**INTHE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case No: JA42/2015

In the matter between:-

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| **ASSOCIATION OF MINEWORKERS AND** | |
| **CONSTRUCTION UNION ("AMCU")** | **Appellant** |
| **INDIVIDUALS LISTED IN ANNEXURE "A"** | **Second to Further Appellants** |

and

| | |
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| **BUFFALO COAL DUNDEE (PTY) LTD** | **First Respondent** |
| **ZINOJU COAL (PTY) LTD** | **Second Respondent** |

**Heard**: **4 November 2015**

**Delivered**: **11 May 2016**

**Summary: Interpretation of section 52(4) of the Mineral Resources and Petroleum Development Act (MRPDA) in relation to the holder of a mining right that has subcontracted the mining operation to another entity in the event of retrenchment. Question for consideration is whether mining rights holder entitled to be part of the consultation process in terms of section 189 of the LRA – interpretation must be consonant with the objectives of the MRPDA to ensure that holders of mining and production rights contribute towards the**

**socio-economic development of the areas in which they are operating – mining rights holder submitting a social and labour plan and it would be senseless to do so if it were to be excluded from the consultation process - irrespective of the fact that the mining rights holder subcontracted the mining operation, the mining rights holder remains responsible for the implementation of the retrenchment process. *NUM v Anglo American Platinum* distinguished - contractor was supposed to invite the mining rights to be part of the whole retrenchment process. The mining rights had a duty to insist to be part of the retrenchment process. The failure of the mining rights holder to be part of the process rendered it procedurally unfair. Despite the procedural flaw, court finding that reinstatement impractical - Appeal dismissed - Labour Court's judgment set aside only to the issue of costs.**

**Coram: C J Musi, Coppin JJA e*t* Makgoka AJA**

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**JUDGMENT**

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CJ MUSI JA

[1] This appeal essentially concerns the duties and responsibilities of a mining right holder that is not the employer, in the event of retrenchment.

[2] The appellants approached the Labour Court, (Prinsloo AJ), on an urgent basis, seeking an order in the following terms:

> 'a. An order declaring that the Respondents have failed to comply with a fair procedure in terms of section 189A(13) of the Labour Relations Act (LRA) and with section 52 of the Mineral Petroleum Resources Development Act (MPRDA);
>
> b. Interdicting the Respondents from giving effect to the notices of termination issued on 11 March 2015 which notices of termination take effect on 11 April 2015, until such time the Respondents complied with a fair procedure and complied with the obligation set out under the MPRDA and particular the social of labour plan;

c. Alternatively if the Court finds that the notices of termination issued to the individual applicants resulted in their dismissal, direct the Respondents to reinstate the individual applicants until there is compliance with a fair procedure and section 52 of the MRPDA, alternatively order the payment of 12 months compensation, further alternatively refer this matter to trial.'

[3] The Labour Court dismissed the application with costs. The appellants appeal, with the leave of the court *a quo*, against the order of the Labour Court.

[4] The facts of this matter are common cause and may be summarised as follows.

[5] The first and second respondents are companies with limited liability registered in terms of the company laws of the Republic of South Africa. The second respondent (Zinoju) is a 70% owned and controlled subsidiary of the first respondent (Buffalo Coal).

[6] Zinoju is the mining right holder, while the mine is operated by Buffalo Coal. The two entities entered into an agreement in terms of which Buffalo Coal operated the mine.

[7] On 22 December 2014, Buffalo Coal issued a notice in terms of section 189(3) of the Labour Relations Act 66 of 1995 (the Act)[1] to the first appellant (Association of Mineworkers and Construction Union (AMCU)) and the National Union of Mineworkers (NUM), the two unions recognised by the mine. Buffalo Coal also requested the Commission for the Conciliation

[1] 189(3) reads as follows: "(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-
(a) the reasons for the proposed dismissals;
(b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
(c) the number of employees likely to be affected and the job categories in which they are employed;
(d) the proposed method for selecting which employees to dismiss;
(e) the time when, or the period during which, the dismissals are likely to take effect;
(f) the severance pay proposed;
(g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
(h) the possibility of the future re-employment of the employees who are dismissed;
(i) the number of employees employed by the employer; and
(j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

Mediation and Arbitration (CCMA) to facilitate the process in terms of section 189A(3)(a) of the Act[2]. Mr Ndaba was appointed as facilitator by the CCMA.

[8] The section 189(3) notice spans 18 pages and sets out the dire financial position of Buffalo Coal and the restructuring measures it undertook to keep the wolf from the door. It also set out the alternatives considered before deciding to retrench, the number of employees and job categories likely to be affected, the proposed method of selection, the timing of the dismissals, severance pay, the purpose of and issues for consultation, assistance to be offered to employees and possible future employment.

[9] Zinoju, as the mining right holder, advised the Department of Mineral Resources on 22 December 2014 that Buffalo Coal issued a section 189(3) notice to its employees. It also informed the mayor of Endumeni Municipality, in whose jurisdiction the mining operations were undertaken, about the section 189(3) notice.

[10] The first consultation meeting was supposed to be held on 20 January 2015, it was however postponed to 30 January 2015 due to the unavailability of an interpreter. NUM and AMCU were not prepared to continue without an interpreter.

[11] On 30 January 2015, Buffalo Coal provided the unions with its financial statements. A copy of the Social and Labour Plan (SLP) submitted by Zinoju to the Department of Mineral Resources was also provided. Buffalo Coal however contended that it was not obliged to comply with the obligations set out in the SLP because it was not the mining right holder. AMCU was of the view that Buffalo Coal should comply with the SLP because it is the majority shareholder of Zinoju.

[12] AMCU insisted that Zinoju should be part of the consultative process so that it could explain how it would comply with its obligations in terms of its SLP. Buffalo Coal indicated that although some of the directors of Zinoju would be attending the consultations, they would do so in their capacities as board

[2] 189A(3)(a) reads as follows: (3) The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if-
(a) the employer has in its notice in terms of section 189 (3) requested facilitation;

members of Buffalo Coal. Buffalo Coal informed AMCU that Zinoju would not be part of the consultations because it (Zinoju) was not retrenching employees.

[13] During the meeting held on 9 February 2015, AMCU raised the issue of Buffalo Coal's non-compliance with the SLP. Buffalo Coal was unrelenting in its stance that it was not the mining right holder and therefore had no obligation to comply with the SLP.

[14] AMCU's proposal that a task team should be established to look into the restructuring and possible retrenchments at Buffalo Coal's Magdalena Underground Operations (MUG) was accepted. The task team was formed on 10 February 2015. The terms of reference of the task team were agreed upon. AMCU proposed that a mining expert should assist the task team. Mr Johnson, a consultant from RSV Enco was appointed by AMCU as the technical mining expert to assist the task team. The task team met on 16 February 2015. On 17 and 18 February 2015, Mr Johnson went on a detailed site visit with the other task team members. He was granted access to technical and financial information about MUG and Buffalo Coal ostensibly to enable him to provide an informed expert assessment to the task team. The task team produced a report on 19 February 2015.

[15] The parties met on 23 February 2015. AMCU then requested, for the first time, Zinoju's financial statements, which were provided. AMCU proposed an extension of the consultation process in order to procure advice on Zinoju's financial statements. The request was refused.

[16] The parties met again on 24 February 2015 and they agreed that the task team should meet between 25 and 27 February 2015, even though the consultation process under the Act had already run its course. The task team met and produced a report in which it concluded that the MUG was in financial dire straits.

[17] Throughout the process, AMCU made verbal proposals in relation to ways to avoid dismissals and other related issues. It only made written proposals on

11 March 2015 wherein it, *inter alia*, suggested that LIFO should be applied as the selection criteria.

[18] The task team investigated ways to avoid dismissals. It identified various positions which could and were filled to reduce the number of retrenchments. The task team also recommended that voluntary severance packages should be offered to employees. This was done.

[19] On 2 March 2015, the parties met to consider the latest report and recommendations of the task team. The parties tabled their final proposals. Between 2 and 10 March 2015, Buffalo Coal considered the verbal recommendations made by AMCU. Some of AMCU's recommendations were accepted which reduced the number of employees identified for retrenchment.

[20] On 10 March 2015, Buffalo Coal wrote to AMCU explaining why it could not accept all AMCU's proposals. In the same letter, Buffalo Coal stated that although Zinoju was not retrenching its own employees, it (Zinoju) would provide the necessary support to Buffalo Coal employees being dismissed in order to ameliorate the social and economic impact on individuals who were dismissed. Buffalo Coal set out in detail the assistance that Zinoju would give to dismissed employees. The assistance offered conformed with Zinoju's SLP. The list of affected employees was supplied to AMCU and letters of termination were issued, on 10 March 2015, to those employees.

[21] The appellant contended, in the court *a quo*, that Zinoju and Buffalo Coal were co-employers of the second appellants (workers). They relied on the provisions of section 200B of the Act. They further contended that Zinoju, as the mining right holder was supposed to be part of the consultation and that its exclusion rendered the consultation process unfair. They submitted that Buffalo Coal, and Zinoju did not comply with section 52 of the Mineral Resources and Petroleum Development Act, 28 of 2002 (MRPDA). They further submitted that Buffalo Coal did not follow a fair procedure by failing to consult over the list of affected employees and that it refused a reasonable request to extend the consultative process in circumstances where the alternatives to dismissal were not exhaustively considered.

[22] The court *a quo* found that section 200B, which was inserted by the Labour Relation Amendment Act,[3] did not have retrospective operation. The section came into operation on 1 January 2015, whilst the consultation process started on 22 December 2014. The court *a quo* also found that Buffalo Coal did not have to comply with the provisions of section 52 of the MPRDA as it placed an obligation on the mining right holder and not an employer who is not the mining right holder. The court *a quo* however did not answer the most important question viz whether Zinoju was supposed to be part of the consultative process. In respect of the list of affected employees and the refusal of the extension of the process, the court *a quo* found in favour of the respondents.

[23] In this Court, Mr Boda on behalf of the appellants limited his submission to the retrospective application of section 200B and the applicability of section 52 of the MPRDA.

[24] Section 200B of the Act reads as follows:

> **'200B Liability for employer's obligations**
>
> (1) For the purposes of this Act and any other employment law, 'employer' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law.
>
> (2) If more than one person is held to be the employer of an employee in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of this Act or any other employment law."

[25] Mr Boda contended that section 200B is applicable in this case because the consultations only started on 20 January 2015, i.e. after the Amendment Act came into operation. Mr Watt-Pringle contended that the consultations started on 22 December 2014 when the section 189(3) notice was issued, that being

[3] Act 6 of 2004.

the case, section 200B was therefore not applicable because the process started before the section became operational.

[26] Section 200B was enacted to prevent collusion by two or more persons involved in an associated or related business by or through an employer in order to undermine the provisions of the Act or any employment law. The intent of the persons or the effect of their acts or omissions must be to directly or indirectly defeat the purpose of the Act or any employment law. If all the requirements in section 200B are met, the persons would be "employers" and therefore jointly and severely liable for any failure to comply with the obligations of an employer in terms of the Act or any other employment law.

[27] The Memorandum on the objects of the Labour Relations Amendment Bill of 2014 states that:

> 'Insertion of section 200B of Act 66 of 1005: A new section is inserted to prevent simulated arrangement or corporate structures that are intended to defeat the purposes of the LRA or any other employment law, and to provide for joint and several liability on the part of persons found to be employers under this section for any failures to comply with an employer's obligations under the LRA or any employment law. This is particularly important in the context of subcontracting and outsourcing arrangements if these arrangements are subterfuges to disguise the identity of the true employer.'

[28] The party who wants to invoke section 200B must not only show that the persons are carrying on or conducting an associated or related business but also that the intent or effect of doing so is or was to directly or indirectly defeat the purpose of the Act or any employment law. In this matter, the appellants succeeded in showing that the respondents carried on associated or related business. They failed to prove that there was an intention to directly or indirectly defeat the purpose of the Act or any other employment law neither did they prove that the effect of the business arrangement was to indirectly or directly undermine the purpose of the Act or any other employment law. It therefore matters not, for the purposes of this judgment, whether section 200B has a retrospective effect or not. We therefore do not have to decide that point. I now turn to consider the MRPDA.

[29] One of the objects of the MRPDA is to ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.[4] Socio-economic development in society is measured with indicators such as gross domestic product (GDP), life expectancy, literacy and levels of employment.

[30] Employee is defined in the MRPDA as any person who works for the holder of a mining right and who is entitled to receive any remuneration and includes any employee working at the mine, including any person working for an independent contractor.

[31] In terms of section 11 of the MRPDA, a mining right or an interest in such right may not be transferred, alienated or in any way disposed of without the written consent of the Minister of Minerals and Energy, except in the case of change of controlling interest in listed companies.

[32] Section 101 makes it clear that the holder of a mining right may employ a contractor to mine on its behalf but the holder of the mining right would remain responsible for compliance with the Act. Section 101 reads as follows:

> '**101 Appointment of contractor**
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> If the holder of a right, permit or permission appoints any person or employs a contractor to perform any work within the boundaries of the reconnaissance, mining, prospecting, exploration, production or retention area, as the case may be, such holder remains responsible for compliance with this Act.'

Section 52 of the MRPDA reads as follows:

> '**52 Notice of profitability and curtailment of mining operations affecting employment**
>
> (1) The holder of a mining right must, after consultation with any registered trade union or affected employees or their nominated representatives where there is no such trade union, notify the Minister in the prescribed manner-

[4] See section 2(i) of the MRPDA.

(a) where prevailing economic conditions cause the profit to revenue ratio of the relevant mine to be less than six per cent on average for a continuous period of 12 months; or

(b) if any mining operation is to be scaled down or to cease with the possible effect that 10 per cent or more of the labour force or more than 500 employees, whichever is the lesser, are likely to be retrenched in any 12-month period.

(2) The Board must, after consultation with the relevant holder, investigate-

(a) the circumstances referred to in subsection (1); and

(b) the socio-economic and labour implications thereof and make recommendations to the Minister.

(3) (a) The Minister may, on the recommendation of the Board and after consultation with the Minister of Labour and any registered trade union or affected persons or their nominated representatives where there is no such trade union, direct in writing that the holder of the mining right in question take such corrective measures subject to such terms and conditions as the Minister may determine.

(b) The holder of the mining right must comply with the directive and confirm in writing that the corrective measures have been taken.

(c) If the directives contemplated in paragraph (a) are not complied with, the Minister may provide assistance to or apply to a court for judicial management of the mining operation.

(4) The holder of a 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.'

[33] The MRPDA contains an interpretation clause. Section 4 thereof reads as follows:

'1. When interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must be preferred over any other interpretation which is inconsistent with such objects.

2. In so far as the common law is inconsistent with this Act; this Act prevails."

[34] In terms of regulation 42 of the regulations promulgated in terms of the MRPDA, an application for a mining right must be accompanied by a social and labour plan (SLP). The SLP, after approval, is valid until a certificate of closure has been issued in terms of section 43 of the MRPDA.[5] Once the

[5] **43 Issuing of a closure certificate**
(1) The holder of a prospecting right, mining right, retention permit, mining permit, or previous holder of an old order right or previous owner of works that has [sic] ceased to exist, remains responsible for any environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance to the conditions of the environmental authorisation and the management and sustainable closure thereof, until the Minister has issued a closure certificate in terms of this Act to the holder or owner concerned.
(2) On the written application in the prescribed manner by the holder of a prospecting right, mining right, retention permit, mining permit or previous holder of an old order right or previous owner of works that has ceased to exist, the Minister may transfer such environmental liabilities and responsibilities as may be identified in the environmental management report and any prescribed closure plan to a person with such qualifications as may be prescribed.
(3) The holder of a prospecting right, mining right, retention permit, mining permit, or previous holder of an old order right or previous owner of works that has ceased to exist, or the person contemplated in subsection (2), as the case may be, must apply for a closure certificate upon-
(a) the lapsing, abandonment or cancellation of the right or permit in question;
(b) cessation of the prospecting or mining operation;
(c) the relinquishment of any portion of the prospecting of the land to which a right, permit or permission relate; or
(d) completion of the prescribed closing plan to which a right, permit or permission relate.
(4) An application for a closure certificate must be made to the Regional Manager in whose region the land in question is situated within 180 days of the occurrence of the lapsing, abandonment, cancellation, cessation, relinquishment or completion contemplated in subsection (3) and must be accompanied by the required information, programmes, plans and reports prescribed in terms of this Act and the National Environmental Management Act, 1998.
(5) No closure certificate may be issued unless the Chief Inspector and each government department charged with the administration of any law which relates to any matter affecting the environment have confirmed in writing that the provisions pertaining to health and safety and management pollution to water resources, the pumping and treatment of extraneous water and compliance to [sic] the conditions of the environmental authorisation have been addressed.
(5A) Confirmation from the Chief Inspector and each government department contemplated in subsection (5) must be received within 60 days from the date on which the Minister informs such Chief Inspector or government department, in writing, to do so.
(6) When the Minister issues a certificate he or she must return such portion of the financial provision contemplated in section 41 the National Environmental Management Act, 1998, as the Minister may deem appropriate, to the holder of the prospecting right, mining right, retention permit or mining permit, previous holder of an old order right or previous owner of works or the person contemplated in subsection (2), but may retain any portion of such financial provision for latent and residual safety, health or environmental impact which may become known in the future.
(7) The holder of a prospecting right, mining right, retention permit, mining permit, or previous holder of an old order right or previous owner of works that has [sic] ceased to exist, or the person contemplated in subsection (2), as the case may be, must plan for, manage and implement such procedures and such requirements on mine closure as may be prescribed.
(8) Procedures and requirements on mine closure as it relates to the compliance of the conditions of an environmental authorisation, are prescribed in terms of the National Environmental Management Act, 1998.

mining rights to which the SLP pertains have been granted, the SLP may only be amended with the consent of the Minister.[6] The holder of a mining right must submit an annual report on the compliance with the SLP to the relevant Regional Manager.

[35] In terms of regulation 46, the contents of the SLP must include the following:

> **'46. Contents of social and labour plan**
>
> (a) A preamble which provides background information of the mine in question;
>
> (b) a human resources development programme which must include-
>
> (i) a skills development plan which identifies and reports on -
>
> (aa) the number and education levels of the employees which must be completed in the form of Form Q contained in Annexure II; and
>
> (bb) the number of vacancies that the mining operation has been unable to fill for a period longer than 12 months despite concerted effort to recruit suitable candidates which must be completed in the form of Form R contained in Annexure II;

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(9) The Minister, in consultation with the Minister of Environmental Affairs and Tourism, may identify areas by notice in the Gazette, where mines are interconnected or their safety, health, social or environmental impacts are integrated which results in a cumulative impact.
(10) The Minister may, in consultation with the Minister of Environmental Affairs and Tourism, publish by notice in the Gazette, strategies to facilitate mine closure where mines are interconnected, have an integrated impact or pose a cumulative impact.
(11)The holder of a prospecting right, mining right, retention permit, mining permit, or previous holder of an old order right or previous owner of works that has [sic] ceased to exist, or the person contemplated in subsection (2), as the case may be, operating or who has operated within an area identified in subsection (9), must amend their programmes, plans or environmental authorisations accordingly or submit a closure plan, subject to the approval of the Minister, which is aligned with the closure strategies contemplated in subsection (10).
(12) In relation to mines with an interconnected or integrated health, safety, social or environmental impact, the Minister may, in consultation with the Minister of Environmental Affairs and Tourism, determine the apportionment of liability for mine closure as prescribed.
(13) No closure certificate may be issued unless-
(a) the Council for Geoscience has confirmed in writing that complete and correct prospecting reports in terms of section 21 (1) have been submitted to the Council for Geoscience;
(b) the complete and correct records, borehole core data or core-log data that the Council of Geoscience may deem relevant, have been lodged with the Council for Geoscience; or
(c) in the case of the holder a permit or right in terms of this Act, the complete and correct surface and the relevant underground geological plans have been lodged with the Council for Geoscience.

[6] Regulation 44.

(ii) a career progression plan and its implementation in line with the skills development plan;

(iii) a mentorship plan and its implementation in line with the skills development plan and the needs for the empowerment groups;

(iv) an internship and bursary plan and its implementation in line with the skills development plan; and

(v) the employment equity statistics which must be completed in the form of Form S contained in Annexure II and the mine's plan to achieve the 10% women participation in mining and 40% historically disadvantaged South Africans (HDSA) participation in Page 35 of 108 Prepared by: In partnership with: management within 5 years from the granting of the right or the conversion of the old order right.

(c) A local economic development programme which must include –

(i) the social and economic background of the area in which the mine operates;

(ii) the key economic activities of the area in which the mine operates;

(ii) the impact that the mine would have in the local and sending communities;

*(Publishers Note: Numbering as published in the original Government Gazette)*

(iii) the infrastructure and poverty eradication projects that the mine would support in line with the Integrated Development Plan of the areas in which the mine operates and the major sending areas;

(iv) the measures to address the housing and living conditions of the mine employees;

(v) the measures to address the nutrition of the mine employees; and

(vi) the procurement progression plan and its implementation for HDSA companies in terms of capital goods, services and consumables

and the breakdown of the procurement which must be completed in the form of Form T contained in Annexure II.

(d) processes pertaining to management of downscaling and retrenchment which must include –

(i) the establishment of the future forum;

(ii) mechanisms to save jobs and avoid job losses and a decline in employment;

(iii) mechanisms to provide alternative solutions and procedures for creating job security where job losses cannot be avoided; and

(iv) mechanisms to ameliorate the social and economic impact on individuals, regions and economies where retrenchment or closure of the mine is certain.

(e) to provide financially for the implementation of the social and labour plan in terms of the implementation of -

(i) the human resource development programme;

(ii) the local economic development programmes;

(iii) the processes to manage downscaling and retrenchment.

(f) an undertaking by the holder of the mining right to ensure compliance with the social and labour plan and to make it known to the employees."

[36] In terms of section 189(1)(ii) of the Act, an employer who contemplates dismissing one or more employees for reasons based on the employer's operational requirements must consult with any registered trade union whose members are likely to be affected by the proposed dismissals. In terms of section 189(3), the employer must issue a written notice inviting the other consulting party/parties to consult with it and disclose in writing all relevant information. In terms of section 189(2), the employer and other consulting parties must, in the consultation, engage in meaningful point consensus – seeking process and attempt to reach consensus on *inter alia* appropriate

measures to avoid; minimise the number; change the timing and mitigate the effects of the dismissals.

[37] The court *a quo* looked at the provisions of the Act and the MPRDA in silos and followed a segmented approach. It concluded that section 52 of the MRPDA places an obligation on the mineral right holder, which is Zinoju. It opined that it is not its task to determine whether Zinoju had complied with its obligation under the MRPDA.

[38] The court *a quo*, relying on *National Union of Mineworkers v Anglo American Platinum and Others*[7] as authority, then concluded that:

> 'In my view the obligations the MRPDA places on the holder of a mineral right remain the obligation of the mineral right holder and do not extend to entities or parties who are not mineral right holders, as contemplated in the MRPDA. In the event that the mineral right holder is also the employer of the employers to be affected by a contemplated retrenchment, the position is different, as section 189 of the LRA will also come into play.'

[39] The court ***a quo's*** conclusion as stated above, unfortunately did not answer the most important questions viz whether the mining right holder was supposed to be part of the consultative process and at whose invitation it should form part of the consultative process.

[40] In *National Union of Mineworkers v Anglo American Platinum and Others,*[8] it was said:

> '[29] On the face of it, s 52 does not seek to substitute the procedure prescribed for that established by s 189 or s 189 A of the LRA. First, the obligations that s 52 creates are imposed on the holder of a mining right, not the employer of any employees whose security of employment may be affected by the conditions that trigger the requirement to give notice and who may be the subject of any contemplated retrenchment. It is therefore entirely feasible that the holder of a mining right may have obligations in terms of s 52, but no obligations to employees or registered unions in terms of s 189. Section 52 therefore would appear to address a purpose different to that

[7] (2014) 35 ILJ 1024 (LC) at para 29.
[8] *Supra.*

which underlies s 189 of the LRA, which is the promotion of consensus on the employment-related consequences of adverse operational requirements through a joint consensus-seeking exercise. Secondly, s 52 makes no reference to any obligation to consult employees or their representatives about the consequences of any reduction in the profit to revenue ratio or scaling down of the mining operation. The obligation to consult employees and their representatives established by s 52 is relevant only to the timing of notice to the minister. That having been said, s 52(4) acknowledges that the holder of a mining right (to the extent presumably that the holder is the employer of any employees potentially affected by a retrenchment) is required to comply with s 189 or 189A, as the case may be. It does not seem to me, contrary to what is said by Dale et al in South African Mineral and Petroleum Law, that notice in terms of s 52 is to be given only once consultations conducted under the LRA have been completed. Whether a s 52 notice ought to precede any s 189 consultation process or is best conducted post the issuing of the notice, or whether the processes ought best to run in parallel, must necessarily depend on all of the relevant facts and circumstances, especially those that serve to trigger the requirement to give notice in terms of s 52. For example, a temporary decline in profit ratios that has a minimal impact on levels of employment will inevitably be dealt with differently to the closure of a mine with the loss of all jobs. In other words, notice in terms of s 52 may conceivably be required in circumstances where s 189 does not apply and conversely, s189 can apply where there is no requirement to give notice under s 52. When notice must be given to the minister and when employees and their representatives must be invited to consult over the terms of any proposed retrenchment are matters dealt with by the MPDRA and LRA respectively. While it is true that any directives regarding corrective measures issued by the minister to a mineral rights holder may impact of the nature and course of a s 189 or s 189A consultation process, for present purposes, in the absence of any directive, compliance with s 189 or s 189A does not fall to be assessed by reference to s 52.'[9]

[41] I agree, to a limited extent, with what was said in *NUM v Anglo American Platinum*. I disagree with the statement that: "…section 52(4) acknowledges that the holder of a mining right (to the extent presumably that the holder is the employer

[9] At para 29.

of any employees potentially affected by the retrenchment) is required to comply with section 189 or 189A as the case may be."

[42] Before setting out my reasons for disagreeing with the above statement, I set out, briefly, the approach to be followed when dealing with seemingly conflicting Acts.

[43] In *Arse v Minister of Home Affairs and Others,*[10] it was said that:

> '[19] The respondents' reliance on s 23(2) of the Immigration Act to justify the appellant's detention is, as I have said, misconceived. Section 23(2) provides that '[d]espite anything contained in any other law' the holder of an asylum transit permit becomes, on expiry of the permit, an 'illegal foreigner' liable to be dealt with under the Immigration Act. This contention, however, does not account for s 21(4) of the Refugees Act which provides that '[n]otwithstanding any law to the contrary' no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence in the country if that person has applied for asylum in terms of s 21(1) until a decision has been made on his or her application and that person has had an opportunity to exhaust his or her rights or review or appeal in terms of the Refugees Act. Section 23(2) of the Immigration Act is a general enactment passed after the Refugees Act which deals with the specific situation of refugees. In so far as there may be a conflict between the two provisions they should be reconciled. Where two enactments are not repugnant to each other, they should be construed as forming one system and as re-enforcing one another. In *Petz Products v Commercial Electrical Contractors* it was said:
>
> 'Where different Acts of Parliament deal with the same or kindred subject-matter, they should, in a case of uncertainty or ambiguity, be construed in a manner so as to be consonant and inter-dependant, and the content of the one statutory provision may shed light upon the uncertainties of the other.[11]

[44] Can the provisions of the LRA and the MRPDA be reconciled without, as the Labour Court did in *NUM v Anglo American Platinum,* limiting the provisions of section 52(4) of the MRPDA?

[10] 2010 (7) BCLR 640 (SCA).
[11] At para 19.

[45] In *S v Zuma and Others,*[12] the Constitutional Court sounded a warning that:

> 'If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.'[13]

[46] In *Kent, NO v South African Railways and Another,*[14] Maxwell's Interpretation of Statutes is quoted with approval, where he states the following:

> 'The language of every enactment must be so construed as far as possible as to be consistent with every other which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a Statute by construction when the words may have their proper operation without it…'[15]

[47] The first task, when there is a conflict, is therefore to look at the language used and in the process not to ignore any word or phrase in a section or Act. No word or part of a section should therefore be construed as meaningless or useless. The meaning of an Act should be construed by looking at all the sections together so that no word or section becomes unnecessary or meaningless. When this exercise yields a clear and unambiguous meaning, which does not lead to absurd consequences, that law as written must be applied and no alteration, modification or revocation should be done, because more harm than good might be done.

[48] It is clear from the content of section 52(4) of the MPRDA that the legislature was aware of the provisions of the Act pertaining to the "management of downscaling and retrenchment(s)".

[49] The section states that the mineral right holder remains responsible for the implementation of the processes provided for in the Act pertaining to retrenchments. Remain is defined as: be left over after other parts have been removed or used or dealt with. Implement is defined as: put into effect.[16]



[12] 1995 (2) SA 642 (CC).
[13] S v Zuma *supra* at 653 A-B.
[14] 1946 AD 298.
[15] At page 405.
[16] See Concise Oxford Dictionary tenth edition Oxford University Press.

[50] The employer is in terms of the Act responsible for the retrenchment process. In terms of section 52(4), the mineral right holder remains responsible for the implementation of the processes in the MPRDA in respect of the management of downscaling and retrenchment until the Minister has issued a closure certificate to the holder concerned. This is irrespective of the employer's duties in terms of the Act.

[51] According to the court *NUM v Anglo American Platinum,* the legislature refers to a mining right holder as employer. I disagree. 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 under those circumstances. The word "remain" was therefore deliberately used to emphasise that irrespective of the fact that the mineral 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.

[52] This makes sense because the mineral right holder must submit a SLP. The contractor has no such obligation. It would be senseless to require a SLP from a mineral right holder wherein the impact of the mining operations on the community in the area is set out and the steps that would be taken in case of retrenchments and downscaling and then leave the implementation thereof in the hands of a contractor (employer) who has not submitted such a plan. The intention was clearly to keep the mining right holder responsible where it is the employer and in the cases where it is not the employer.

[53] If the purpose of section 52(4) of the MPRDA is to keep the mining right holder responsible in its capacity as employer only then the entire section 52(4) would be superfluous, because the Act deals comprehensively with the duties of the employer.

[54] In my view, section 52(4) is not and was not intended to be surplusage. Section 52(4) of the MPRDA and 189 of the Act can be reconciled without any modification. Section 189 caters only for the employer. If it is read with section 52(4) however, the mineral right holder, even though not the employer would

alone and or together with the employer be responsible for the implementation of the retrenchment process.

[55] 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 liability or responsibility in terms of the SLP. The contractor would, like in this case, argue that it has no responsibility in terms of the SLP. The workers and the community, where the mining operations are or were, would then be prejudiced.

[56] The stated objective of the MPRDA, namely, to ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating would not be achieved. It is clear 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 Act, is consistent with the objects of the MPRDA and should be preferred over the interpretation adopted by the court *a quo*.

[57] Section 101 of the MPRDA also makes plain that the holder of a right remains responsible for compliance with the provisions of the Act.

[58] The first respondent was supposed to invite the second respondent to be part of the whole retrenchment process. The second respondent had a duty in terms of section 52(4) of the MPRDA to be part of the retrenchment process. The failure of Zinoju to be part of the retrenchment process rendered that process procedurally unfair.

[59] Having come to that conclusion, however, I do not think that this is a matter where this Court should order the reinstatement of the second to further appellants pending compliance with section 52 of the MRPDA. I say this for the following reasons. The first appellant requested and was given the financial statements of Zinoju before the consultation process was terminated. It did not indicate how the dismissals could be avoided based on the information in the financial statements. In fact, even in the court *a quo* and before us it could not demonstrate how the information in the financial

statements would have led to the avoidance of the dismissal of any of the second and further appellants.

[60] AMCU was not *bona fide* during the entire process. It engaged Mr Johnson whilst knowing that he was employed by a competitor of the first respondent. Mr Johnson was actually busy with reconnaissance work on behalf of the first respondent's competitor that had an interest in buying some of the mines of the first or the second respondent. AMCU knew or ought reasonably to have known this.

[61] Some of the directors of Zinoju were part of the process although they represented Buffalo Coal. When they were called upon to bind Zinoju to its social and labour plan they did so. They therefore took decisions on behalf of Zinoju and Buffalo. It is for that reason that Zinoju undertook to train the second to further appellants and to comply with its post dismissal obligations. This is a matter, in my view, where no compensation order should be made in light of what was said above. Although I disagree with the court *a quo'*s reasoning, its order, save for the costs part, was correct.

[62] The court *a quo* made a cost order against the appellants. In light of my finding in relation to the proper interpretation of section 52(4) of the MRPDA, considerations of fairness and the law militate against a costs order being made.

[63] I therefore make the following order:

1) The appeal is dismissed with no order as to costs.

(a) The order of the court *a quo,* dismissing the application, is confirmed save to the limited extent set out in (b) below.

(b) The order that the appellants should pay the costs of the application is set aside and replaced with the following:

"No order as to costs"

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C J MUSI JA

Coppin JA and Makgoka AJA concur in the judgment of C J Musi JA.

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|---|---|
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