IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J 294/16

In the matter between:

KARIN STEENKAMP AND 1817 & OTHERS **Applicant/s**

and

EDCON LTD **Respondent**

Heard: 14 December 2016

Delivered: 13 June 2017

JUDGMENT

MALINDI AJ

Introduction

[1]. The applicants apply for condonation for failure to comply with the 30 day time limit contemplated in section 189A(17)(a) of the Labour

Relations Act.[1] The power to condone such non-compliance is bestowed on this Court in section 189A(17)(b) "on good cause shown".[2] The application is opposed by respondent who will also be referred to as Edcon.

[2]. This application arises out of the applicants' application in terms of section 189A(13) of the LRA wherein the applicants seek compensation in terms of the provisions of section 189A(13)(d)[3] as a result of the respondent's alleged non-compliance with the peremptory provisions of section 189 as well as section 189A, which resulted in their unfair dismissal.

[3]. The main application involves over 100 separate cases concerning 1818 former employees of the respondent who were all dismissed for operational reasons between April 2013 and October 2015. It is alleged that the dismissals followed a large-scale restructuring which took place across various divisions of Edcon throughout South Africa, which was effected over the course of 2½ years. The applicants were not all dismissed at the same time, and were not given notices in terms of section 189 at the same time.

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[1] 66 of 1995, as amended (LRA). Section 189A(17)(a) provides:

> "An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed."

[2] Section 189A(17)(b) states:

> "The Labour Court may, on good cause shown condone a failure to comply with the time limit mentioned in paragraph (a)."

[3] Section 189A(13)(d) provides:

> "(13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order—
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> . . .
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> (d). make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate."

[4]. The respondent has categorised the applicants as follows:

4.1. 803 employees were not dismissed. 680 took Voluntary Severance Packages (VSPs) and 123 took VSPs together with retirement, with two of the latter having been re-employed ("category 1"). Edcon contends that where an employee accepts a VSP, this does not give rise to a dismissal under the LRA.

4.2. 1236 employees were party to a Commission for Conciliation, Mediation and Arbitration (CCMA) facilitation process. 952 in case number HO164/14 and 284 in case number HO2861/12 (the non-unionised employees involved in the latter case all took VSPs and/or early retirement) ("category 2"). Edcon contends that, insofar as employees were dismissed subsequent to this process, such dismissals were procedurally fair.

4.3. 278 employees, including Ms Steenkamp, were retrenched without a dispute having been referred to the CCMA in terms of section 189A(8) ("Category 3"). Edcon contends that these employees (as with all the applicants) waived/abandoned their rights to bring the current proceedings.

4.4. 248 employees fall within a miscellaneous category. 1 was transferred, 27 contracts did not terminate, 2 contracts expired, 3 employees deserted, 8 were dismissed for misconduct, 23 resigned, 77 retired outside of the section 189 process, 67 are unknown, and 40 employees are duplicate ("category 4"). Edcon contends that these employees have no case whatever.

4.5. 47 employees were re-employed ("category 5"). Edcon contends that they suffered no loss, and that their claims should be dismissed.

Background

[5]. The applicants allege that the respondent failed in its legal obligation to dismiss the applicants fairly in terms of the provisions of section 189 as well as section 189A of the LRA. In particular, it is alleged, it failed to:

5.1. Consult with affected employees or their representatives in terms of sections 189 and 189A;

5.2. Implement fair selection criteria;

5.3. Consult on the timing of the dismissals;

5.4. Consult on severance pay;

5.5. Consult on ways to mitigate the adverse effects of dismissal:

5.6. Implement consistent severance payments;

5.7. Appoint a facilitator;

5.8. Refer the matter for conciliation with section 189A(8)(a) & (b);

5.9. Provide obligatory written notices of termination in accordance with section 189A(2)(a).

[6]. The applicants allege, and it is submitted, that the respondent had:

6.1. A legal duty to dismiss the applicants fairly and in accordance with the peremptory provisions of section 189 and 189A inclusive of sub-sections 189A(2)(a) and 189A(8)(a) & (b) of the LRA.

6.2. In a rushed, ill-conceived as well as ill-advised dismissal strategy, designed to circumvent section 189A and to shorten dismissal proceedings at all costs, Edcon ignored and discarded the provisions of section 189 and 189A. In the process the entire exercise devolved and collapsed into a retrenchment characterised by gross irregularities, inconsistencies, one-sided poor

communications and a general neglect of proper, HR and employee relations management.

6.3. As a result:

6.3.1. the dismissal of the applicants was fraught with irregularities, inconsistencies and unfair practices;

6.3.2. some inconclusive facilitation processes were initiated, then abandoned by Edcon;

6.3.3. purported VSP's were offered to some applicants with no additional benefits whatsoever;

6.3.4. others received a 3 week gratuity pay and some not at all.

6.4. The applicants submit that this Court should not come to the assistance of the respondent, as a result of its flagrant disregard for the law and effectively coming to Court with unclean hands, and in a *mala fide* manner.

[7]. They submit further that in terms of section 189A(13) of the LRA, if the employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application or an order:

7.1.1. compelling the employer to comply with a fair procedure (section 189A(13)(a);

7.1.2. interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure (189A(13)(b);

7.1.3. directing the employer to reinstate an employee until it had complied with a fair procedure (section 189A(13)(b));

7.1.4. make an award of compensation if an order in terms of paragraphs (a) to (c) is not appropriate (section

189A(13)(d)).

[8]. The dismissals followed a large-scale restructuring which took place across various divisions of Edcon throughout South Africa, which was effected over the course of 2½ years. The applicants were not all dismissed at the same time, and were not given notices in terms of section 189 at the same time.

[9]. Various disputes were referred to the Labour Court, in respect of different "batches" or categories of applicants. The mostly comprised individuals from the same area or department within Edcon. In total, 101 different cases have been referred to the Labour Court.

[10]. In respect of the following two cases, the applicants' attorney referred disputes of unfair dismissal to the CCMA in terms of section 191 of the LRA, and after conciliation, a statements of claim were filed in the Labour Court, alleging invalidity of the dismissals, and substantive unfairness of the dismissals:

10.1. JS648/13 – *Karin Steenkamp v Edcon* ("the *Steenkamp* referral")

10.2. JS51/14 – *Mzimkhulu De Booi & 3 Others*.

[11]. In respect of these matters, Edcon filed statements of response, in which the following defences were raised:

11.1. Section 189A did not apply to the dismissals, as some of the applicants "opted" for voluntary severance packages; and

11.2. The dismissals were substantively and procedurally fair.

[12]. In the lead up to the pre-trial conference in the *Steenkamp* matter, the applicants allege, Edcon, *inter alia*, conceded that section 189A of the LRA was applicable to the retrenchment. In the light of this admission and

subsequent concessions made by Edcon that section 189 was not followed, the statements of claim were amended to rely on invalidity of the dismissals for want of compliance with section 189A.

[13]. In the pre-trial minute in the *Steenkamp* case, it is recorded that:

> "The issues have been narrowed as a result of the amendment. The applicant abandons all allegations that the dismissal was substantively and procedurally unfair under section 189".

[14]. In respect of the remainder of the other 100 referrals, as apart from the *Steenkamp* case, statements of claim were brought in the Labour Court, in which it was alleged that the dismissals were invalid for want of compliance with the time periods contained in section 189. These matters were not referred to conciliation in the light of the cause of action pursued.

[15]. The above claims were brought on the invalidity of the dismissals. The applicants' attorney's understanding of the law, as advised by counsel he had consulted, was that a litigant which had several causes of action arising out of the same facts was entitled to choose one and was not compelled to pursue them all at once.

[16]. Edcon then brought proceedings in the Labour Appeal Court, for various declaratory relief, but effectively challenging the correctness of the LAC decisions in *De Beers*[4] and *Revan*[5] on the interpretation of section 189A, and the effect of non-compliance with the time periods in this section as being unconstitutional. As part of the challenge included a constitutional challenge, Edcon joined the Minister of Labour, NUMSA and the Minister

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[4] *De Beers Group (Pty) Ltd v National Union of Mineworkers* [2011] 4 BLLR 318 (LAC). (*De Beers*)

[5] *Revan Civils Engineering Contractors and Others v National Union of Mineworkers and Others* (2012) 33 ILJ 1846 (LAC). (*Revan*)[6] *Edcon v Steenkamp and Others* (2015) ZALAC 2; 2015 (4)

of Justice and Correctional Services in the application.

[17]. The issue was argued before the Labour Appeal Court, and on 3 March 2015, the LAC delivered its judgment, in which it held that *De Beers* and *Revan* had been wrongly decided, and that non-compliance with the provisions of section 189A(2)(a) read with section 189A(8) did not result in an invalid dismissal.[6]

[18]. The applicants (and NUMSA) noted an appeal to the Constitutional Court against the decision of the LAC. Edcon opposed the matter, and the matter was argued on 8 September 2015 at the Constitutional Court.

[19]. On 22 January 2016, the Constitutional Court delivered a judgment, in which leave to appeal was granted, but the appeal was refused.

[20]. The majority of the Court concurred with the judgment of Zondo J, in which he held that non-compliance with the relevant provisions of section 189A did not result in invalidity, but could result in unfair dismissal.

[21]. The respondent attacks the applicants' characterisation of the issues and background in paragraphs 28-32 of its Heads of Argument. The thrust of the argument is that:

21.1. If the contents of the applicants' attorney's affidavit had been presented as a statement of claim, it is so lacking in particularity, that it would surely have given rise to an exception. The respondent submits that Mr Whitaker's affidavit simply does not make out a case that the dismissal of all the applicants was procedurally unfair and that they are all entitled to 12 months'

SA 247 (LAC).

[6] *Edcon v Steenkamp and Others* (2015) ZALAC 2; 2015 (4) SA 247 (LAC).

compensation. It comes nowhere near setting out all the evidence that would be necessary to establish the applicants' case in a trial, and therefore stands to be dismissed on this basis alone.

Condonation

[22]. It is common cause that the interest of justice is a determinative element in considering applications for condonation.[7] Factors that are taken into account in order to determine whether it is in the interests of justice to grant or not grant condonation were restated as follows in *Grootboom* at paragraph 50:

> "(a) the length of the delay;
> (b) the explanation for, or cause for, the delay;
> (c) the prospects of success for the party seeking condonation;
> (d) the importance of the issue(s) that the matter raises;
> (e) the prejudice to the other party or parties; and
> (f) the effect of the delay on the administration of justice."

[23]. A court is enjoined further to take into account all relevant factors but to remain cognisant of the fact that the various factors are not individually decisive. The Court stated the following in this regard:

> "The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not

[7] *Grootboom v National Prosecuting Authority & Another* (2014) 35 ILJ 121 (CC) at paras 50-1. (*Grootboom*)

> individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."[8]

[24]. The Court, having applied its mind to this test and the factors relevant to its application exercises a discretion, which should be judiciously exercised, whether to grant condonation. Ultimately, the particular circumstances of each case will determine which of these factors are relevant.[9]

[25]. The respondent remonstrates against the reliance placed in the Grootboom case and contends that *Shaik v South African Post Office Ltd and Others*[10] is a more stringent test in this context. It was there said:

> "It is trite that the primary objective of the LRA is to ensure that labour disputes are effectively and expeditiously resolved, particularly those involving individual dismissals, such as the present case. This objective is not only in the interests of the dismissed employee but also in the interests of the employer. Just like the employee, the employer is entitled to have finality in the dispute. Either party is always likely to suffer prejudice if the finalisation of the dispute is unduly and unjustifiably delayed."

[26]. The LAC in *Shaikh* went on to find that it is more difficult to get condonation in the Labour Court than it is in ordinary civil matters, and that applications for condonation should thus be subject to a strict judicial scrutiny test:

> "On the basis of the aforementioned considerations, there needs, in my view, to be a differentiation in approach between condonation applications under labour law (the LRA), on the one hand, and under civil law, on the other, in that it should generally be more difficult to obtain the indulgence of condonation under the former, especially in

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[8] Id at para 51.

[9] Id at paras 20 and 22.

[10] [2013] ZALAC 18 at para 22.

> disputes involving individual dismissals (not excluding mass dismissals in appropriate cases), than under the latter. In other words, condonation applications under the LRA need to be subjected to a strict judicial scrutiny test."[11]

[27]. Reliance on the *Shaikh* case is primarily on the basis that in the labour law context expedition in disposing of disputes is important and that inordinately long and egregious delays "*in non-compliance with the rules*" should not be lightly condoned.[12]

[28]. On the basis of the *Shaikh* authority the respondent submits that in this instance where the delays between the dismissals and the launching of the section 189A(13) application ranges from in excess of 2½ years to 10 months when it should have been brought within 30 days with it should have been brought within 30 days of dismissal, the Court should follow Van Niekerk J in *Karin Parkinson v Edcon Ltd*[13] where he stated:

> "The fact that the applicant gave consideration to a remedy in terms of s 189A(13) only at a late stage she did, or that she was advised that stage to pursue that remedy, cannot be the basis for an explanation not to have brought the application timeously. Even if I were to grant to the applicant the benefit of the doubt in relation to the explanation for the delay in bringing this application, she has no prospect of success on the merits. This court has made clear on more than one occasion that the purpose of s 189A(13) is one that enables this court to supervise an ongoing retrenchment process or one that has recently been concluded; it is not a remedy that is available well after dismissals have been effected. The section intends to ensure that a fair process is followed; it is not a means to thwart retrenchment itself (see Insurance and Banking Staff Association v Old Mutual Services and Technology (2006) 27 ILJ 1026 (LC)). In the present instance, the applicant's date of dismissal, as I have indicated, is 25 August 2014, a little short of two years ago. The irresistible conclusion to be drawn is that having

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[11] Id at para 25.

[12] Id.

[13] [2016] ZALCJHB 540 at para 4. (*Parkinson*)

> abandoned her unfair dismissal claim, the applicant seeks redress in terms of s 189A (13), a provision ordinarily reserved for urgent intervention in a consultation process involving a significant number of employees. There is no basis, in these circumstances, for the court to intervene in the present dispute, and the applicant's prospects of success are accordingly minimal, if they exist at all."

[29]. In *Parkinson* Van Niekerk J had found that a delay of some five months in bringing the section 189A(13) application was inordinately long.

[30]. Further attacks on the condonation application are made upon the other factors to be taken into account.

Consideration of the factors for condonation

[31]. The respondent's primary attack upon the application is that if the applicants had brought the application timeously, Edcon would have been afforded the opportunity of remedying any procedural deficiency at the time – this in keeping with the very purpose of section 189A(13). To now award the applicants 12 months' compensation (or indeed any compensation) would be to wish away the fact that the delay was caused by them, and their failed legal strategy.

[32]. The applicants' response to this submission is that in light of the legal position at the time the applicants, legitimately and properly, elected to pursue their matters on the basis only of the invalidity of the dismissals that resulted from the respondent's failure to comply with section 189A. This cause of action was supported by well-established and settled law at the time.

[33]. The applicants submit that the reasons why the applicants have not challenged the procedural fairness of their dismissals, is that it is common cause that, until 22 January 2016, the legal position was that the failure to comply with the relevant time periods in section 189A resulted in the dismissals being invalid law, and that therefore the question of unfairness

did not come into consideration. This had been held by the LAC in *De Beers*[14] and *Revan.*[15]

[34]. They submit that their non-compliance should therefore be reckoned from 22 January 2016 when the Constitutional Court delivered the judgment in *Steenkamp and Others v Edcon Ltd (National Union of South Africa intervening)*.[16] The application was brought within 30 days of receipt of the judgment of the Constitutional Court.

[35]. It appears to me that it would be grossly unjust to bar the applicants from pursuing a remedy that although it was available to them, they had chosen to pursue a more favourable remedy to them, which was competent at the time that they did, so, which was later found incompetent by the Courts. I find therefore that in this case and the circumstances pertaining to it, this constitutes a significant factor that the applicants should be permitted to pursue the lesser favourable remedy even at this stage.

[36]. As Zondo J stated in *Steenkamp*:[17]

> "Until the decision of this Court, the employees acted on the strength of decisions of the Labour Court and Labour Appeal Court whose effect was that in this type of case it was open to them not to use the dispute resolution mechanisms of the LRA and not to seek remedies provided for in section 189A but instead to simply seek orders declaring their dismissals invalid. It is arguably open to them to seek condonation and pursue remedies under the LRA."

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[14] Above n 3.

[15] Above n 4.

[16] (2016) 37 ILJ 564 (CC); (2016) 37 ILJ 564 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); 2016 (3) SA 251 (CC). (*Steenkamp*)

[17] Id at 193.

[37]. What remains therefore is to consider the other factors.

[38]. I must point out that Van Niekerk J alluded in *Parkinson* that had the application for condonation had prospects of success, the lateness of the application would have been favourably considered despite its lateness. In that case he found that the application had no prospects of success and it would have defeated the purpose of condoning the application when it was doomed to fail on the merits. Van Niekerk J therefore did not depart from the test of "*in the interests of justice*" after considering all relevant factors and the peculiar circumstances of each case.

[39]. In as far as the period of delay is concerned, the applicants have provided a plausible explanation why the section 189A(13) application was not pursued from the outset. As stated above, the cause of action that they first pursued would have resulted with reinstatement if successful. That would have been a major victory for the applicants. Since the Constitutional Court outcome in *Steenkamp*, that avenue was closed to them and were left with the unfairness of the section 189A process as their cause of action. It is a significant consideration whether the respondent will suffer great prejudice if the section 189A(13) application is condoned. Whilst such prejudice would follow if reinstatement were to be ordered, it would not be so prejudicial if compensation, being the relief sought by the applicants, were ordered. Such compensation would have to be just and equitable and therefore fair to both parties in the circumstances.[18]

[40]. In regard to prospects of success, the respondent has argued with great vigour that this factor disposes of the application since, *inter alia*, the applicants have not canvassed fully and satisfactorily that the application has any prospects of success and that since the applications' affidavit is deposed to by their attorney who has no personal knowledge of the facts

[18] Section 194 of the LRA

deposed to, no regard should be given to it by the Court.

[41]. The respondent has referred me to the five (5) categories of the applicants and submitted that category 3 stands out as those who have no prospects of success.

[42]. The applicants have referred me to the *Steenkamp* judgment at paragraphs [161] – [164] regarding section 189A(13) where it was said:

> "[161] If an employer has already dismissed employees without complying with a fair procedure, the consulting party may apply to the Labour Court in terms of subsection (13)(c) for an order reinstating the employees until the employer has complied with a fair procedure. The significance of the remedy of reinstatement in subsection (13)(c) is that it is made available even for a dismissal that is unfair only because of non-compliance with a fair procedure. That is significant because it is a departure from the normal provision that reinstatement may not be granted in a case where the only basis for the finding that the dismissal is unfair is the employer's failure to comply with a fair procedure. In such a case the norm is that the Labour Court or an arbitrator may award the employee only compensation.
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> [162] Subsection (13)(d) provides that a consulting party may apply to the Labour Court for an award of compensation "if an order in terms of paragraphs (a) to (c) is not appropriate". It seems to me that the phrase "if an order in terms of paragraphs (a) to (c) is not appropriate" constitutes a condition precedent that must exist before the Court may award compensation. The significance of this condition precedent is that its effect is that the Labour Court is required to regard the orders provided for in subsection (13)(a) to (c) as the preferred remedies in the sense that the Labour Court should only consider the remedy in subsection (13)(d) when it is not appropriate to make any of the orders in subsection (13)(a) to (c).
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> [163] This is a reversal of the legal position that obtains in the case of dismissals for the employer's operational requirements governed by only section 189 where dismissal is only procedurally unfair and not substantively unfair as well. In these cases the Labour Court is required not to order reinstatement at all. So, in making the remedy of reinstatement available for a procedurally unfair dismissal and also making it one of the preferred remedies in subsection (13), the Legislature has gone out of its way to give special protection for the rights of employees and to protect the

integrity of the procedural requirements of dismissals governed by section 189A.

[164] The extensive remedies in subsection (13) provide at least partial compensation for the fact that in respect of disputes concerning the procedural fairness of dismissals the employees have been deprived of the right to adjudication that other employees have. In part the extensive remedies in subsection (13) for non-compliance with procedural fairness have been provided because of the importance of the pre-dismissal process."

[43]. In terms of these passages, should the applicants be successful in their claim for unfair procedure on the part of the respondent they, would be entitled at least to relief under section 189A(13)(d), if relief in terms of subparagraphs (a) to (c) is not appropriate. The applicants seek relief under subparagraph (d). I agree with the statement that the extensive remedies in subsection (13) provide at least partial compensation for the fact that in respect of disputes concerning the procedural fairness of dismissals the employees have been deprived of the right to adjudication that other employees have. In part the extensive remedies in subsection (13) for non-compliance with procedural fairness have been provided because of the importance of the pre-dismissal process. This statement sets section 189A as very important when dismissals are conducted thereunder. This goes to all of the considerations that the application of the section was fair, that dismissals under section 189A are very important and that the employer must bear the burden of being prejudiced if reinstatement were to be ordered under subparagraph (a) pending the institution of a fair procedure were it to be found that no fair procedure was followed in effecting the dismissal. I find therefore that this provision satisfies the factor of the importance of the matter or that it is of great public interest that a matter such as this warrants being fully ventilated in view of the legal meanders that it has undergone to this point.

[44]. In *Parkinson* Van Niekerk J was clear that the lack of prospects of success was because section 189A(13) was not designed to thwart

retrenchment itself but to ensure that a fair process was followed. His statement that the section applies to “ongoing retrenchment process or one that has recently been concluded” and “is not a remedy that is available well after dismissals have been effected” must not be elevated to an immutable principle and apply it to circumstances where an applicant had taken another legitimate course during the ongoing retrenchment process and/or within the permitted time frames only to be disavailed of that cause of action later and after the lapse of the 30 day rule.

[45]. The respondent’s submissions regarding the five categories to be considered and the submission that all, in particular category 3 employees, have failed to make out a case for the relief sought should be considered in the full context of this matter. It being so, each category or individual case must be considered on its merits when the matter is fully ventilated. The defences, if I may call them that, in respect of each category remain available to the respondent should the matter proceed by application or trial.

[46]. I have considered the other factors and have come to the conclusion that when considered together with the ones that I have dealt with pertinently, they aid rather than detract from my inclination to grant condonation. For example the fact that the applicants’ attorney attested to the affidavit should not serve as a red herring. Much indicates from all affidavits that have been filed that the issues for determination and the applicable law are common cause. At worst for the applicants, their attorney’s affidavit suffices for purposes of determining whether condonation should be granted.

Costs

[47]. This is a case that requires that costs of this application be reserved for later determination. The trial court will, among others determine these costs on the degree of success in excluding some of the categories of

employees in the five stated categories. A successful defence in each category may affect the costs issue both in the application and the trial.

Conclusion

[48]. In the circumstances I make the following order:

48.1. The referrals to the Court under the case numbers in annexure "NOM1" hereto are consolidated into a single trial.

48.2. The late filing of this application, insofar as it pertains to the application for condonation for the late filing of the application for compensation in terms of section 189A(13)(d) of the Labour Relations Act 66 of 1995, is condoned.

48.3. The application for compensation referred to in paragraph 48.2 above in respect of procedural fairness under section 189A is referred to trial and consolidated with the main action.

48.4. Costs are reserved and are to be determined in the main action.

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G. Malindi

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicants: Adv Paul Pretorius SC & Adv Andrew Snider
Instructed by Mr K. Whitaker of Whitaker Attorneys

For the Respondent: Adv A.T. Myburgh SC & F.A. Boda SC
Instructed by: Ms V. Reddy of Norton Rose Fulbright South Africa Inc.