employer may give notice of dismissal by reason of its operational requirements without further ado. Whether any of these circumstances existed at the time that the employer issued its notice of termination will obviously be a factual question to be determined in every case. I am further of the view that whether such consensus is reached under circumstances where a facilitator has been appointed in terms of subsections 3 or 4 of Section 189A, or it is reached under circumstances where no such facilitator has been appointed, the moment consensus has been reached between the employer and the consulting parties, or if there is no dispute between them, the employer may give notice of dismissal, irrespective of the time periods contained in Section 189A(7) or (8).

25. When then would Section 189A(9) apply? This section expressly deals with the situation when notice of the commencement of a strike may be given. There can be little, if any, doubt that no strike or recourse to a lock-out can, or will, take place in the absence of "*an issue in dispute*". Section 64 of the LRA makes it very clear that every employee has the right to strike and every employer has recourse to lock-out if the **"issue in dispute"** has been referred

to a council or to the Commission as required by the LRA. I accordingly remain of the view that notionally it is possible for an employer to reach consensus with the other consulting parties within a day or days of having embarked on consultations after compliance with all the procedural requirements of particularly Section 189(3) of the LRA. The employer will then be able to give notice of dismissal and in the absence of any issue in dispute strike action is, as I have said, not possible, nor can I think of any circumstances where a strike will, or may, in any event take place in the absence of an issue in dispute between the employer and the employee or its representative trade union. It is for this particular reason that I believe that it is always a requirement that, if anyone of the parties is in dispute with the other, such dispute should be stated clearly and not be clothed in such a way that, objectively viewed, the other side does not know that it is in dispute at all. I am firmly of the view that parties should not conduct themselves in any manner which may lead to a situation where the other side is left in doubt as to whether there is a dispute between them in relation to a particular issue. Likewise I hold the firm view that, if a dispute has arisen between parties, not only must the dispute be clearly stated and identified but also the outcome, or the solution, which a party requires to resolve the dispute should be unambiguously stated. The fact that a party is unhappy cannot be allowed to form the basis of that party later on alleging that it was, as a matter of fact, in dispute with the other side. I am of the view that a dispute only arises when the parties in fact express their differing views and assume different positions in relation to a specific factual complex. The mere

fact that one party may be unhappy about a particular state of affairs does not give rise to a dispute. In this regard it has been most helpful to have had regard to what Zondo AJ (as he then was) had to say about the question when does a dispute arise in the matter of SACCAWU v EDGARS STORES LIMITED and ANOTHER [1997] 10 BLLR 1342 (LC) at 1348 *et seq* as well as the authorities referred to therein. Zondo AJ referred, it would appear with approval, to what was said by Silke J in the matter of DURBAN CITY COUNCIL v MINISTER of LABOUR and ANOTHER 1953 (3) SA 708 (D) where he, at 712A, said the following relating to the question of whether a dispute had existed:

> "*I think it unnecessary – and it certainly would be unwise – to attempt a comprehensive definition of the word "dispute" as used in Section 35 (1) of the Industrial Conciliation Act. But whatever other notions the word may comprehend, it seems to me that it must, as a minimum, so to speak, postulate the notion of the expression by parties, opposing each other in controversy, of conflicting views, claims or contentions*."

26. Having regard to some of the other authorities quoted in the EDGARS STORES case, supra, I believe that one can say that some of the further indicators as to whether a dispute did exist could be to have regard to the fact that *"no difference of opinion, and, a fortiori, no controversy, as to the (issue allegedly in dispute) can arise until some opinion is expressed."* Further analyses of the authorities would reflect that it has been stated that *"a dispute exists when one party maintains one point of view and the other the contrary or a different one."*

/…

27. What is apparent is that as the existence of a dispute is not always a simple and determinable event, it underscores the proposition I made earlier namely that it is important that, if parties arrive at a point where the one or the other forms the view in its mind that it is now in dispute with the other, it should say so and do so in the clearest of terms possible so as not to leave any doubt, as I said, about what it is in dispute about and what resolution it demands.

28. Having regard to the facts herein, I am of the view that, considering the respondents' position as reflected by its letter to the applicant on 31 August 2006, one can at most say that the respondents expressed not being happy with the situation. What is further patently clear is that the respondents stated as a firm proposition that it confirmed that all workers will be dismissed on 28 February 2007. That appeared to be an acceptance of this situation. NUMSA indicated that unless the applicant indicated otherwise within seven days, it would accept that no worker would be dismissed on an earlier date. Thereafter the respondents were expressly advised that it intended dismissing certain employees on 30 September 2006 and it advised NUMSA that a list of these employees had been agreed to with its shop stewards. On 11 September 2006, the applicant advised NUMSA of the final list of employees to be retrenched with effect from 30 September 2006. Again, NUMSA was advised that the list had been agreed to with the its shop stewards. Most importantly this communication from the applicant to NUMSA expressly stated *"Should*

there be no comment on the names of the employees on the list, by Friday 15 September 2006, it has been agreed with the shop stewards that the attached list of employees will be communicated with accordingly." Understandably, when the applicant had received no comment whatsoever from NUMSA by the stipulated Friday, that is on the following Monday, 18 September 2006, it proceeded to give the listed employees notice of their retrenchment, effective from 30 September 2006. Thereafter, only on 27 September 2006, did NUMSA write to the applicant. A number of the allegations made in this letter by NUMSA are in dispute between the parties. The one thing that NUMSA still does not expressly say is that it is in dispute with the applicant. One must divine from the contents of the letter that the union is unhappy with the applicant for it having selected employees to be dismissed without discussions with the first respondent. This proposition, that no discussions with the Union had preceded the selection, is in dispute. Secondly, NUMSA appears to take issue with the applicant dismissing employees whilst continuing to employ temporary or fixed term contract employees. By implication, one must conclude that NUMSA also takes issue with the lawfulness of the notices of termination as it demands that the applicant should withdraw its notices for the dismissal until the parties have exhausted negotiations or consultations on the matter.

29. Although NUMSA's communication of 27 September 2006 is unsatisfactorily vague, I am willing to accept in its favour that it, on that date, for the first time, had at least left the applicant in no doubt that it now expressed views in conflict

with those of the applicant. I am however satisfied that, when the applicant issued its notice of dismissal to the affected employees, without referral to a council or the Commission, it was justified in doing so on the basis that no dispute existed between it and any of the respondents or that it was justified to have operated under that impression when it did so. In terms of my above conclusion that, in the absence of a dispute, an employer may issue notices of termination without referring the matter to a council or the Commission, it follows that I am of the view that the termination notices herein have been lawfully issued by the applicant. The fact that the first respondent has now, in my view for the first time, clearly indicated that it is in dispute with the applicant in respect of its notice of termination to the affected employees, does not, in my view, after the event, now render the notices of termination to be unlawful in the sense that they are, or have been, in breach of any of the requirements of Section 189A of the LRA. Applying the interpretation I have given to the relevant subsections of Section 189A above to the present circumstances, I am of the view that any of the parties may refer the dispute which has now arisen between them to a council or the Commission as the 30 day period has already lapsed from the date on which the Section 189(3) notice had been given. Once any of the parties has so referred a dispute to a council or a Commission and the periods mentioned in Section 64(1)(a) of the LRA have lapsed, may the respondents herein then give notice of a strike in terms of Section 64(1)(b) or (d) of the LRA or refer a dispute concerning whether there was a fair reason for the dismissal to the Labour Court in terms of Section 191(11) of the LRA. The

notice of termination given does not now become unlawful as such because a dispute has now arisen between the parties. Whether the dismissals effected by these notices are procedurally and substantively fair, is a completely different question. The fact that I have found the notices not to be in breach of Section 189A(8) does not affect this question one way or the other.

30. A further question that I had to answer was when, if at all, might employees have recourse to industrial action without referral of the dispute to conciliation. Based on what I have concluded earlier herein, I am of the view that such a circumstance may only arise in the first instance under circumstances where there is a dispute between the parties. Again I believe it emphasises the importance of particularly union and/or employee parties making it clear when and about what they disagree with the employer. Irrespective of whether a facilitator has been appointed or not, if an employer then, whilst a dispute exists between the parties, gives notice of dismissal before the expiry of the periods referred to in Sections 189A(7)(a) or 189A(8)(b)(i), then the employee parties and their registered trade union may, without the need to refer the dispute to conciliation, participate in a retaliatory strike. Why I say it is a retaliatory strike is that such strike will be in response to what I would term being conduct by an employer not in compliance with the requirements of either Sections 189A(7)(a) or 189A(8)(b)(i) of the LRA, under circumstances where a dispute existed between the parties.

31. In addition to its contention that, before the respondents may embark on protected strike action, a dispute has to be referred to conciliation and there must first be compliance with Section 64(1)(a) of the LRA, the applicants also contended before me that the respondents' strike will be unlawful because it emerged from the respondents' own papers that part of the purpose of the strike is to extract a better dispensation in respect of severance pay in relation to both the past dismissals and those possibly contemplated in the future. It was accordingly contended on behalf of the applicants that on any sensible interpretation of the MIBCO collective agreement binding on the parties hereto, the strike will be unprotected because the parties are bound by a collective agreement that prohibits a strike or a lock-out in respect of the issue in dispute.

32. It was common cause between the parties that both the applicant and the respondent were parties to the MIBCO collective agreement regulating, *inter alia*, the issue of payments due upon retrenchment. Clause 13 of the MIBCO agreement reads as follows:

> "*RETRENCHMENT PAY:*
>
> *Notwithstanding anything to the contrary contained in this Agreement, an employer shall whenever an employee's services are terminated for the reason that he is retrenched, pay to such an*

employee, in addition to any payment that may be due in lieu of notice of termination of services, a sum equal to two weeks' wages for each completed year of service for the first four years service with an employer, and one week's wages for each completed year of service for the next eight completed years' service with that employer, provided that two weeks retrenchment pay calculated on a proceedings-rata basis after only four months' employment in the first year of employment shall be applicable."

33. Clause 2 of the MIBCO agreement in turn reads as follows:

"*MINIMUM TERMS AND CONDITIONS:*

Unless stated otherwise in this Agreement, it is agreed that where a particular sector has negotiated actual and/or guaranteed wage increases or any other conditions of employment, then there can be no plant level negotiations on those employment conditions or wages negotiated nationally."

34. Clause 4 of the MIBCO agreement reads as follows:

"*PEACE CLAUSE:*

The parties agree not to embark on and/or participate in any form of industrial action as a result of any dispute on any wage and/or salary adjustments and other conditions of employment relating to any sector or chapter in this Agreement. Provided that an employer has implemented the wage and/or salary adjustments and other agreed conditions of employment matters on or before promulgation, participation in any form of industrial action after promulgation of wage and/or salary adjustments and agreed conditions of employment shall be unprotected."

35. It was contented on behalf of the applicants that Section 189A(11) specifically renders Sections 65(1) and (3) of the LRA of application to any strike or lock-out embarked upon under the provisions of Section 189A. Section 65(1)(a) of the LRA provides as follows:

"*(1) No person may take part in a strike … or in any conduct in contemplation or furtherance of a strike … if –*

(a) that person is bound by a collective agreement that prohibits a dispute a strike … in respect of an issue in dispute.

(b) … ….

/…

(c) … …

(2) ...

(3) Subject to a collective agreement, no person may take part in a strike … or in any conduct in contemplation or furtherance of a strike … -

(a) if that person is bound by –

(i) any arbitration award or collective agreement that regulates the issue in dispute; or

(ii) …..

(b) … …."

36. On behalf of the respondents it was contended that the MIBCO collective agreement indeed contained minimum terms and conditions. As such there was no difference between the status and function of the MIBCO collective agreement and the corresponding provisions of the BCEA relating to severance pay. It was contended that the severance pay concerned is consistent with a minimum in that it amounted to no more than a re-arrangement of the severance pay as prescribed by the BCEA. It was argued that the severance pay provided for in the MIBCO agreement did not amount to a significant, or any improvement, of the severance pay dictated by Section 41 of the BCEA. Accordingly, so I understood the argument, just as parties may strike to improve the severance pay dictated by Section 41 of the BCEA, the individual respondents herein may strike in support of a demand for an

improvement of the severance pay agreed to in the Mibco collective Agreement.

37. I do not believe the question here is whether such conditions of employment as are agreed to between parties and contained in a collective agreement constitute an improvement of those contained, for example, in the BCEA. I believe the question is really only whether the issue in dispute is regulated in a collective agreement and whether the party who wishes to participate in the strike is bound by that collective agreement regulating the issue in dispute.

38. A proper interpretation of clause 13 of the MIBCO collective agreement to which the parties are all subject, drives me to conclude that the Mibco collective agreement does not establish a minimum entitlement but an actual one in respect of severance pay. Both the peace clause of the agreement, (clause 4) as well as Section 65(1)(a) of the LRA, provide that parties may not take part in a strike if the issue in dispute, in this case the severance pay which a retrenched employee within the Motor Industry must receive when retrenched, is regulated in a collective agreement applicable to the parties. I am of the view that, to the extent that the respondents have now indicated that their intended strike action would also have been in pursuance of the improvement of the severance to be paid to dismissed employees, it would be unprotected. This unlawfulness, I believe, is not capable of being cured by the referral of the dispute to conciliation. Only those issues in respect of which the

individual respondents herein may be able to strike after having referred their dispute to conciliation, may they in the future acquire the right to participate in protected strike action. That, as I said, in my view will exclude that the individual respondents may strike in pursuit of better severance pay whilst the provisions of the MIBCO agreement regulate the issue of retrenchment pay.

39. For these reasons I issued the order on 7 October 2006 as I indicated earlier herein.

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DEON NEL

Acting Judge of the Labour Court

Date of hearing 6 October 2006
Date of judgment: 10 November 2006

Appearances:

On behalf of the applicant: Advocate R B Wade
Instructed by Kirchmanns Inc.
On behalf of the respondents: Mr Minnaar Nieuhaus of Minnaar Nieuhaus Attorneys.