IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J737/09, J726/09 and J829/09

In the matter between:

NATIONAL UNION OF MINEWORKERS Applicant

and

DE BEERS GROUP SERVICES (PTY) LTD and DE BEERS CONSOLIDATED MINES Respondents

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JUDGMENT

BHOOLA AJ:

Introduction

[1] These are my reasons for the orders I issued on 9 June 2009 in the above three matters. For purposes of convenience, in respect of the two matters heard on 4 June and the one matter heard on 5 June, and given the similarity of issues and the parties, I have prepared one set of reasons and distinguish the matters on the facts where necessary. I describe these matters as follows for purposes of ease of reference in these reasons:

NUM v De Beers Group Services (Pty) Ltd, case no. J737/09 ("Exploration");
NUM v De Beers Consolidated Mines, case no. 726/09 ("DBCM"); and
NUM v De Beers Group Services (Pty) Ltd, case no. J829/09 ("DTC SA").

[2] On 9 June I issued orders declaring the notices of termination issued to the applicant's members' on 13 March 2009 (in Exploration), on 26 and 30 March and 7 April 2009 (in DBCM), and 27 March 2009 (in DTC SA), to be of no force and effect, and ordering the respondent to pay the costs of all three applications.

[3] My orders were made pursuant to hearing the parties in the three applications brought on an expedited basis in terms of sections 189A(13) and (14) of the Labour Relations Act, 66 of 1995 ("the LRA"). The applications were prompted by the respondent's failure to comply with a fair procedure and the requirements of section 189A (8) (and in DTC SA, section 189A (7)), prior to purporting to issue notices of termination to the applicant's members.

[4] The applicant sought orders in the three matters, *inter alia*, in the following terms:

(a)Declaring that the notices of termination of the applicant's members' contracts of employment issued [on various dates] to be of no force and effect;
(b)Alternatively, directing the respondent to reinstate the applicant's members purportedly dismissed in terms of the notices issued on [the respective dates] until it has complied with a fair procedure, and further alternatively, awarding the applicant's members compensation.

[5] I am satisfied as to the inherent urgency of the matters and that more than sufficient notice had been given to the respondent, and accordingly proceeded to hear the applications on an expedited basis.

Background facts

[6] De Beers Corporate Services and De Beers Consolidated Mines (Pty) Ltd ("DBCM") are members of the De Beers Group in South Africa. DBCM owns and operates a number of mines, including Kimberley, Venitia, Finsch, Namaqualand, and Voorspoed, and employed about 3700 employees prior to the retrenchments. The applicant has organisational and collective bargaining rights at each DBCM mine, except for Voorspoed, at which it has only organisational rights. It also participates in the Central Negotiating Committee ("CNC") at company level with representatives from each mine to consult and negotiated about company-wide issues. A Central Forum has also been established in a separate collective agreement between DBCM and the applicant, with the purpose being to promote communication and engagement on appropriate matters of mutual interest. The Central Forum comprises the Chairperson of the applicant and the full-time shop stewards of each specified mine, together with an equal number of company representatives.

[7] De Beers Group Services (Pty) Ltd principally provides services to DBCM and is split into various business units, including De Beers Group Exploration ("Exploration"), Diamond Trading Company South Africa ("DTC SA"), Shared Services, Corporate Services, Global Mining, Debtech, De Beers Supply Chain Centres, and De Beers Marine RSA. De Beers Group Services employs some 600 employees after the retrenchments. The applicant has organisational rights at DTC SA, De Beers Supply Chain Centres, and De Beers Marine RSA. Since 2006 substantive agreements between DTC SA and DBCM, on the one hand, and the applicant on the other, have been entered into at the Central Forum.

[8] The respondent pleads that the retrenchments are necessitated by the global economic crisis which has had a significant effect on the diamond industry since 2008, and which is expected to continue over the next few years. As a result the De Beers Group worldwide has been forced to re-prioritise its strategic focus to conserve cash and preserve equity, which has prompted the need to reorganise and restructure all business units worldwide. This process has resulted in significant job losses and scaling down of operations internationally.

[9] The retrenchments at Exploration involve four members of the applicant; at DBCM 570 (152 at Kimberley, 95 at Finsch and 323 at Namaqualand) and at DTC SA approximately 30 members of the applicant.

Exploration

[10] On 21 January 2009, the respondent issued notices in terms of section 189(3) to individual employees, including the applicant's members, of its contemplated retrenchment of 61 employees from the Exploration division. The notices stated that the respondent anticipated issuing notices of retrenchment to affected employees from 23 March 2009.

[11] It is common cause that section 189A of the LRA was applicable to the process, and that the respondent did not issue a notice in terms of section 189(3) to the applicant.

[12] No facilitator was appointed to the process in terms of section 189A (3) or (4).

[13] Following the 21 January notices the respondent held briefing feedback sessions with its employees in which it conveyed information about its plan to restructure its operations given the impact of the global financial crisis. As a result of this process employees were, *inter alia*, invited to submit their CVs for consideration by a panel established to select employees for retrenchment. Although the respondent contends that the process of selection was significantly more complex than the applicant sets out in its founding papers, for present purposes it is sufficient to note only that four members of the applicant were not selected for placement in the restructured operation, and that the reasons for their non-selection are the subject of factual disputes in respect of which I need not engage for present purposes.

[14] On 13 March 2009 the respondent issued notices of termination to four members of the applicant employed at Exploration. The notices stated that they had not been placed in the new structure and were being retrenched on 23 April 2009, and the notice periods applicable to their termination would run from 22 March to 23 April 2009.

[15] On 14 April 2009, 30 days after the notices in terms of section 189(3) were issued, the applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA"). The referral described the dispute as one "*in terms of section 64 (1)(a) read with section 189A(8)(a)".* Prior to this referral, neither of the parties had referred a dispute to the CCMA in terms of section 64(1) read with section 189A(8)(a).

[16] On 19 May 2009 a conciliation meeting was held at the CCMA and a certificate of non-resolution was issued.

[17] It is common cause that there was no collective agreement in place at Exploration that required the respondent to consult with a person or body when contemplating retrenchments. The respondent pleaded that the

applicant only represented 13.6% of Exploration's workforce and had no organisational rights at Exploration. The applicant's case is that the respondent was obliged in terms of section 189(1)(b)(ii) and (c) of the LRA to consult with it in respect of the proposed retrenchment of its members and failed to do so. The respondent contends that while this may be the case, it did not *per se* render the process unfair.

[18] The applicant pleads that at no stage had consensus been reached regarding the retrenchment of its members, and that discussions regarding severance pay and measures to mitigate the adverse effects of the retrenchments had not been concluded at the Central Forum, at which all of the mines in the De Beers Group and the applicant were represented. The respondent, in its Answering Affidavit (para 21), avers that at no stage at the Central Forum consultations (where only one business unit participated, the rest of the business unit consultations having been undertaken at business unit level together with the applicant where it was recognized) did the applicant raise the fact that retrenchment consultations were being undertaken at Exploration in its absence or that Exploration was not represented at the Central Forum.

DBCM

[19] On 19 January 2009, the respondent issued notices in terms of section 189(3) regarding the contemplated retrenchment at its Kimberley, Finsch and Namaqualand mines ("the individual mines") of approximately 1467 employees. The notices stated that the respondent anticipated issuing notices of retrenchment to affected employees from 19 March 2009.

[20] Attached to the notices were requests for facilitation in terms of section 189A of the LRA. It was recorded in these requests that in the context of the central collective agreement the parties had agreed to schedule a Central Forum meeting before consultations commenced at mine level.

[21] On 6 February 2009 the respondent addressed a letter to the CCMA in which it withdrew the requests for facilitation at the individual mines. On 16 February it addressed a letter to the applicant informing it that the request for facilitations at individual mines had been withdrawn and that the applicant's agreement to appoint a facilitator would again be sought in due course. It is common cause that this was not done.

[22] On 26 March and 30 March 2009 Kimberley and Finsch mines issued notices of termination to applicant's members, and on 7 April 2009 Namaqualand mine followed. In terms of these notices the applicant's members were subjected to notice periods ranging from 1 April to 30 April 2009.

[23] The retrenchment notices were issued without requesting the applicant to agree to the appointment of a facilitator.

[24] At the time the notices were issued the parties had not reached consensus regarding severance pay and measures to mitigate the adverse effects of the dismissals at the Central Forum.

[25] On 17 April 2009 the applicant referred disputes to the CCMA as contemplated in section 189A (8)(a) of the LRA in respect of the individual mines. Prior to these referrals, neither of the parties had referred a dispute to the CCMA in terms of section 64(1) read with section 189A (8)(a) of the LRA.

[26] On 26 May 2009 a conciliation meeting was held at the CCMA and a certificate of outcome stating that the disputes remained unresolved, was issued.

DTC SA

[27] On 27 January 2009, the respondent pleads that a presentation was made to all employees at DTC SA highlighting the economic downturn and its impact on diamond sales. Employees were informed that production levels for 2009 were going to drop by 60% and as a result of this DTC SA had to restructure its business from sorting 12.5 million carats to sorting 4.5 million carats.

[28] On 28 January 2009, DTC SA gave notice in terms of section 189(3) of the contemplated retrenchment of 66 to 95 employees, in terms of which it was anticipated that notices of retrenchment would be issued on or before 31 March 2009, or earlier should the parties agree.

[29] On the same day DTC SA also delivered a request for facilitation to the CCMA, and on 29 January 2009 the CCMA indicated that a facilitated meeting in respect of the contemplated retrenchments would be held on 5 February 2009.

[30] At a Central Forum meeting on 4 February 2009, the applicant raised a concern regarding the non-participation of DTC SA's management in the Central Forum consultations. Following this, according to the applicant, it was agreed that facilitation processes at operations would be halted until consensus had been reached at Central Forum. The respondent disputes that such agreement was reached, and states that the DBCM Group Industrial Relations Manager, Wayne Smerdon, agreed that the facilitation requests for DBCM operations would be withdrawn but that insofar as DTC SA was concerned, the facilitation process would continue and would not be replaced by Central Forum consultations (see Answering Affidavit, para 21 page 6). The first facilitated consultation was scheduled for 5 February 2009. The respondent alleges that the applicant did not attend any of the facilitation consultation meetings. Disputes of fact exist in regard to the reasons for its non-attendance.

[31] On 26 March 2009 a meeting was held between DTC SA and representatives of the applicant at which a presentation was made by DTC SA. The management of DTC SA indicated that retrenchment notices would

be issued the following day and the applicant's representatives suggested that a further consultation meeting should be held the following day.

[32] On 27 March 2009 the respondent issued affected employees with notices of retrenchment effective from 30 March 2009.

[33] The facilitator issued a letter dated 14 April 2009 in terms of which she set out the attempts to consult with the applicant and indicated that DTC SA was entitled to issue notices of termination from 29 March 2009.

Grounds of challenge

[34] The applicant seeks to challenge the retrenchments on the grounds firstly, that the notices of termination were issued in breach of section 189A (7) or 189A (8), and were invalid, and secondly that the retrenchments were not effected in accordance with a fair procedure. I consider each of these grounds below.

Invalidity of termination notices

[35] Mr van der Riet, SC, the applicant's counsel, contended that the notices of termination issued to the applicant's members are premature, unlawful and invalid, and accordingly of no force and effect**.**

[36] The basis for this contention is that, *inter alia,* section 189A (2) (a) provides that "*an employer must give notice of termination in accordance with the provisions of*" section 189A. Furthermore, section 189A (8) (b) (i) provides that an employer may only give notice to terminate the contracts of employment *"once the periods mentioned in section 64(1) (a) have elapsed".* Section 64(1) (a) relates to the right to strike and the recourse to lock-out if the dispute has been referred to a council or the CCMA and a certificate of non-resolution has been issued or the period of 30 days (or a period extended by agreement) has elapsed since the referral of the dispute was received by the council or CCMA.

[37] Mr van der Riet further advanced in support of his contention the Explanatory Memorandum on the object of the 2002 amendments to the LRA, which states that one of the purposes of introducing section 189A was *"to prevent employers from dismissing employees until after the conclusion of facilitation or conciliation"* (Memorandum on the objects of the Labour Relations Amendment Bill, 2001, in Thompson and Benjamin, *South African Labour Law,* page AA2-183, at para 2.45).

[38] Mr van der Riet further cited as authority the decision of Freund AJ in *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd* (2006) 27 ILJ 1909 (LC), where the court found a notice of termination in breach of the provisions of section 189A(8)(b)(i) to be invalid and of no force and effect. Counsel referred the court to the following *dicta* from the judgment (at [37]):

"If the employer gives notice that it is contemplating retrenchments and if the union is unwilling to agree thereto within 30 days, I see no reason why the employer cannot treat this as a dispute and refer it for conciliation in terms of s 189A(8)(a)", and (at [48]):
"In my view, the scheme of these provisions [ss 189A(7)(a) and 189A(8)(b)] is to prevent the employer from giving notice to terminate the contracts of employment until a fixed period of 60 days (or a longer period controllable by the employer) has elapsed. In a case where a facilitator is appointed, the employer is required to wait no more than 60 days, regardless of the progress made by the facilitator. If a facilitator is not appointed, the employer must, in my view, wait 30 days from the date of the s 189(3) notice to be able to refer the dispute for conciliation and for up to a further 30 days thereafter (if no agreement is reached to extend the relevant period and no certificate of outcome has been issued) before being entitled to give notice to terminate the contracts of employment".

[39] Mr Myburgh SC, appearing for the respondent, opposed the relief sought on two grounds. Firstly, nothing in section 189A(8) compels an employer, where a facilitator is not appointed, to first refer a dispute to the CCMA and wait for the expiry of the periods in section 64(1)(a) before issuing notices of termination. Secondly, even if the respondent is wrong on the first ground, an employer is obliged to make the referral only if a "*dispute"* as contemplated in section 189A(8)(a) exists. An interpretation to the contrary, he submitted, relying on *Leoni Wiring Systems (East London) (Pty) Ltd v NUMSA & others* ((2007) 28 ILJ 642 (LC)), will result in an absurdity.

[40] In regard to the first ground, Mr Myburgh submitted that while he could not dispute that the two judgements relied on by the applicant i.e. *NUM v De Beers Consolidated Mines (Pty) Ltd* (supra) at paras 35 and 36, and *Leoni Wiring Systems (East London) (Pty) Ltd v NUMSA & others* (2007) 28 ILJ 642 (LC) at para 19-31), have held to the contrary they are clearly wrong. Moreover they conflict with commentaries by various leading labour lawyers. In support of this submission Myburgh referred the court to the following academic authorities: Brassey *Commentary on the Labour Relations Act* (RS 2/2006) at A8-116 at para 4(b); Grogan "The new law on retrenchment – Practical effects of the amendments to section 189 and 197" (2002) 18 (4) *Employment Law* 4 at 6; Bosch "A Survey of the 2002 Labour Legislation Amendments: Is there really 'Something for Everyone'?" (2003) 24 ILJ 23 at 34; and Thompson 'Labour-Management Relations' in Cheadle et al *Current Labour Law 2001* at 37).

[41] Furthermore, Mr Myburgh contended, the duty imposed on the employer by section 189(2) is to "attempt" to reach consensus, and at some point the employer is entitled to call off the process (particularly where the union frustrates the process, as it submits was clearly the case in DTC SA discussed below), and proceed to act unilaterally. This is pertinent given the fact that the Labour Appeal Court has eschewed a mechanical checklist approach to section 189 (in *Johnson & Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR (LAC)), and the correct approach is to view the consultations preceding the retrenchment in a broad and all-encompassing manner in order to

determine whether the objectives of section 189 and 189A have been met. In this regard, section 189A and 189 must be read together. Mr Myburgh submitted that section 189A introduced three innovations in dealing with large scale retrenchments i.e. permitting an election on the part of the union to strike over a retrenchment dispute; introducing facilitation: and developing a process to deal with a procedural logjam. The latter is relevant to the present matter, and permits the employer to elect for strategic reasons not to use a facilitator, and requires the union to elect whether to strike in respect of a dispute of interest once notice of the retrenchment has been issued, or to refer the dispute to the CCMA. The applicant's submissions, Mr Myburgh contended, amounts to introducing new wording into section 189A(8)(a) to the effect that where consensus is not reached on all aspects of a retrenchment the employer is prevented from issuing notices of retrenchment before a dispute is referred to the CCMA by either party. This, it was submitted, was clearly incorrect in that section 189A (8) envisaged a situation where no notice had been issued and the parties could accordingly choose to refer the dispute to the CCMA or the union could elect to strike. Section 189A (8), counsel submitted, does not prevent an employer from issuing notice to terminate, although the risk to the employer is that it can attract a retaliatory strike.

[42] In my view however, even if this submission is correct, the period contemplated in section 189A (8) (a) and (b) (i) are still applicable and the employer would at least have to wait for the expiry of the 60-day period clearly contemplated therein. This is consistent with the approach of Freund AJ in *NUM v De Beers* (supra) and accords with the view of Thompson where he makes the point that the union, if it has not previously attempted to refer a matter to statutory conciliation, can force the retraction of termination notices (supra, at page 37). He states as follows:

"(9) If the parties do not agree to statutory facilitation, they are still frozen out of termination action, industrial action or referrals to Court for an equivalent 60 day period. This is because section 189A (8) bars any such action –

- *until statutory conciliation has run its course (typically a 30 day process), but in addition*
- *no party can refer a dispute to statutory conciliation until 30 days after the issue of the section 189(3) notice.*

(10)If, after the issue of a section 189(3) notice, no facilitator is agreed and no one refers the dispute to statutory conciliation, the employer will presumably have to proceed with the standard consultation efforts and exhaust that process before issuing termination notices".

I do not agree with the respondent that this envisages that the employer could take its chances and issue notices of termination once it feels that the process is exhausted, despite the risk the union would not be in agreement that the process has in fact been exhausted. It is clear in my view, as expressed above, that this approach is incorrect and the employer has to wait out the minimum statutory 60 day period prior to issuing the termination notices. This is pertinent to the facts in all three matters, in that notices of termination were issued prior to the expiry of the 60 day period.

[43] In regard to the second ground, the respondent, relying on *Leoni Wiring Systems* (supra, at paras 23-26) submitted that in circumstances

where consensus was reached; or in the absence of a clear dispute between the parties; or where the employer reasonably believed there was no dispute between the parties; the employer may give notice of termination without first referring a dispute. Furthermore, for a dispute to exist in this context, it must be clearly identified and the union's solution for resolving it must have been unambiguously stated. The fact that the union was simply unhappy could not be relied upon by it to state at a later stage that it was in dispute with the employer (*Leoni Wiring Systems* supra at para 27. See also *City of Johannesburg v SAMWU & others* (2008) 29 ILJ 650 (LC) at para 18). The notices of termination issued by the employer accordingly remained valid in circumstances where it was issued by the employer unaware of a dispute that manifests itself later in a referral by the union. Support for this, Mr Myburgh contended, is found in *Leoni Wiring Systems* (supra at para 31). Therefore, Mr Myburgh submitted, the facts *in casu* on the respondent's version, which on first principle this court must accept, it is patently clear that there was no dispute about union representation (which is the only dispute pleaded by the applicant in its Founding Affidavits) at the time the notices were issued. I agree however with the replying submissions by Mr van der Riet to the effect that the dispute was an interest dispute concerning the failure to reach consensus on the retrenchment. This is clearly stated in the referral form to the CCMA. Moreover, our jurisprudence is clear on the issue that a dispute includes an "alleged dispute" : see Halton Cheadle and Shamima Gaibie, *Current Labour Law 2008*, page 114 where in regard to the *dictum* relied upon by the respondent in City of Johannesburg (supra), the following is stated in regard to the definition of dispute in section 213 : *"[t]here is a very good reason for this definition – it was inserted precisely to avoid litigation over the existence of a dispute as a jurisdictional prerequisite for conciliation. That the employer is not informed of the alleged dispute before the referral is not good labour relations practice but no harm is done as long as the referral clearly identifies what the referring party alleges to be in dispute. The conciliation process will give the other party the opportunity to respond. That process is, in a collective bargaining context, a form of induced negotiation assisted by a conciliator – to provide a process where none exists, or is defective".*

[44] The respondent accordingly submitted that, on the first, alternatively the second grounds advanced above, the notices of termination were valid. In addition, even if they were issued prematurely, this did not render them of no force and effect, notwithstanding the *dictum* to the contrary in *De Beers* (supra), which this court was urged to find was incorrect. At worst, the respondent submitted, this would render the dismissals procedurally unfair.

[45] I do not agree with the respondent in this regard. I am bound by the *dictum* in *NUM v De Beers*, and insofar as Nel AJ in *Leoni Wiring Systems* (supra) agreed with Freund AJ but chose to qualify the 30 day requirement by stating that the employer did not have to wait until 30 days before declaring a dispute when the parties had reached consensus, I agree with Mr van der Riet that he contemplates a dispute about the fairness of the dismissal, which is not of relevance here. Mr van der Riet submitted that this was not the dispute that the legislature had in mind and that section 189A(8)(b)(ii)(bb) provides that where the periods mentioned in section 64(1) have elapsed the union

may refer a dispute concerning whether there is "*fair reason*" for the dismissal in terms of section 191 (11). The present matter is distinguishable on the facts in that the dispute is an interest dispute concerning the failure of the union to accede to the employer's proposals regarding retrenchment. In other words, what the legislature intended in respect of a mass retrenchment, is that the parties must be forced to involve a facilitator as a third party, and that this must continue for 60 days, unless they reach agreement in the interim. Alternatively, where no facilitator is appointed, there must be a period of 30 days where the parties engage and if they are unable to reach agreement then there is an interest dispute which should be referred to the CCMA in terms of section 64 (1)(a). Only after the certificate of non-resolution or the expiry of the second 30 day period can the substantive fairness of the dispute be referred by the union or can the employer validly issue notices of termination in accordance with section 37(1) of the Basic Conditions of Employment Act, 75 of 1997. Mr van der Riet submitted that Nel AJ's approach was based on two errors, firstly that the nature of the dispute which the legislature had in mind was incorrectly seen to be about substantive fairness, but was in fact an interest dispute about the failure to agree to the retrenchments; and secondly if the parties reached agreement regarding the retrenchment, the assumption is that this was an exception to section 189A(8)(b)(i) and that the employer could issue notices without first referring the dispute. However, if there was no "*dispute"* then there would be no need to issue termination notices. Mr van Der Riet submitted that section 189(A) (8) (b) (i) had nothing to do with the first 30 day period contemplated in section 189A (8)(a), and that Nel AJ conflated the two. Freund AJ, on the other hand, contemplated a situation where the employer could elect to exhaust conciliation or speed up conciliation by reaching agreement with the union on the retrenchment, but where no agreement was reached the dispute had to be referred before termination notices could be issued. In either instance however, the full 60 day period would be applicable. The reliance by the respondent on the proviso of Nel AJ is thus not sustainable, and the approach of Freund AJ must be preferred.

[46] Furthermore, I am in agreement with Mr van der Riet that the imperative "must" in section 189A (2) (a) means that compliance with the provisions of section 189A are peremptory. This means, in the words of Freund AJ (*NUM v De Beers* supra, at [40]), that "it would flout the intention of the lawgiver and the policy underlying section 189A to recognize the validity of notices given in contravention of section 189A(8)". I do not agree with the submission by Mr Myburgh that "*must*" (and the concomitant declaration of lack of force and effect) is an administrative law concept not applicable to labour law which incorporates a fairness jurisprudence. It is clearly applicable and that section 189 and 189A have little to do with fairness and set out rights and obligations which have legal consequences. In this regard I agree that the *dictum* of Brassey AJ is applicable: see *Sikhosana v Sasol Synthetic Fuels* 2000 (1) BLLR 101 (LC). This court cannot decide whether a failure to comply with a peremptory statutory period in the LRA is fair. I do not consider the authority cited by the respondent in respect of correcting short-notice (*Honono v Willowvale Bantu School Board & Another* [1961] (4) AD 414) to be applicable, which in effect would amount to any notice issued prematurely

being remedied by being considered to take effect on the date when it could have been validly issued. *Honono* emanates from an era when the common law of master and servant characterised our labour law jurisprudence and is not applicable. This was confirmed by the Appellate Division (as it then was) in a subsequent decision in *GWU and others v Industrial Tribunal and Minister of Labour,* 1963 (4) SA 775 (A), where at 787 A-C the court states as follows : "*Honono's case, limited as it is to the position of common law servants, is no authority, by analogy or otherwise, for the proposition that, where the Minister has fixed a date earlier than six months after the date of publication, that would take effect as if he had fixed a date in accordance with the requirements of this section".*

[47] I accordingly agree with Mr van der Riet in that the meaning of section 189A (8) (b) (i) is clear – the applicant had referred a dispute (in Exploration and DBCM), and certificates of non-resolution were issued. The respondent in such circumstances could not have issued notices of termination prior to the periods referred to in section 64(1) (a) having elapsed. The earliest date therefore, it could have been entitled to issue valid notices of termination would have been from the dates on which the certificates of outcome were issued. In the case of Exploration this would be 19 May 2009 and in DBCM, 26 May 2009.

[48] The facts in DTC SA differ from the other two matters. In DTC SA it is common cause that notice in terms of section 189(3) notice was issued on 28 January 2009 that the respondent contemplated retrenchment of between 66 and 95 employees. Notices of termination were then issued on 30 March 2009. Mr van der Riet submitted that the 60 day period referred to in section 189A(7) would have expired on 30 March 2009, and that, relying on section 4 of the Interpretation Act, 33 of 1957, the reckoning of number of days is exclusive of the first and inclusive of the last day. Therefore the earliest day on which the respondent could have given notice would have been at the end of the working day on 30 March and therefore notice could only have validly been given on 31 March 2009. Mr Myburgh submitted that the relevant date was when the company purported to issue the notices in terms of the Basic Conditions of Employment Act, and that in actual fact notice was given for a period that would run until the end of April and accordingly only took effect on 1 April 2009. Mr van der Riet submitted that it was not the notice period envisaged in the Basic Conditions of Employment Act that was relevant, but the section 189A (7) notice and that insofar as respondent contends notice was given on 1 April 2009, this is clearly wrong in that the requirement was that 60 days had to elapse from the appointment of the facilitator and only after 60 days could the employer validly give notice. I agree with this submission.

[49] Mr Myburgh submitted that this court should not deal with s189 in terms of invalidity more apt to administrative law. To say that if something is one day out of time and is invalid and leads to it being set aside it anathema to labour law. If the respondent miscalculated, at worst he submitted, this constituted procedural unfairness and to construe it as an act of invalidity which led to it being of no force and effect was wrong. Mr Myburgh argued

that even if this court were to find the notice to be invalid, it should not be said to have no force and effect, but should instead be considered to have become valid on the date it could have been validly issued, on the *Honono* test. Mr van der Riet contended, *inter alia,* that *Honono* was not applicable since we are not concerned in the present matter with "*short notice",* and it was distinguishable. I have dealt with *Honono a*bove, save to say that Mr van der Riet referred me to a more recent judgment in which it was found to have no application : *Stocks and Stocks Holdings Ltd and Another v Mphelo* (1996 (2) SA 864 (T)). There Botha J found that where notice was defective (on the grounds that one calendar month's notice had not been given), it was invalid and had not terminated the contract. *Honono* accordingly, Mr van der Riet submitted, had no application to statutory periods that are peremptory under section 189A.

[50] The notices of termination *in casu* are tainted by prematurity and, as decided by Freund AJ (in *NUM v De Beers* supra, at [40]), are accordingly invalid and of no force and effect. Valid notices could accordingly only have been issued, at the earliest, from the dates of issue of the certificates of outcome in Exploration and DBCM, being 19 and 26 May 2009 respectively, and with effect from 31 March 2009 in DTC SA. The applicant is accordingly entitled, for the reasons set out herein, to a declaratory order to this effect. In considering the consequences of such an order, and given the submissions by the parties in this regard, I am in agreement with Mr van der Riet that reinstatement is still the primary remedy envisaged in terms of the fairness jurisprudence envisaged under the LRA. I do not agree with Mr Myburgh that reinstatement would be an exceptional remedy. It is considered to be an appropriate remedy for procedural fairness in terms of section 189A(13), and a finding of invalidity of the notices goes beyond mere procedural unfairness. This matter is moreover distinguishable on the facts from *NUM v De Beers* (supra) where the mine in question had already closed by the time the matter was heard, and the court did not order relief other than the declaratory order, and declined to interdict the issue of notices where a certificate of outcome had not been issued but 30 days had expired since the referral of the dispute. In the premises, in my view, the reinstatement of the applicant's members from the date of their purported termination of employment would be a justifiable remedy given the invalidity and unlawfulness of the termination notices, until such time as valid notices are issued.

Procedural unfairness

Exploration

[51] The applicant seeks alternative relief on the grounds of the procedural unfairness of the retrenchments in that the respondent failed to consult with it, as required by section 189 (1) (b) (ii) and (c), in respect of the retrenchment of its members. To the extent that it is necessary for me to decide whether there was adequate consultation as required by the LRA, I deal with this issue below.

[52] Mr van der Riet relying on *NUM v Alexcor Ltd* ((2004) 25 ILJ 2034 (LC),at paras 85 and 100), submitted that section 189(1) creates a hierarchy of parties and that an employer is required to consult in terms of this prior to effecting a retrenchment.

Section 189 (1) provides as follows:

"(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult-

(a) any person whom the employer is required to consult in terms of a collective agreement;

(b) if there is no collective agreement that requires consultation-

(i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and

(ii) any registered trade union whose members are likely to be affected by the pr opposed dismissals;

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose."

[53] It is common cause that the respondent did not consult with the applicant in regard to the retrenchment of its members at Exploration. The respondent accepts that, in terms of section 189 (1), where union members belonged to the applicant (albeit that it was unrecognized at Exploration), the respondent was obliged to consult with the applicant over their retrenchment: *Baloyi v M & P Manufacturing* ([2001] 4 BLLR 389 (LAC) at para 20). However, the respondent submits it does not follow axiomatically that a failure to do so would render the retrenchments unfair, and that this court is required to consider procedural fairness in the context of the totality of circumstances that existed. In this regard, taking account of the following, the respondent submitted that the retrenchments of applicant's members was not procedurally unfair:

(i)Section 189(1)(c) is not "unwavering and immutable" : see *FGWU & others v Irvin & Johnson Ltd* ([1999] 7 BLLR 683 (LC) at para 22);

(ii)On the respondent's version the applicant elected not to be consulted at Exploration;

(iii)There was an obligation on the applicant to inform the respondent that it wished to be consulted and to intervene timeously;

(iv)In the absence of an adequate explanation for why the applicant did not do so, it stands to be inferred that it frustrated compliance with section 189 (relying on *Johnson & Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC) at para 28), or otherwise acted negligently;

(v)The respondent consulted with Seefane who was effectively a shop steward; and

(vi)Through Seefane's participation in the Central Forum consultations the members of the applicant also had a voice at central level in that it was agreed that any decision taken there would also apply to them.

[54] In essence the submission was to the effect that the process was not perfect but was not procedurally unfair simply on account of the non-involvement of the applicant. In this regard however the respondent conceded that it had thought the applicant was not entitled to be notified in terms of section 189 (3) and consulted in terms of section 189 (1) (b) (ii) or (c). The so-called "shop steward" (Seefane) appears to have made the same mistake as the respondent's Human Resources Manager in assuming that the applicant was not entitled to participate in the consultation process. Moreover, even at Central Forum level, the process of consensus-seeking had not been exhausted in that there were still outstanding issues at the time the notices of termination were issued. They were issued furthermore in the light of a pending Central Forum meeting. The failure to involve the applicant constitutes a fatal procedural error, and I agree with the submission by Mr van der Riet that it cannot be contended that it was not clear to the employer that consensus had not been reached. Whatever the reasons however, it is not disputed that a section 189(3) notice was not issued to the applicant in respect of its members at Exploration, and that it was not invited to participate in the ensuing consultation process at Exploration. While I accept the respondent's version that Seefane participated at the Central Forum and liaised with it in regard to Exploration, in my view this is not sufficient to remedy the defect occasioned by non-involvement of the applicant in the consultation process, which the respondent concedes. In my view, the failure to consult with the applicant in respect of Exploration is a patent and irredeemable error.

DBCM

[55] In its Founding Affidavit the applicant submits that notices of termination were issued in circumstances where:
(i)The respondent failed to seek consensus with the applicant over the appointment of a facilitator after the respondent's initial request for facilitation had been, by agreement between the parties, withdrawn;
(ii)The respondent failed to select applicant's members for retrenchment using the agreed criterion of LIFO;
(iii)A dispute over the interpretation or application of a Memorandum of Understanding concluded at Namaqualand dealing with selection criteria had been referred to the CCMA by the applicant;
(iv)Agreement had not been reached on severance pay (albeit only in relation to the terms of payment of the R7000- training allowance component thereof); and
(v)Discussions regarding a social and labour plan agreement had not been finalised.

[56] The applicant's case is that the respondent decided to end the consultation process prior to it being exhausted. Mr van der Riet submitted, relying on Enterprise *Foods (Pty) Ltd v Allan* ([2004] 7 BLLR 659 (LAC) paras

23, 32 and 33), and *Highveld Steel & Vanadium Corporation v NUMSA* ([2004] 1 BLLR 11 (LAC) at para 26I-27D and 30F-G), that it on this basis alone it was clear that a fair retrenchment procedure had not been followed prior to the decision to dismiss being taken. In the result, the applicant pleads that the respondent failed to engage in, alternatively conclude, a meaningful joint consensus-seeking process with the applicant prior to retrenching its members. In the circumstances the dismissals were premature and procedurally unfair.

[57] The respondent's version, however, which I am obliged to accept where material disputes of fact exist (as per *Plascon- Evans Paints v (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)), was that :
(i)Neither party sought to recommence the facilitation process (which was withdrawn at the applicant's insistence and which the applicant did not participate in another process at Diamond Trading Company);
(ii)The selection criteria were not limited to LIFO and were multifaceted;
(iii)On the Memorandum of Understanding the document itself reflects that LIFO was not the sole selection criterion; the referral of the dispute to the CCMA was made in terms of section 24(2) (and not 189A(8)); and the referral of the dispute was made after the termination notices were issued (albeit on the same day);
(iv)In regard to severance pay, the parties were not making progress;
(v)In regard to the labour plan issue it was not relevant to the retrenchment exercise in question (such a plan was already in place), and the applicant had been invited to table a plan for the future.

[58] In short, the respondent submitted, a dispute had not manifested itself on any of the aforesaid issues at the time that the notices of termination were issued. Therefore there is no merit to applicant's complaints. Furthermore, a strict checklist approach was not applicable (having been eschewed by the LAC in *Johnson & Johnson* supra) and this court was obliged to have regard to the overall process, which reflected a genuine attempt by the respondent to reach consensus. Furthermore, Mr Myburgh submitted, Freund AJ had also endorsed an overall approach in *SACCAWU v Sun International SA Ltd* ((2003) 24 ILJ 594 (LC) para 46) and had made it clear that the issue was whether an "attempt" had been made to reach agreement. The court expressed this as follows:
"Section 189(2) of the LRA imposes a duty on an employer to attempt to reach consensus but it does not impose a duty to reach consensus. It follows, in my view, that a time may be reached in a consultation process when the employer is entitled to call off the consultation process and to act unilaterally (albeit fairly, in terms of the requirements of the LRA). Since this is so, depending on what has gone before, it is in my view not necessarily unfair or contrary to the requirements of the LRA, for an employer to decide that it is only prepared to attempt to reach consensus on one more occasion and to decide that, if necessary, it will act unilaterally thereafter".

[59] I was also referred in this regard to Thompson and Benjamin (supra, at AA1-508). Mr Myburgh submitted that furthermore, the two judgments relied on the by the applicant did not assist it. Unlike *Highveld Steel* (supra) here the

respondent did not “close the door on further consultations on the issue of the selection criteria”, but in fact reached agreement thereon, and then issues arose on the application thereof, and *Enterprise Foods* (supra) was also distinguishable in that, *inter alia,* it did not deal with a “spill and fill” exercise (this being the restructuring model chosen by the parties in the present matter).

[60] Although it is clear that the parties had not been able to reach consensus on a number of the issues contemplated in section 189, I agree with Mr Myburgh however, that this on its own does not mean there was procedural unfairness. Furthermore, Freund AJ found in *NUM v De Beers* (supra at [55]) that notwithstanding the failure to reach agreement on severance and some of the detail regarding community involvement post-retrenchment, there was no procedural unfairness. I agree with the respondent that the consultation process had been exhausted.

DTC SA

[61] Mr van der Riet submitted that the respondent was in a position at the meeting on 26 March 2009 between the parties to finalise consultation in good faith before the 60 day period expired and refused to do so, and acted in contravention of the statutory 60 day notice period. The respondent urged the court to find that where there are material disputes of fact these must be resolved in its favour. In the present matter DTC SA felt that the consultation process could continue; DTC SA was not part of the Central Forum but sent two shop stewards as a compromise; the applicant knew full well that the respondent was not calling off the facilitation and implored it to attend but it said it was not in a position to consult and it was responsible for the delay. On these facts in its version, the respondent submitted, there can be no procedural unfairness, and in fact this was a prime example of when, on the *Sun International* (supra) *dictum*, an employer was entitled to say enough is enough.

[62] Mr van der Riet submitted that the applicant is entitled to relief on both grounds of its complaint i.e. the notices are invalid in that they were issued in breach of section 189A(7) and secondly the conduct of the employer indicates it that it refused to engage in consensus seeking when it could have done so. It is entitled to relief, Mr van der Riet submitted, even if the respondent’s version is accepted on the *Plascon-Evans* (supra) test. Alternatively, if this court finds the material facts are not common cause it should refer the issue to oral evidence.

[63] I agree with the respondent that *Plascon-Evans* being applicable, I am required to decide any material dispute of fact in its favour to the extent that this is relevant. However, on the material facts it is common cause that the applicant did not participate in the facilitated consultation (the reasons for this are in dispute) process and by the time it decided to do so, the employer had clearly formed a view that it was deliberately attempting to frustrate the process and was entitled to call it to a halt. I agree with Mr Myburgh’s submissions in this regard. There is accordingly no procedural unfairness.

Final relief

[64] In applying the facts to the law in the three matters *in casu*, I am cognisant of the fact that the applicant seeks final relief in motion proceedings. The applicant has not submitted any evidence to gainsay the rationale for the retrenchments, and I accept that this is not contested (at this stage at least although it may do so at a later stage after the terminations). Furthermore, where there are material disputes of fact which are relevant to the relief sought, I have accepted the version of the respondent in line with the test articulated in *Plascon-Evans* and in *Continental Tyre SA (Pty) Ltd v NUMSA* ((2008) 29 ILJ 2561 (LAC)). This is only relevant in regard to procedural unfairness contentions in DBCM and DTC SA, and particularly DTC SA where there are factual disputes regarding the reasons for non-participation of the applicant. Resolving the factual disputes in the respondent's favour in both DBCM and DTC SA, I have concluded that it is common cause that the applicant did not participate in the facilitated process at DTC SA, and that in DBCM the consultation process was exhausted, and that save for the five outstanding issues, consensus was reached.

Costs

[65] Counsel were in agreement that costs should follow the cause. Although the applicant has not succeeded in regard to procedural fairness in the DBCM and DTC SA matters, the notices of termination in all three matters have been declared to be invalid and of no force and effect. Accordingly it is appropriate that the respondent is ordered to pay the costs as I have ordered.

Conclusion

[66] In the premises, I confirm the orders issued in the three matters to the effect that the notices of termination were issued prematurely (albeit in DTC SA by one day) in terms of section 189A(7) and (8), and are of no force and effect. In addition, the notices issued at Exploration are furthermore invalid on the ground that they were not preceded by compliance with a fair procedure in as required by section 189A(13) read with section 189A(14). In consequence of the orders, for the reasons set out above, the applicant's members are reinstated until such time as valid termination notices may be issued, and, in the Exploration matter, until the respondent has complied with a fair procedure.

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Date of hearing : 4 and 5 June 2009
Date of order : 9 June 2009, followed by reasons delivered on 24 June 2009.

Appearance:

For the Applicant : Adv J G van der Riet SC instructed by Cheadle, Thompson and Haysom
For the Respondents: Adv A T Myburgh SC instructed by Perrott Van Niekerk Woodhouse Matyolo Inc.