

MINING & RESOURCES

What is the relevance of s 52 of the MPRDA on retrenchments in terms of section 189 and 189A in the mining industry?

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In *National Union of Mineworkers v Anglo American Platinum Ltd & others (Amplats)*, on 15 January 2013, Amplats had issued a notice of intention to consult in terms of s 189(3) of the LRA. The proposed restructuring could result in up to 14 000 retrenchments. On 24 May 2013, Amplats, Department of Mineral Resources (**DMR**) and the unions entered into a written agreement called DMR Agreement.

In terms of this agreement some 6000 positions were affected but it was agreed that the s 189 consultation would be held in terms of s 189A with the facilitation of the CCMA. The s 189A process under the auspices of the CCMA was concluded on 16 August 2013. In the interim, on 3 July 2013, Amplats had issued a letter to the Minister in terms of s 52 of the Mineral and Petroleum Resources Development Act 28 of 2002 (**the MPRDA**). The Minister did not respond to the letter. From 2 September 2013, Amplats started issuing notices of termination.

The union launched an urgent application in terms of s 189A(13) of the LRA seeking an order declaring that the dismissal of its members by Amplats was invalid for want of compliance with s 52 of the MPRDA and/or s 189 and 189A of the LRA. It required Amplats to reinstate its members. The union's contentions were that in the absence of notification to the Minister, or in the absence of the investigations and recommendations by the Board to the Minister, and in the absence of any directives issued by the Minister concerning corrective measures referred to in s 52, the consultations for retrenchment of the employees were invalid and/or procedurally unfair.

Invalidity issue

The Labour Court considered that the purpose of s 189A(13) is to provide for the adjudication of disputes to enable the court to determine procedural fairness in retrenchments at an early stage so as to set the employer back on the right track where there is a genuine and clear-cut procedural unfairness which goes to the core of the process. The Court, relying on *NUMSA & others v SA Five Engineering & others*, found that disputes about procedure in cases falling within the ambit of s 189A cannot be referred to the Labour Court by statement of claim but must be dealt with by means of motion proceedings.

On those bases, the Labour Court declined to make a determination as to whether the dismissal of the affected employees was invalid on account of non-compliance with s 52 of the MPRDA. The Court reasoned that a determination of the invalidity of the dismissal was a matter of substance rather than procedure. It held that the issue of the invalidity of the dismissals fell outside the court's jurisdiction in terms of s 189A(13) of the LRA.

Relevance of s 52

The Court proceeded to determine the relevance of s 52 of the MPRDA within the context of procedural fairness of the consultations as contemplated by s 189, and it concluded that s 52 appeared to be addressing a purpose different to that which underlines s 189. First, the obligations that s 52 creates are imposed on the holder of the mining right, not the employer of the employees whose security of employment is affected by the retrenchments. Second, s 52 makes no reference to any obligation on the holder of the mining right to consult with the employees or their representatives.

However, the Court held that in terms of s 52(4) the holder of the mining right (to the extent that the holder is the employer of the employees affected by retrenchments) is required to comply with s 189 of the LRA, and in that case, whether the notice in terms of s 52 is issued before, parallel to, or after the s 189 notice, is a matter to be determined by the facts of each case.

On this basis, the Court found that it is true that any directives regarding corrective measures issued by the Minister to a mineral rights holder may impact the nature and course of a s 189 consultation process, and the overlap between s 52 and s 189 will be dictated by the relevant facts of the case. However, where the notice in terms of s 52 has been issued to the Minister but no investigations are instituted by the Board and no directives are issued by the Minister, the s 52 process holds no further relevance to the consultation process in terms of s 189.

In the instant case, the Court held that the section 52 notice had been issued but there were no investigations by the Board and no directives by the Minister; therefore the s 52 process held no further relevance to the consultation process. The union's application was therefore dismissed.

Conclusion

It is apparent from the above authority that the s 52 notice must always be issued by the holder of the mining right because such notice may impact the nature and course of the s 189 consultation process, particularly in cases where the Minister may decide to issue directives. Therefore, it is advisable for the holder of the mining right to issue the s 52 notice every time the employer of the affected employees has decided to issue a s 189 notice.

It is also apparent from the above authority that the issue of the invalidity of the dismissals for non-compliance with s 52 was not determined. This is because the Court had been approached in terms of s 189A(13) of the LRA, the determination of which is confined to procedural fairness. This leaves a possibility that another Court, with the necessary jurisdiction, may determine that non-compliance with the provisions of s 52 renders the dismissals invalid.

This is an important factor to bear in mind because s 52 is not located within the LRA. For these reasons, the holder of the mining right should always issue the s 52 notice every time the employer of the affected employees has taken a decision to issue a s 189 notice. This applies even where the employer of the affected employees is also the holder of the mining right. However, the timing of the issuing of the s 52 notice may be crucial.

Mining terminology: the difference between "accepted", "granted", "executed" and "registered"



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