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MINING & RESOURCES

What exactly are the duties and responsibilities of the mining right holder in the retrenchment process in the mining industry?

7 June 2023 *7 min read*

In *Association of Mineworkers & Construction Union v Buffalo Coal Dundee (pty) Ltd & another* ("Buffalo Coal"), the Labour Appeal Court ("the LAC") considered the relevance of s 52 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA") to retrenchment processes in the mining industry as well as the conclusions made by the Labour Court in *National Union of Mineworkers v Anglo American Platinum Ltd & another* ("Amplats").

Just to remind the reader, in Amplats, the Labour Court had held that in terms of s 52(4) of the MPRDA, the holder of the mining right is required to comply with the provisions of s 189 of the LRA [only] if it is the employer of the employees affected by retrenchment.

In *Buffalo Coal*, the owner of the mining rights was Zinoju (Pty) Ltd ("Zinoju"). However, Zinoju was 70% owned by *Buffalo Coal* and the two entities had an agreement in terms of which *Buffalo Coal* operated the mine.

In December 2014, *Buffalo Coal* issued a notice in terms of s 189(3) of the LRA to AMCU and NUM. It also requested the CCMA to facilitate the consultation process. On the same date, Zinoju issued a notice in terms of s 52 of the MPRDA informing Department of Mineral and Resources ("DMR") *inter alia*, that *Buffalo Coal* had issued s 189 notice to its employees.

In January 2015, *Buffalo Coal* provided the unions with its financial statements and a copy of the social and labour plan ("SLP") submitted to the DMR by Zinoju. AMCU contended that Buffalo Coal should comply with the SLP because it was the majority shareholder of Zinoju. Buffalo Coal countered that it was not obliged to do so because it was not the mining right holder. AMCU contended that Zinoju be part of the consultation process so that it could explain how it would comply with its obligations in the SLP. *Buffalo Coal* argued that Zinoju would not be part of the consultation process because it was not retrenching the employees. However, it indicated that some of the directors of Zinoju would attend the consultations in their capacity as board members of *Buffalo Coal*.

In February 2015, AMCU raised issues relating to Buffalo Coal's non-compliance with the SLP. *Buffalo Coal* contended that it was not the mining right holder and therefore had no obligation to comply with the SLP. In March 2015, Buffalo Coal wrote a letter to AMCU indicating that although Zinoju was not retrenching any employees, it would provide the necessary support to Buffalo Coal employees. The said assistance conformed with Zinoju's SLP.

When Buffalo Coal issued termination letters, AMCU approached the Labour Court on an urgent basis seeking an order declaring that Buffalo Coal and Zinoju had failed to comply with fair procedure in terms of s 189A(13) of the LRA read with s 52 of the MPRDA in particular the SLP. The Labour Court found that Buffalo Coal was not the mining rights holder and therefore it did not have to comply with the provisions of s 52 of the MPRDA.

Dissatisfied, AMCU approached the LAC. The LAC's view was that the most important issue to be decided was whether the mining right holder was supposed to be part of the consultation process. The LAC disagreed with the Labour Court's interpretation of s 52(4).

This section provides as follows:

> *"The holder of mining right remains responsible for the implementation of the processes provided for in the Labour Relations Act, 1995 (Act 66 of 1995), pertaining to the management of downscaling and retrenchment, until the Minister has issued a closure*

> *certificate to the holder concerned."*

The LAC interpreted s 52(4) to mean that the mining right holder remains responsible for the implementation of the processes in MPRDA pertaining to the management of downscaling and retrenchment of the employees until the Minister has issued the closure certificate. The LAC reasoned that the legislature must have known that the mining right holder would not necessarily be the employer because the mining right holder may employ a contractor to mine on its behalf.

> *"It must therefore be accepted that the legislature knew that the contractor would be the employer in those circumstances. The word 'remain' was therefore deliberately used to emphasize that, irrespective of the fact that the mining right holder appointed a contractor to mine on its behalf, the mining right holder would nevertheless remain responsible for the implementation, inter alia, of the retrenchment process."*

The LAC further reasoned that this interpretation makes sense because the mining right holder must submit the SLP and the contractor has no such obligation. It indicated that the mischief that the legislature wanted to prevent is a situation where the mining right holder would submit a grand SLP; be granted mining rights; employ a contractor and escape all the liability and responsibility in terms of the SLP. The contractor would also argue that it has no responsibility in terms of the SLP. The workers and the community where the mining operates would then be prejudiced.

The LAC found that s 52(4) and s 189 can be reconciled without any modification. S 189 caters only for the employer but read with s 52(4), the mining right holder, even though not the employer, would alone or together with the employer be responsible for the implementation of the retrenchment process.

It was held therefore that an interpretation whereby both the mining right holder and the employer would be responsible for the implementation of the retrenchment process, albeit one in terms of the MPRDA and the other in terms of the LRA, is consistent with the objects of the MPRDA and should be preferred.

The LAC found that s 101 of the MPRDA makes it plain that the holder of the right remains responsible for compliance with the MPRDA, therefore, *Buffalo Coal* was responsible to invite the Zinoju to be part of the consultation process. It was held that failure by Zinoju to be part of the consultation process rendered the consultation process procedurally unfair.

However, no relief was granted because the directors of Zinoju were part of the consultation process, they had submitted Zinoju's financial statements and Zinoju had provided assistance that complied with its SLP. The union's appeal was dismissed.

Conclusion

It is apparent that the LAC has not approved the Labour Court's interpretation of s 52(4) of the MPRDA, in particular, that the holder of the mining right is required to comply with the provisions of s 189 of the LRA only if it is the employer of the employees affected by a retrenchment.

The LAC's interpretation of s 52(4), is that it is the mining right holder's duty and responsibility to implement the processes in MPRDA including retrenchment processes until the Minister has issued the closure certificate.

In reconciling s 189 of the LRA together with s 52 of the MPRDA, the LAC has concluded that the mining right holder, even though not the employer, can alone, in terms of s 52(4) be responsible for the retrenchment process or together with the employer, in terms of s 189, be responsible for the implementation of the retrenchment process.

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Comment

It is apparent that the LAC decision in *Buffalo Coal* places the mining right holder at the center of the retrenchment processes irrespective of whether or not it is the employer of the employees affected by retrenchment process and irrespective of whether or not the mining right holder has employed a contractor to mine on its behalf.

Therefore, it is crucial for the employers in the mining industry to carefully consider how they can implement both s 189 of the LRA and s 52 of the MPRDA together and at the same time. We anticipate that the SLPs will feature prominently during the consultation processes. Therefore, the mining right holders will be well advised to pay special attention on compliance with their SLPs.



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