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# EMPLOYMENT ALERT

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### A clear message sent - do not abuse the section 189A(13) procedure

In *NUMSA obo Members v CBI Electric Telecom Cables (Pty) Ltd* (a matter in which CDH successfully represented the respondent), the Labour Court was faced with the task of determining whether a dispute regarding the disclosure of relevant information could be entertained in terms of section 198A(13) of the Labour Relations Act 66 of 1995 (LRA).

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## A clear message sent - do not abuse the section 189A(13) procedure

In January 2020, a section 189(3) notice calling upon the relevant parties to consult was issued by the respondent.

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In January 2020, a section 189(3) notice calling upon the relevant parties to consult was issued by the respondent. NUMSA requested a raft of documentation which would "enable it to meaningfully carry out its task" as contemplated by section 189 (2) of the LRA. The respondent obliged but at that time, the Alert Level 5 lock down was imposed and the consultation process was interrupted. The consultation process was re-established in July/August 2020. During these consultations, NUMSA quibbled whether all relevant information had been disclosed to it. Further meetings were arranged to discuss various issues including the possible alternative placement of affected employees and the principles that would underpin applications for voluntary severance packages. NUMSA refused to participate in these meetings on the basis that the information it had received was inadequate for the purpose of a meaningful consultation.

NUMSA instituted urgent proceedings alleging that the employer had not complied with a fair procedure as it had not disclosed the audited and signed off financial statements. At that juncture, the unsigned financials were available, and the employer was prepared to make them available for inspection by NUMSA's expert financial advisor provided a non-disclosure undertaking was provided first. On this point, and in passing, it was the view of the Labour Court that what may be relevant to the employer may not be relevant to NUMSA, and vice-versa. The Labour Court found that in any consultation process facilitated by a commissioner, item 5 (2) of the Facilitation Regulations would apply thereby allowing the commissioner to hear representations from the parties and to make a ruling governing disclosure and apply relevant dispute resolution provisions contained in the LRA if it was found necessary to do so. There was no need for NUMSA to approach the court for this relief when it could have brought its complaint at an earlier stage in the process before the facilitator.

The Labour Court said it was for the "umpteenth time" that it had to pronounce on the purpose of section 189A(13) which was designed to deal with matters involving compliance by the employer with its statutory obligations. The Court

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## A clear message sent - do not abuse the section 189A(13) procedure...continued

The Court noted how it is increasingly clear that the section was being abused and even relied upon inappropriately to challenge substantive aspects of a large-scale retrenchment.

is not there to determine disputes about the procedural fairness of retrenchments as this was not within its purview in "mass retrenchments". This is a case where the application was dismissed with costs.

In *Tawusa obo G N Mothibedi and 81 Others v Barloworld Transport (Pty) Ltd* (a matter in which CDH also successfully represented the respondent), the Labour Court again emphasized the purpose of the section 189A(13) process and the role of the Labour Court in such an application. The Court noted how it is increasingly clear that the section was being abused and even relied upon inappropriately to challenge substantive aspects of a large-scale retrenchment.

It is not the duty of a Judge in an urgent motion court to resolve disputes about what is relevant and what is not. The commissioner or facilitator must engage about whether the information is relevant and take account issues of confidentiality if there was a basis to order disclosure.

The Labour Court held that a dispute over relevant information is not a dispute that resides within the section 189A(13) process. The Labour Court took extreme exception to NUMSA abusing the process and found that it was unreasonable for parties to deliberately ignore other available statutory remedies, and instead opt to come before the Labour Court on truncated time periods. Due to the vexatiousness and frivolity of the application, the Labour Court made a cost order against NUMSA.

In conclusion, the Labour Court has sent a clear message, rightly so, that where the section 189A(13) procedure is abused, it will allow costs to follow the result.

*Fiona Leppan, Bheki Nhlapho and Kgodisho Phashe*

# A CHANGING WORK ORDER

# CASE LAW UPDATE 2020

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EMPLOYMENT



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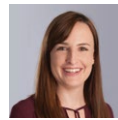
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