**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JA134/18

In the matter between:

**THE COLD CHAIN (PTY) LTD** **Appellant**

and

**FOOD AND ALLIED WORKERS UNION** **Respondent**

**Heard:** **18 February 2020**

**Delivered:** **18 May 2020**

**Summary: dismissal – notice of termination - dismissal for operational requirements – Non-compliance with procedural requirements not rendering dismissal invalid – declaration of invalidity not remedy contemplated by the LRA 1995.**

**Coram: Davis, Musi and Sutherland JJJA**

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**JUDGMENT**

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DAVIS JA

Introduction

[1] This case concerns the effect of s 189(A) (8) and (13) of the Labour Relations Act 66 of 1995 ('LRA') and, in particular, whether respondent was entitled to

relief to the effect that the notices of termination of employment issued to its members by the appellant on 13 December 2013 were of no legal force and effect. Following therefrom, respondent sought an order that its dismissed members were entitled to be reinstated until such time as appellant had complied with the procedural requirements laid out in s 189 of LRA.

The chronology leading to the dispute

[2] The core facts appeared to be undisputed. The notices terminating the contracts for employment of the members of respondent were given to them on 13 December 2013, headed "Notice of Retrenchment".

[3] The notices required the relevant members to sign and confirm that his or her contract of employment was terminated for reasons based on operational requirements from 13 December 2013, that their contract would be terminated on 14 January 2014 and that they could be paid until that date. On 10 January 2014, respondent launched an application in terms of s 189 A (13) and (14) of the LRA for an order declaring that the notices of termination of the member's contracts of employment, as issued on 13 December 2013, were of no force and effect. The dispute was heard by Shai AJ, sitting in the court *a quo*, on 17 April 2014. Judgment was delivered on 13 May 2014. Shai AJ held that the notices of termination issued by the appellant on 13 December 2013 were invalid and thus unlawful in terms of s 189 A (8)*(b)* read with s 189 (3) and s 64 of the LRA. The members refused to sign these notices.

[4] The relevant sections upon which the court *a quo* relied on are the following:

> 'Section 189 A (8) provides as follows:
>
> If a facilitator is not appointed-

(a) a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which a notice was given in terms of s 189 (3); and

(b) once the periods mentioned in s 64(1)*(a)* have lapsed-

(i) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of *the Basic Condition of Employment Act*; and

(ii) a registered trade union or the employees who have received notice of termination may-

(aa) give notice of a strike in terms of section 64(1) *(b)* or *(d)*; or

(bb) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of s 191(11).'

Section 64 (i) of the LRA provides as follows:

(1) Every employee has a right to strike and every employer has a recourse to lock out if-

(a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and-

(i) a certificate stating that the dispute remains unresolved has been issued;

(ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or Commission; and after that…'

[5] In essence, the respondent contended that the appellant had failed to trigger the periods referred to in s 64 (1)(*a)* by way of a referral to the council or to the Commission for Conciliation Mediation and Arbitration; hence the notices were in breach of the LRA and thus had to be considered as legally invalid.

[6] The court *a quo* agreed with the respondent's submissions that the appellant had not applied the time periods laid down in s 64 (1)*(a)*. Accordingly, and following jurisprudence of this Court, in particular *De Beers Group Services (Pty) Ltd v National Union of Mineworkers* [2011] 4 BLLR 319 (LAC) *De Beers)*, the notices issued on 13 December 2013 were held to be in breach of the prescribed time limits and thus had to be considered to have no legal force and effect. On this basis, the court *a quo* reinstated the dismissed members until such time as the appellant had complied with the fair procedures as set out in s 189 A of the LRA.

The appeal

[7] The central issue on appeal was the following: subsequent to the decision of this Court in *De Beers*, a further decision of this Court was delivered in *Edcon v Steenkamp and others* 2013 (4) SA 247 (LAC) in which a different approach to the effect of s189 was adopted. This latter approach was later confirmed by the Constitutional Court in *Steenkamp v Edcon* 2016 (3) SA 251 (CC) (*Edcon*). It is to this judgment that I now must turn.

*The Edcon Case*

[8] In *Edcon*, the Constitutional Court was required to determine whether a dismissal effected by an employer pursuant to notices given in breach of s 189 A (8) of the LRA was invalid and of no force and effect. The Court accepted that an employer was precluded from giving an employee a dismissal notice during the period of 30 days from the date of the giving of a s189 (3) notice until the period set out in s 64 (1) *(a)* had elapsed. In *Edcon* the employer had given individual employees dismissal notices during the prescribed period when it was precluded from doing so. The effect of the breach of these requirements lay at the heart of the dispute before the Constitutional Court.

[9] Writing on behalf of the majority of the court, Zondo J (as he then was) concluded that an 'invalid dismissal and a declaratory order that a dismissal is invalid and of no force and effect fall outside the contemplation of the LRA. Such an order cannot be granted in a case based on the breach of an obligation under the LRA concerning a dismissal'. (para 136)

[10] Zondo J also held that there has to be a 'LRA remedy for a LRA breach' (para 137). If a litigant's cause of action constitutes a breach of a provision of the LRA, that litigant should seek a remedy as provided in the LRA. If an employer had failed to comply with the procedures set out in s 189 (A), the employee was entitled to apply to the Labour Court for an order compelling the employer to comply with a fair procedure. As Zondo J said:

> 'If an employer gives employees notices of dismissal without complying with a fair procedure, or if an employer dismisses employees without complying with a fair procedure, the consulting party may apply to the Labour Court for an order interdicting the dismissal of employees in terms of ss (13) (b) until there is compliance with a fair procedure.' (para 160)

[11] The majority of the court was clear: there is a distinction to be drawn between an invalid dismissal and an unfair dismissal. In the case of a s 189 A dispute, the majority found that the previous jurisprudence was incorrect in holding that an invalid dismissal had taken place. In any event, the Court noted that an employee whose dismissal is invalid does not need an order of reinstatement. (see para 192)

*Application to the present appeal*

[12] It is clear from this judgment that the approach adopted by the court *a quo* cannot be sustained. It was based on precedent which was overruled by the Constitutional Court. Thus the finding of the court *a quo* that the dismissal was invalid and that reinstatement flowed from this invalidity must be set aside.

[13] The problem in the present case is that the respondent relied on decisions of the Labour Court and Labour Appeal Court, the effect of which was that it was open to respondent to circumvent the dispute mechanism of LRA and seek a declaration of invalidity. In *Edcon*, the court was alive to this problem and considered the question as to what employees could do in such a situation. The answer provided by Zondo J was as follows: 'it is arguably open to them to seek condonation and pursue remedies under the LRA obviously Edcon would be entitled to oppose that.' (para 193)

[14] In the present case, it was not the course that the respondent chose to follow. It did not rely upon challenge to the procedural fairness of the dismissal of its members. It chose instead to bring the case exclusively on the strength of an invalid dismissal. Once the invalidity argument falls to be rejected, there is no alternative cause that commends it to consideration by this Court. However, even if it could be said that the issue of procedural fairness was raised by respondent in the case it brought before the court *a quo*, more than six years have elapsed since the notices of termination were issued. After the *Edcon* judgment, the only relief available to a party such as respondent and its members would be to order reinstatement pending proper compliance by appellant with the procedures contained in s 189 A of the LRA. But six years have passed and there would appear to be no sensible basis to grant what, in effect, is an interim interdict, pending procedural compliance. In this connection see *Steenkamp v Edcon Ltd* (CC) (2019) 40 ILJ 1731 at para 73:

> 'Having regard to the primary purpose of s 189A(13), which is to get the consultation process back on track whilst parties are still engaged in consultation or in timeous proximity to the dismissal of the employees when the process may still be salvaged, a long delay in seeking remedies provided for this purpose is simply inappropriate. The mere fact that the applicants' application in terms of s 189A(13) has been delayed as a result of their pursuit of a remedy that has subsequently has been found to be wanting, does not entitle the court to ignore the purpose of the process provided for in s 189A(13).'

[15] The Court is thus left with no alternative other than to find that the order of the court *a quo* cannot stand in law. Thus the appeal must succeed.

[16] Accordingly, the following order is made. The order of the court *a quo* is set aside and substituted with the following:

The application in terms of s 189 A (13) of the LRA is dismissed with costs.

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Davis JA

Musi and Sutherland JJA concur.

APPEARANCES:

FOR THE APPELLANT: Mr Snyman of Snyman attorneys

FOR THE RESPONDENT: Adv F A Boda SC

Instructed by Cheadle Thompson and Haysom