REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JS648/13

JS51/14

JS350/14

In the matter between:

EDCON	**Applicant**
and	
KARIN STEENKAMP	**First Respondent**
(Applicant in case no JS 648/13)	
MINISTER OF LABOUR	**Second Respondent**
NUMSA	**Third Respondent**
THE MINISTER OF JUSTICE AND	
CONSTITUTIONAL DEVELOPMENT	**Fourth Respondent**
THE EMPLOYEES LISTED IN ANNEXURE "A":	
MZIMKHULU DE BOOI AND 3 OTHERS	
(Applicants in case no JS51/14)	
VICTORIA SEKHOTO AND 132 OTHERS	
(Applicants in case no JS288/14)	

GOODNESS KHUMALO AND 65 OTHERS **Fifth to Further Respondents**

(Applicants in case no JS350/14)

Heard: **23 October 2014**

Delivered: **03 March 2015**

Summary: dismissal for operational requirements in terms of section 189A of the LRA – employer failing to comply with timeframe in terms of section 189A(8) of the LRA in giving notice of termination as contemplated in section 189A(2). Parties contending of the correctness of the *De Beers* principle that non-compliance with a statutory requirement is sanctioned with invalidity and rendering the dismissal of no effect- The court held that the sanction of invalidity not in keeping with the purpose of the LRA and inconsistent with the intention of the legislature to generally limit relief for procedural lapses. Section 189(8) and (13) providing urgent court application or immediate industrial action as remedies for procedural flaw - non-compliance with section 189A(8) of the LRA was not intended to result in the invalidity or nullity of any ensuing dismissals. Invalidity foreign to remedies for dismissal - *De Beers Group Services (Pty) Ltd v NUM* and *Revan Civil Engineering Contractors and Others v NUM* wrongly decided. Non-compliance with the provisions of sections 189A(2) and (8) does not does not lead to an invalid dismissal. Application upheld with costs.

JUDGMENT

THE COURT

[1] During April 2013, the applicant ("Edcon") commenced with a process of restructuring based on operational requirements. The process resulted in the retrenchment of about 3000 employees (some of whom accepted voluntary

severance packages) during the period April 2013 to mid-2014. Edcon at the relevant time employed about 40 000 employees nationwide and the retrenchments occurred throughout the company.

[2] Since the retrenchments involved more than 50 employees, the provisions of section 189A of the Labour Relations Act[1] ("the LRA") applied to the exercise. Section 189A(1) of the LRA provides that the provisions of the section apply *inter alia* to employers employing more than 500 employees if the employer contemplates dismissing by reason of its operational requirements at least 50 employees.

[3] Section 189A was inserted into the LRA by section 45 of Act 12 of 2002. The general purpose of the amendment was to enhance the effectiveness of consultation in large-scale retrenchments by seeking to reduce friction in the process. The section provides for facilitation at an early stage and lays down the requirements and elements of due and fair process. The section contains twenty sub-sections, some of which are not relevant to the present dispute. Nonetheless, it will assist in the discussion which follows to examine the section as a whole contextually with regard to its purpose and the circumstances of its enactment.

[4] The dispute between the parties relates to whether there has been compliance with the section and significantly whether previous pronouncements upon and the interpretation of the section by this Court are correct and constitutionally sustainable. Given the importance of the case, the Judge President, acting in terms of section 175 of the LRA, directed that the matter be heard by this Court sitting as a court of first instance.

[5] The respondents in the matter are several employees of Edcon affected by the retrenchments, the National Union of Metalworkers of South Africa ("NUMSA"), the Minister of Labour and the Minister of Justice and Constitutional Development. We deal with the relevant facts and issues related to the referral of the dispute after first providing an overview of section 189A.

[1] Act 66 of 1995.

[6] Section 189A of the LRA, as we have said, regulates large-scale retrenchments. It is an adjunct to section 189 of the LRA which governs operational requirements dismissals in general. In terms of the latter provision, as is well known, the employer is obliged to consult with appropriate bargaining agents and to engage in a meaningful joint consensus-seeking process aimed at reaching consensus on appropriate measures to avoid, minimise and mitigate the adverse effects of the dismissals, as well as the method for selecting the employees to be dismissed and the severance pay to be paid. Section 189(3) of the LRA requires the employer to issue a written notice inviting the other consulting party to consult with it and to disclose relevant information about the reasons for the proposed retrenchment, the alternatives considered and rejected, the numbers of employees likely to be affected, the proposed selection criteria, the timing of the dismissals, the severance pay proposed and assistance to mitigate the adverse impacts. The remaining provisions of section 189 regulate the consultation process, the disclosure of information and the method of selection of the employees to be dismissed. One of the key innovations introduced by section 189A of the LRA is that it allows for the consultation process to be run by an independent facilitator.

[7] Section 189A(3) of the LRA provides that the Commission for Conciliation, Mediation and Arbitration ("the CCMA") must appoint a facilitator to assist the parties engaged in consultations in two instances, first: if the employer has in its section 189(3) notice requested facilitation; or, second, if the consulting parties representing the majority of employees who the employer contemplates dismissing have requested facilitation and have notified the CCMA accordingly within 15 days of the section 189(3) notice. The parties may also appoint a facilitator by agreement between them.[2] In all cases, the facilitation must be conducted in terms of regulations made by the Minister of Labour after consulting the National Economic Development and Labour Council ("NEDLAC").[3] The Facilitation Regulations were issued by the

[2] Section 189(4) of the LRA.
[3] Section 189A (5) and (6) of the LRA.

Minister on 10 October 2003.[4] Regulation 3 provides that the facilitator must at the first facilitation meeting assist the parties to reach agreement on the procedure to be followed during the facilitation and the information to be disclosed by the employer. Unless agreed otherwise, the facilitator will chair the meetings between the parties, decide any issue of procedure that arises in the course of the meetings, arrange further facilitation meetings and perform other relevant functions. The facilitator's rulings on procedure are final and binding.[5] Facilitation can be conducted with or without prejudice.[6]

[8] Section 189A(2) of the LRA, which is of importance to the present matter, reads:

> '(2) In respect of any dismissal covered by this section -
>
> (a) an employer must give notice of termination of employment in accordance with the provisions of this section;
>
> (b) despite section 65(1)(c), an employee may participate in a strike and an employer may lock out in accordance with the provisions of this section;
>
> (c) the consulting parties may agree to vary the time periods for facilitation or consultation.'

[9] The aim of section 189A(2) of the LRA is threefold: firstly, it imposes a limitation upon the employer's right to time the dismissal of employees in a large-scale retrenchment;[7] secondly, it introduces a right to resort to industrial action in disputes about the fairness of the reason for such retrenchments; and thirdly, it permits the statutory time periods for facilitation or consultation to be varied by agreement.

[10] The introduction of the right to strike or to have recourse to a lock-out in disputes about the fairness of the reasons for larger retrenchments signified a notable policy shift in the law of collective bargaining and dismissal. Prior to

[4] GNR 1445 GG 25515.
[5] Regulation 4.
[6] Regulation 7.
[7] Section 189A(2)(a) of the LRA.

the amendment, it was impermissible in our law for parties to engage in industrial action in relation to disputes regarding the reasons for and procedure followed in dismissals. Such are regarded as "rights" disputes which are customarily submitted to and resolved by adjudication or arbitration. Section 65 of the LRA which deals with limitations on the right to strike or recourse to lock-out includes a prohibition on industrial action where the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of the LRA. The relevant part of section 65(1) reads:

> 'No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if -
>
> > (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act.'

[11] Section 189A(2)(b) of the LRA, by providing that "despite section 65(1)(c)" employees and employers may participate in such industrial action, creates an exception to the general prohibition on industrial action in relation to rights issues, recognising that large-scale retrenchments may involve hybrid issues not always classifiable as disputes of right or interest. This innovation was the main purpose of the amendment of the LRA in 2002 and is thus key to its interpretation. The section as a whole, as evident from its content and structure, is directed at regulating the process of industrial action and referrals to adjudication where facilitation or conciliation has failed to produce consensus in relation to all the topics or subjects of consultation.

[12] As we intimated earlier, the parties are not obliged to submit to facilitation in all cases. Facilitation will only be obligatory if the employer or the other consulting parties request it in terms of section 189A(3) of the LRA, or if there is an agreement to appoint a facilitator in terms of section 189A(4) of the LRA.

[13] Section 189A(7) of the LRA deals with the situation where a facilitator has been appointed. It reads:

> '(7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189(3) -

> (a) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and
>
> (b) a registered trade union or the employees who have received notice of termination may either -
>
> (i) give notice of a strike in terms of section 64(1)(b) or (d); or
>
> (ii) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).'

[14] It is immediately evident from this provision that where facilitation has been attempted and 60 days have lapsed since the employer issued a section 189(3) notice inviting consultation and disclosing relevant information, the employer may give notice to terminate the contracts of employment of the employees selected by it for retrenchment in accordance with agreed or fair selection criteria as required by section 189(7) of the LRA. Section 37(1) of the Basic Conditions of Employment Act[8] ("the BCEA") stipulates notice periods for the termination of employment which are variable depending on the employee's period of service.

[15] The notice given by the employer in terms of section 189A(7)(a) of the LRA, after the 60 day period allowed for facilitation has elapsed, triggers the right of the employees or their representatives to resort to either strike action in terms of section 189A(7)(b)(i) of the LRA or litigation in terms of section 189A(7)(b)(ii) of the LRA. There are two notable features of the right to strike conferred by section 189A(7)(b)(i) of the LRA. The first is that the dispute does not have to be referred to a bargaining council or the CCMA for conciliation over a 30 day cooling-off period, as is normally required in terms of section 64 of the LRA. Where there has been a facilitation process, it would be unnecessary duplication to require an additional 30 day conciliation process at the end of the 60 day period allowed for facilitation - bearing in mind that the parties may agree to extend the facilitation period in terms of section 189A(2)(c) of the LRA. Likewise, the envisioned referral to the Labour

[8] Act 75 of 1997.

Court in terms of section 191(11) of the LRA[9] does not require a prior referral to conciliation. Secondly, the requirement of 48hrs notice[10] of the commencement of the industrial action remains applicable.[11]

[16] Where a facilitator is not appointed a different process is followed. In such instances, the legislature contemplated that the ordinary conciliation and cooling-off provisions should continue to apply. Section 189A(8) of the LRA provides:

> '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 notice was given in terms of section 189(3); and
>
> (b) once the periods in section 64(1)(a) have elapsed -
>
> (i) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions 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 section 191(11).'

The main issue in the dispute presently before us relates to the interpretation of section 189A(8) of the LRA and the consequences of non-compliance with the time periods stipulated by it. In view of the detailed submissions made on behalf of the parties, the provisions of the sub-section require careful analysis, which we reserve until a fuller explication of the facts and issues. Suffice it for

[9] Read with section 191 (5)(b) of the LRA.
[10] 7 days where the State is the employer.
[11] Section 189A (7)(b)(i) read with section 64(1)(b) and (d) of the LRA.

present purposes to state that the sub-section, like section 189A(7) of the LRA, permits the employees or their registered trade union on receipt of notices of termination to resort either to strike action or litigation.

[17] Once the employees make their election to strike or litigate under section 189A(7) or 189A(8) of the LRA, they will be held to it. If they want to challenge the fairness of the reason for dismissal, they must choose either to refer the dispute to the Labour Court or to strike. Section 189A(10) of the LRA provides that a consulting party may not give notice of a strike in respect of a dismissal if it has referred a dispute concerning whether there is a fair reason for that dismissal to the Labour Court and likewise may not refer such a dispute to the Labour Court if it has given notice of a strike.

[18] In the event of the employees resorting to industrial action, their objective ordinarily would be to obtain an agreement advantageous to their rights and interests on the various topics or subjects of bargaining. Should they prefer to refer a dispute about substantive fairness (concerning whether there was a fair reason for the retrenchments) to the Labour Court, in terms of section 189A(19) of the LRA the court will be obliged to find that the dismissal was for a fair reason if -

> (a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
>
> (b) the dismissal was operationally justifiable on rational grounds;
>
> (c) there was a proper consideration of alternatives;
>
> (d) selection criteria were fair and objective.

[19] Having carved out distinct alternative procedures for the resolution of disputes about the substantive fairness of large scale retrenchments, section 189A of the LRA additionally creates a distinct procedure for disputes about procedural fairness in dismissals falling within the ambit of the section. Section 189A(18) of the LRA provides that the Labour Court may not adjudicate a dispute about the procedural fairness of an operational

requirements dismissal referred to it in terms of section 191(5)(b)(ii) of the LRA. Consulting parties who allege procedural unfairness in the consultation process are now required to approach the Labour Court by way of an application made in terms of section 189A(13) of the LRA within 30 days after the employer has given notice to terminate or, if notice of termination is not given, within 30 days of the date of dismissal. In an application made in terms of section 189A(13) of the LRA, the consulting party may seek an order, if need be on an urgent basis,[12] -

> (a) compelling the employer to comply with a fair procedure;
>
> (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
>
> (c) directing the employer to reinstate an employee until it has complied with a fair procedure; or
>
> (d) awarding compensation, if an order in terms of paragraphs (a)-(c) is not appropriate.

[20] The object of section 189A(13) of the LRA, as appears from a purposive interpretation of section 189A read as a whole and in context, is to separate out procedural issues and to provide a means whereby the consultation and facilitation processes are not undermined by procedural flaws. It offers a useful expedient to the parties to seek the assistance of the court, acting as the guardian of the process, to ensure that the issues are adequately identified, considered and ventilated in the process of consultation or facilitation before it ends. It thus ensures that only disputes about the fairness of substantive reasons and outcomes will generally be subjected to resolution by means of collective action or in a trial involving the hearing of oral evidence.

[21] With this analysis of section 189A of the LRA in mind, we turn now to deal with the facts, the issues in dispute and the question of the somewhat unusual

[12] Such an order may be sought and obtained on an urgent basis in terms of section 189A(14) of the LRA.

relief sought by Edcon from this Court sitting atypically as a court of first instance.

[22] As stated at the beginning, Edcon commenced with a process of restructuring during April 2013 which resulted in the termination of employment of approximately 3000 of its 40 000 employees. The facilitation route was not followed, and for that reason the dismissals are governed by section 189A(8) of the LRA. According to Edcon, 51 referrals have been made to the Labour Court challenging the fairness of the dismissals. These referrals involve a total of 1331 applicants. Four of these referrals are the subject of the application brought by Edcon. The first is case number JS 648/13 brought by Ms Karin Steenkamp, the first respondent ("the Steenkamp matter"). The applicants in the other three matters have been cited as the fifth and further respondents in this application. The second referral, JS 51/14, has been made on behalf of Mzimkhulu de Booi and three others; ("the De Booi matter"); the third referral has been made on behalf of Ms Victoria Sekhoto and 132 others, JS 288/14 ("the Sekhoto matter"); and the fourth is that made on behalf of Goodness Khumalo and 85 others, JS 350/14 ("the Khumalo matter").

[23] An additional 47 referrals (involving 1127 applicants) were made during the period 3 June 2014 to 5 September 2014 after Edcon launched this application, which it describes as "a constitutional challenge" to section 189A of the LRA.

[24] The 1331 applicants who are party to the 51 referrals rely on a single cause of action, namely that their dismissals were "invalid" within the meaning of that term as understood by this Court in *De Beers Group Services (Pty) Ltd v NUM*[13] and confirmed and applied in *Revan Civil Engineering Contractors and Others v National Union of Mineworkers and Others*.[14] In these cases, as we discuss more fully presently, this Court held that where an employer issues notices of termination before the period referred to in section 189A(8)(b) of the LRA has elapsed (i.e. prematurely), the ensuing dismissals are invalid, and accordingly of no force and effect. The parties have referred to this finding as

[13] [2011] 4 BLLR 318 (LAC).
[14] (2012) 33 ILJ 1846 (LAC).

"the *De Beers* principle", and it is convenient to adopt their nomenclature. Section 189A(8) of the LRA, it will be recalled, deals with the situation where a facilitator has not been appointed. Section 189A(8)(a) provides that in such instance a party may not refer a dispute to a bargaining council or the CCMA unless a period of 30 days has lapsed from the date on which the employer issued its written notice in terms of section 189(3) of the LRA. Section 189A(8)(b) of the LRA provides that once the periods in section 64(1)(a) of the LRA have elapsed (being 30 days after the referral to a bargaining council or the CCMA of an issue in dispute that is the subject of a contemplated strike or lock-out), the employer may give notice of termination of employment triggering the right of the employees to proceed to strike action or litigation in terms of section 189A(8)(b)(ii) of the LRA.

[25] Edcon's initial challenge was of an entirely constitutional nature in that it sought a declaration that section 189A(2)(a) read with section 189A(8) of the LRA, as interpreted in the *De Beers* case, are unconstitutional and in violation of section 9 and section 23 of the Constitution (the right to equality and the right to fair labour practices). Edcon, after taking heed of certain criticisms levelled in the heads of argument filed on behalf of NUMSA, sought without objection to amend its notice of motion. In terms of the amended notice of motion, it now seeks an order in the following terms:

> '1.Joining the Fifth and Further Respondents to these proceedings and authorising the consolidation of proceedings under case numbers JS648/13, JS51/14 and JS350/14.
>
> 2. Declaring that the interpretation of section 189A(2)(a) read with section 189A(8) of the Labour Relations Act, 1995 (as amended) (the **LRA**) as interpreted in the judgments of **De Beers Group Services (Pty) Ltd v NUM** [2011] 4 BLLR 319 (LAC) and **Revan Civil Engineering Contractors & Others v NUM** [2012] 33 ILJ 1846 (LAC), (insofar as these judgments hold that non-compliance with the provisions of section 189A(2)(a) read with 189(8) results in the invalidity of a dismissal) is wrong and constitutes an erroneous interpretation or application of legislation that has been enacted to give effect to a constitutional right or in compliance with the Legislature's constitutional responsibilities.

3. Reinterpreting the provisions of sections 189A(2)(a) read with 189A(8) in a manner which is consistent with the objects of the LRA and thus declaring that where an employer does not comply with any of the provisions of these sections, the dismissal is not invalid and:

3.1 that the Court considering the dismissal is at large to consider the fairness thereof and the appropriate remedy;

3.2 an employee is free to elect to choose compensation as a remedy instead of reinstatement or re-employment.

4. Alternatively, declaring that section 189A(2)(a) read with section 189A(8) as interpreted in the judgment of **De Beers Group Services (Pty) Ltd v NUM** [2011] 4 BLLR 319 (LAC) and **Revan Civil Engineering Contractors & Others v NUM** [2012] 33 ILJ 1846 (LAC), (insofar as these judgments hold that non-compliance with the provisions of section 189A(2)(a) read with 189A(8) results in the invalidity of a dismissal) are unconstitutional in particular because the sections as interpreted, violate the following rights:

4.1 The right to fair labour practices set out in section 23 of the Constitution of the Republic of South Africa;

4.2 The right to equality set out in section 9(1) of the Constitution of the Republic of South Africa.

5. Reinterpreting the provisions of sections 189A(2)(a) read with 189A(8) in a manner which is consistent with the fundamental rights set out in paragraph 4 above and thus declaring that where an employer does not comply with any of the provisions of these sections, the dismissal is not invalid and:

5.1 that the Court considering the dismissal is at large to consider the fairness thereof and the appropriate remedy;

5.2 an employee is free to elect to choose compensation as a remedy instead of reinstatement or re-employment.

6. Making such further order that is just and equitable in the circumstances in terms of section 172 of the Constitution of the Republic of South Africa, 1996.'

[26] If this Court is persuaded that the interpretation of section 189A(8) of the LRA in *De Beers* is wrong and constitutes an erroneous interpretation, the relief sought in paragraphs 2 and 3 of the amended notice of motion will be dispositive. In which case, there will be no need to pronounce upon the constitutionality of the provisions as prayed for in paragraphs 4-6.

[27] The legal representatives of the parties filed an "agreed statement of issues" setting out the facts upon which Edcon relies and defining the cause of action and defences in summary.

[28] All of the employees in the Steenkamp, De Booi and Sekhoto matters were issued with section 189(3) notices. On Edcon's version, all of the applicants in the Khumalo matter (save for one who died beforehand) accepted voluntary severance packages and hence resigned and thus were not issued with section 189(3) notices in contemplation of dismissal. As mentioned earlier, no facilitator was appointed in terms of section 189A(3) or section 189A(4) of the LRA and the provisions of section 189A(7) of the LRA do not apply. Accordingly, section 189A(8) of the LRA is applicable to all of the dismissals in question. Neither Edcon nor the employees made a referral to the CCMA for conciliation before the employer gave notice to terminate the contracts of employment. The time period between the issuing of the section 189(3) notices and the notices of termination in terms of section 189A(8) of the LRA varied from 6 days to in excess of 60 days. None of the employees brought an application in terms of section 189A(13) of the LRA alleging non-compliance with a fair procedure. According to Edcon, only seven of the employees referred an unfair dismissal dispute to the CCMA in terms of section 191(1)(a) of the LRA for conciliation after the dismissals took place before making a referral to the Labour Court. Some of the employees dispute this. None of the employees challenge the substantive or procedural fairness of their dismissals. They all rely instead exclusively upon the *De Beers* principle to assert a cause of action that their dismissals were invalid and seek to be instated with full back pay. The cost of such orders, were they to be granted, would be substantial.

[29] There are two elements to the interpretation of section 189A(8) of the LRA in *De Beers*. The first involves a determination of whether the parties must refer a dispute to a bargaining council or the CCMA for conciliation before they may resort to industrial action or litigation in those cases when the facilitation route is not followed; the second is the so-called *De Beers* principle. The sub-section, to put it frankly, is badly drafted. Although it seems to envisage that a dispute must be referred to the CCMA or a bargaining council in the absence of an agreement emerging from the consultation process, it makes no express provision for such a requirement. The sub-section merely states that a party may not refer a dispute to a council or the CCMA unless 30 days have lapsed since the section 189(3) notice. In *De Beers* this Court approved the finding of the Labour Court in *Leoni Wiring Systems (East London) (Pty) Ltd v NUMSA and Others*[15] that in terms of section 189A(8) of the LRA, a dispute must be referred to a council or the CCMA after a period of 30 days has lapsed after the issue of the section 189(3) notice.

[30] In *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd*,[16] Freund AJ referred to a submission by counsel that section 189A(8) of the LRA must be construed to prohibit the employer from giving notice to terminate the contracts of employment unless and until a dispute in respect of the proposed retrenchments has been referred by one of the parties to the CCMA or a council and the 30 day period mentioned in section 64(1)(a) of the LRA had elapsed. Since the applicant in that case had in fact referred a dispute to the CCMA it was unnecessary for Freund AJ to make any finding as to whether the notices of termination would have been invalid in the absence of a referral, and *a fortiori* whether such a referral was indeed required.[17] This Court in laying down the *De Beers* principle was clearly of the opinion that such was indeed a requirement, but neglected to read in specific wording whereby that might be accomplished. Reading in such a requirement is warranted and justifiable. Our labour legislation consistently requires parties in dispute to first attempt conciliation before resorting to industrial action or litigation. Section 189A(7) of the LRA exempts the parties from the

[15] (2007) 28 ILJ 642 (LC).
[16] (2006) 27 ILJ 1909 (LC) at para 31.
[17] At para 39.

requirement where facilitation has been chosen by the parties as a substitute. If there is no obligation to refer a dispute to conciliation under section 189A(8) of the LRA, it would mean that the normal requirement of consensus-seeking with the assistance of an independent conciliator would unusually not apply. There is no apparent reason justifying such a departure from the norm and the obvious conclusion is that the sub-section contains a *casus omissus* which the court is bound to supply. Unfortunately we were not provided during argument with possible wording to remedy the omission by a reading in. There is however no need now to formulate the precise wording of any reading in since it is possible to determine this case on the shared assumption of the parties that a referral may have been required but was not made. The principal question for determination is what should be the consequence of a non-referral and/or the precipitous issue of termination notices by the employer.

[31] In the "agreed statement of issues" Edcon addressed the requirement of a referral to a council or the CCMA under section 189A(8) of the LRA by stating that it sought a reinterpretation of section 189A(8) to the effect that:

> 'contrary to what was found in *De Beers*, where the facilitator route is not followed, in the absence of full consensus being reached over a retrenchment, a "dispute" does not exist for the purposes of section 189A(8)(a), and a referral to the CCMA (by the employer in the absence of the employee party doing so) is not then a prerequisite for a retrenchment.'

In argument, however, without conceding the correctness of the first element of the *De Beer's* judgment,[18] Edcon opted to focus on the second and more controversial principle enunciated in the *De Beer's* judgment that a dismissal will be invalid if the employer does not comply with the requirements of section 189A(8) of the LRA, in other words that which it refers to as the *De Beers* principle. Edcon contends that if the employer dismisses employees without the dispute being referred to conciliation, or otherwise prematurely before the lapse of the relevant time periods, such procedural flaws, in the

[18] Namely, that the matter must be referred to the CCMA and the dispute must be certified as resolved; or 30 days must have elapsed since the referral.

context of section 189A of the LRA, do not have the consequence that the dismissals are invalid and of no force and effect.

[32] The *De Beers* principle had its origin in the judgment of Freund AJ in *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd*[19] referred to earlier. In that case the employer had issued section 189(3) notices on 26 January 2006. More than two months later, on 28 March 2006, the employer informed the union that it intended to issue notices of termination of employment to the affected employees on 31 March 2006. On 30 March 2006, the union referred a dispute to the CCMA regarding the proposed retrenchments. On 31 March 2006, the employer delivered letters to the affected employees giving them notice that their contracts of employment would terminate on 30 April 2006. The referral was made to the CCMA in terms of section 189A(8)(a) read with section 64(1)(a) of the LRA. The union contended that the notices of termination were premature in terms of section 189A(8)(b) in that the 30 day period mentioned in section 64(1)(a) of the LRA had not elapsed and the CCMA had not issued a certificate of resolution before the expiry of the 30 days. The union then applied to the Labour Court *inter alia* for an order declaring that the notices of termination were of no force and effect and an interdict restraining the employer from giving notice to terminate the contracts of employment until the periods mentioned in section 64(1)(a) of the LRA had elapsed. It is not clear from the judgment whether the union approached the court in terms of section 189A(13) of the LRA alleging that the employer had not complied with a fair procedure or if it relied on the general provisions of section 158(1)(a) of the LRA which permits the Labour Court to grant urgent interim relief, an interdict and a declaratory order. There are indications in the judgment that the union relied on both provisions in respect of the relief it sought, but did not assert its rights under section 189A(13) of the LRA in relation to the employer's premature notices of termination. [20]

[33] Freund AJ held that if a facilitator is not appointed, the employer must wait 30 days from the date of the section 189(3) notice to be able to refer the dispute

[19] 2006 27 ILJ 1909 (LC).
[20] See paragraph 54.

for conciliation and for up to a further 30 days (unless a certificate of resolution is issued earlier or the date is not extended by agreement) before being entitled to give notice to terminate the contracts of employment. He held that the notices of termination on the facts before him were invalid and of no force or effect. His motivation for his conclusion rested singularly on the word "must" in section 189A(2)(a) of the LRA. He stated:

> 'Section 189A(2) provides explicitly and in imperative language that the employer "must" give notice of termination in accordance with the provisions of section 189A. It would, in my view, flout the intention of the language and the policy underlying section 189A to recognise the validity of notices given in contravention of section 189A(8).'[21]

The learned acting judge accordingly granted a declaratory order that the notices of termination of the employees' contracts of employment were of no force and effect. He refused however to grant the interdict because the employer had become entitled to issue the notices after the lapse of the 30 day period mentioned in section 64(1)(a) of the LRA.

[34] In *De Beers Group Services (Pty) Ltd v NUM,*[22] the case which Edcon submits was wrongly decided, this Court was faced with a situation similar to the one dealt with by Freund AJ. On 21 January 2009, the employer issued section 189(3) notices to four of its employees inviting them to consult with regard to their proposed dismissal based on operational requirements. On 13 March 2009, they were issued with notices of termination advising them that their notice period would run from 22 March 2009 and that their termination date would be 23 April 2009. On 14 April 2009, the union referred a dispute to the CCMA for conciliation. The employees were dismissed on 23 April 2009. A conciliation meeting was held at the CCMA on 19 May 2009, almost a month after the dismissal had occurred, and a certificate of non-resolution was issued. The dismissal of the employees hence took place prior to the expiry of the 30 day period mentioned in section 64(1)(a)(ii) of the LRA and before a certificate of resolution was issued in terms of section 64(1)(a)(i). On 4 June

[21] Paragraph 40.
[22] [2011] 4 BLLR 318 (LAC).

2009, the union sought an order from the Labour Court declaring that the notices of termination were of no force or effect and alternatively an order directing the employer to reinstate the employees pending compliance with a fair procedure and the requirements of section 189A(8) of the LRA, or further in the alternative an award of compensation for procedural unfairness. It is not clear from the judgment whether the application was made in terms of section 189A(13) of the LRA. It appears that it might have been. The Labour Court held that the notices of termination were tainted by prematurity and were invalid and of no force and effect. It accordingly granted the employees an order of reinstatement. In its view a dispute arose once consensus was not reached on the topics of consultation which had to be referred for conciliation and there was no compliance with the time periods in section 189A(8)(b) of the LRA, which it held was peremptory.

[35] The Labour Appeal Court held that a dispute existed between the parties regarding the dismissal of the employees. As a facilitator had not been appointed, a notice of termination could only be issued in terms of section 189A(8) of the LRA once a 30 day period had elapsed from the issuing of the section 189(3) notice and additionally the periods referred to in section 189A(8)(b) of the LRA had also lapsed after the dispute had been referred to the CCMA. In response to submissions by counsel that a breach of the statutory duty to give proper notice did not result in invalidity, Davis JA referred to the *dictum* of Freund AJ cited above and held as follows:

> 'In short, if the employer fails to comply with the mandatory requirement of consultation in terms of section 189(2) and moves to terminate the employment in breach of these provisions, then the dismissal must be considered to be invalid and accordingly of no force and effect.' [23]

The Labour Appeal Court dismissed the appeal and in effect upheld the order of reinstatement granted by the court *a quo*. It is these findings which we have been urged to re-visit and hold to be erroneous.

[23] Paragraph 36.

[36] It is important to note that Freund AJ in the *National Union of Mineworker's* case did not make any finding that the dismissals of the employees in that case were invalid. He consciously limited the relief granted to a declaratory order that the notices of termination (not the dismissals) were of no force or effect. The Labour Appeal Court in *De Beers*, without any elaboration of reasoning, assumed that because the notices of termination did not comply with the statutory requirements it axiomatically followed that the dismissals were invalid and of no force and effect. The proposition is debatable and possibly wrong.

[37] The failure by an employer to give proper or valid notice of termination to an employee can be construed as a breach of contract and if material may result in a wrongful or unfair termination of employment, entitling the employee to invoke the remedies either of specific performance or damages for wrongful termination; or reinstatement, re-employment or compensation (in terms of section 193 of the LRA) for unfair dismissal. Where the failure to give valid notice is in breach of a statutory provision as well, the breach will be a violation of the principle of legality, perhaps allowing the employee to challenge the lawfulness of the action by means of review proceedings. A review of a decision to terminate employment leading to a declaration of invalidity is not unknown in our law and is predicated upon the general principle that acts carried out in the performance of a statutory duty or obligation must be performed in accordance with the requirements of the statute, failing which they are liable to be set aside by the courts because acts performed contrary to law are ordinarily void.[24]

[38] Early in the last century, our courts followed the thinking of English law to hold that the remedy of specific performance was not available to aggrieved employees suing for wrongful dismissal.[25] The consequence of this view was that any termination of an employee's contract of employment by his employer, no matter how wrongful or unfair, had the practical effect of putting an end to the employment relationship (a concept broader than and different

[24] *Schierhout v Minister of Justice* 1926 AD 99 at110.
[25] Specific performance was regarded as an inappropriate remedy for breach of a contract of employment for two reasons; the inadvisability of compelling one person to employ another whom he does not trust in a position that imports a close relationship; and the absence of mutuality.

to a contract of employment) as the employee was restricted to seeking damages. It followed that a dismissal of an employee did not need to be lawful or valid to terminate the employment relationship or to constitute a dismissal.[26] Hence, in the employment context, somewhat abnormally, a contract of employment could be regarded as at an end by the employer rejecting the continued use of the services of the employee and refusing to pay remuneration, even though lawful cancellation had not occurred.

[39] The remedies for unfair dismissal introduced in our labour legislation during the 1980's, now contained in Chapter 8 of the LRA, altered the range of remedies available to employees, by including most notably the right to seek reinstatement.[27]

[40] The implicit acceptance by the Appellate Division in *Schierhout v Minister of Justice*[28] that a wrongful or "invalid" termination can in effect bring a contract of employment to an end has however persisted in our labour law. The notion is comprehended in the definition of "dismissal" in section 186 of the LRA which defines a dismissal to mean *inter alia* "an employer has terminated a contract of employment with or without notice".[29] The statutory concept of a "dismissal" is not the equivalent of a lawful cancellation of a contract of employment. It encompasses much more. Besides the termination of a contract of employment with or without notice, it includes the failure to renew a fixed term contract in certain circumstances, the refusal to allow an employee to resume work after taking maternity leave, selective non re-employment and a resignation by an employee where the continuation of the

[26] That said, the courts in some instances, in accordance with the general principles of the law of breach of contract, regarded a wrongful, unilateral termination of employment by an employer to amount to a repudiation permitting the employee an election to hold the employer to the contract (despite the bar on specific performance) or to sue for damages - *Strachan v Lloyd Levy* 1923 AD 670,671. This led to the possibility that a contract of employment could remain in force despite being unenforceable in the absence of an available remedy of specific performance – an unsatisfactory position in principle. Be that as it was, the decision in *Schierhout* still meant that a contract of employment could in effect be terminated by a wrongful or unfair dismissal. See in general M Wallis: *Labour and Employment Law* (Butterworths 1995) Chp 6.

[27] The prevailing view had in any event begun to change with the decision in *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 (4) SA 151 (T) that there was no general rule excluding specific performance and that the remedy was available at the discretion of the court taking account of relevant considerations.

[28] 1926 AD 99

[29] Section 186(1)(a) of the LRA.

relationship has been rendered intolerable by the employer.[30] The statutory concept of dismissal is therefore not restricted to the contractual notion of lawful cancellation and recognises that contract law is an insufficient instrument to regulate the modern employment relationship. The purpose of the wide definition of "dismissal" is to extend the LRA's scope to cover the effective dismissal of employees, whether or not by due termination of their contracts of employment.[31] A wrongful termination without notice which does not constitute a lawful cancellation or rescission of the contract may therefore still constitute a dismissal in terms of the LRA.[32]

[41] The definition of dismissal is thus wide enough to include a wrongful or "invalid" termination in violation of contractual or statutory notice periods within its ambit. The word "terminated" in section 186(1)(a) of the LRA should be given its ordinary meaning of "bringing to an end". The ordinary meaning is not coloured by the lawfulness, fairness or otherwise of the action. The fact that a remedy may exist to redress any wrongfulness or unfairness does not *per se* alter the consequence of an ending brought about by the employer's action. As a rule, a wrongful or unfair termination will only be reversed (and the contractual rights and obligations restored) by the grant of the remedy of specific performance or an award of retrospective reinstatement at the discretion of the court. The resultant legal position is not unlike that prevailing in administrative law where a declaration of illegality will not have the inevitable consequence that wrongful action will be declared invalid and set aside.[33]

[42] Despite the approach taken by the Appellate Division in *Schierhout* to the contractual remedy of specific performance, it went on to hold that a distinction needed to be drawn in cases of employment in the public service which although primarily contractual were subject to statutory regulation. The

[30] Section 186(b) – (e) of the LRA.
[31] This point is supported by the fact that the existence of a legally valid contract of employment is not a pre-requisite for a dismissal under the LRA - *'Kylie' v CCMA and Others* (2010) 31 ILJ 1600 (LAC).
[32] Terminations without notice occur lawfully, for instance, when there are reasons for summary dismissal (serious breach by the employee justifying unilateral cancellation), or through the effluxion of time where there is an agreed termination date; or wrongfully when in violation of applicable notice provisions.
[33] See *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA); and *Louw v Matjila and Others* 1995 (11) BCLR 1476 (W).

effect of this, as we have mentioned, was "to bring into play a fundamental principle of our law namely that a thing done contrary to a statutory prohibition is void and of no effect".[34] The dismissal of a public servant in contravention of the statute governing his employment could be declared invalid and set aside. The same would apply by extension to any employee whose employment is regulated in part by statutory provisions like those in this case. The *De Beers* principle is predicated upon this notion. A declaration of invalidity however only entitled an employee to claim payment of his salary but did not constitute an order of specific performance *ad faciendum*.[35] The character of a dismissal in contravention of statutory provisions, as a consequence, was more voidable than void by reason of the discretionary nature of the remedies available.

[43] This case, as already explained, is concerned with whether non-compliance with the notice and procedural provisions of section 189A of the LRA should result in a declaration of invalidity and an entitlement to reinstatement on that ground. It will be recalled that, unlike the situations in both the *National Union of Mineworker's* case and the *De Beers* case, no dispute was referred to the CCMA in this case. It is also common cause that there has been non-compliance with the time periods in both section 189A(8)(a) and section 189(8)(b) of the LRA. Should the remedies of specific performance and reinstatement be available for these lapses in the context of the scheme enacted by the LRA? The enquiry necessarily involves an examination of the right sought to be enforced and the wrong sought to be rectified. None of the applicants in the various referrals has alleged unfairness or unlawfulness beyond the stated non-compliance. Where one is concerned with the enforcement or breach of statutory duties, as opposed to mere contractual terms, the question must be resolved with reference to the provisions of the

[34] *Schierhout v Minister of Justice* 1926 AD 99 at109; and M Wallis: *Labour and Employment Law* (Butterworths 1995) 6-10. The principle has been significantly qualified by subsequent judicial decisions to which we refer later in the text.

[35] *Schierhout v Minister of Justice* 1926 AD 99 at111 - This line of thought resulted in public servants before the courts succeeding in having their dismissals set aside on grounds of invalidity and in some cases obtaining orders declaring them still employed and entitled to a salary and in others actually being reinstated, notwithstanding the bar on specific performance. This casuistry brought about a measure of legal incoherence and inconsistency in relation to the remedies available for invalid dismissals (as opposed to merely wrongful dismissals in breach of contract).

applicable statute, its purpose and any remedies which the statute has appointed to redress breach of the statutory obligations it has imposed. The general principle of our law, applied in the employment context by Innes CJ in *Schierhout*, that a thing done contrary to the direct prohibition of the law is void and of no effect, no longer applies in all cases. More recent cases have ruled that whether that is so will depend upon the proper construction of the particular legislation.[36] In addition, our law now seeks to maintain a clearer divide between the law regulating administrative action and that applicable to unfair labour practices, as mandated by the discrete constitutional provisions and statutes applicable to such action.[37]

[44] While it is correct, as both Freund AJ and Davis JA pointed out, that section 189A(2)(a) of the LRA uses imperative language requiring an employer to give notice of termination of employment in accordance with the provisions of section 189A, it does not say what the consequences of non-compliance are. Edcon has submitted that on a proper interpretation of the Act as a whole it does not follow from non-compliance with the procedural requirements of section 189A of the LRA that any subsequent dismissal is rendered a nullity. The principles governing non-compliance with statutory requirements, alluded to above, are well-established. The crucial enquiry is whether the legislature contemplated that the relevant failure should be visited with nullity.[38] The governing principle was capsulated in an oft cited passage in the English case *Howard v Bodington*[39] as follows:

> 'No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of the courts …. to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.'

[36] *Lupacchini NO v Minister of Safety and Security* 2010(6) SA 457 (SCA) at para 8; and *Hubbard v Cool Ideas* 2013 (5) SA 112 (SCA) at para 10.
[37] *Gcaba v Minister of Safety and Security and Others.*2010 (1) SA 238 (CC).
[38] *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association and Others* [2011] 2 All SA 46 (SCA) para 14.
[39] (1877) 2 PD 203, 211.

[45] Various factors must be considered, such as: the subject-matter of the prohibition, its purpose in the context of the legislation, the remedies provided in the event of breach, the nature of the mischief which it was designed to remedy or avoid, and any cognizable impropriety or inconvenience which may flow from invalidity. Then the court must ask whether it was truly intended that anything done contrary to the provisions in question was necessarily to be visited with nullity.[40] The fact that a statute provides for remedies in the event of a breach of its provisions is a significant factor counting against an inference of invalidity. An equally important consideration is whether a declaration of invalidity would have capricious, disproportionate or inequitable consequences. The principle was enunciated as follows in *Pottie v Kotze*:[41]

> 'A further compulsory penalty of invalidity would…have capricious effects, the severity of which might be out of all proportion to that of the prescribed penalties, it would bring about inequitable results as between the parties concerned and it would upset transactions which,…the legislature could have no reason to view with disfavour. To say that we are compelled to imply such consequences in the provisions of section 13bis seems to me to make us the slaves of maxims of interpretation which should serve us as guides and not be allowed to tyrannise even us as masters'

[46] The Labour Appeal Court did not give overt consideration to these principles in *De Beers* when it reached its conclusion that non-compliance with the procedural provisions of section 189A(8) of the LRA should result in any subsequent dismissals being a nullity entitling the employees to reinstatement.

[47] Counsel for Edcon, Mr Myburgh SC, has made detailed submissions in support of his contention that it was never the intention of the legislature to visit non-compliance with section 189A(8) of the LRA with invalidity. He argued that while the consequences of a failure to comply with a peremptory provision are not typically spelt out in a statute, had the legislature intended invalidity one would have expected a clearer indication to that effect;

---

[40] *Palm Fifteen v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A) at 885E-G; and *ABSA Insurance Brokers (Pty) Ltd v Luttig and Another NNO* 1997 (4) SA 229 (SCA) at 238J-239B.
[41] 1954 (3) SA 179 (A) at 726 F-H.

particularly in view of the severe consequences involved. In this case the effect of invalidity would be that despite the employees' dismissal probably being substantively fair and the employer being able to establish grounds for the refusal of reinstatement, it will be prevented from doing so, and will be obliged to instate the employees with full back-pay simply on account of a procedural lapse and despite the employees failing to tender repayment of their severance benefits.

[48] Most importantly, section 189A of the LRA contemplates other remedies when there is non-compliance with the procedural provisions of section 189A(7) and 189(8). Section 189A(9) of the LRA is of particular relevance. It reads:

> 'Notice of the commencement of a strike may be given if the employer dismisses or gives notice of dismissal before the expiry of the periods referred to in subsections (7)(a) or 8(b)(i).'

The provision bestows a right to resort to immediate retaliatory strike action in response to premature notices of termination being given. In addition, as already discussed, section 189A(13) of the LRA provides a remedy to deal with any procedural unfairness on an expedited and urgent basis, which can be resorted to prior to any dismissal taking effect, or shortly after dismissal. In terms of this provision, the Labour Court may compel the employer to follow a fair procedure; interdict the employer from dismissing the employees before having done so; order the employer to reinstate the employees until it has complied with a fair procedure; or award compensation for any procedural unfairness. The aim is to ensure that if the union or employees see a failure of procedure in the consultative process they should act immediately to rectify it as soon as the flaw is detected. Remedies for procedural flaws should preferably be resorted to before the dismissal takes place or in its immediate aftermath. The policy is confirmed by the provisions of sections 189A(18) and 189A(19) of the LRA which limit court challenges after dismissal to questions of substantive fairness.

[49] Mr Myburgh further submitted that the concept of an invalid dismissal is incompatible with the scheme of sections 189 and 189A of the LRA. If such

dismissals are to be regarded as a nullity (i.e. of no legal consequence) that firstly would be inconsistent with the provisions of section 189A(9) of the LRA which evidently regards dismissals in non-compliance with the time periods as dismissals justifying retaliatory strike action. Likewise, dismissals not in compliance with a fair procedure (by not resorting to conciliation or through failing to give proper statutory notice) remain dismissals, which, as discussed earlier, are defined in section 186(1)(a) of the LRA to include instances where an employer has terminated a contract of employment with or without notice. A termination by an employer without giving proper or valid notice is still a dismissal. It may prove to be a wrongful or unfair dismissal, but it is a dismissal nonetheless. As explained earlier, wrongful or unfair dismissals will have the consequence of bringing a contract of employment to an end unless and until a court orders specific performance or retrospective reinstatement. The LRA thus clearly recognises what has been termed "a premature termination" to constitute a dismissal. The ideas of nullity, voidness and invalidity are inconsistent with that scheme.

[50] The *De Beers* principle introduces the anomaly that a conventional dismissal will be removed from the scope of Chapter 8 of the LRA altogether and will not be assessed on the basis of fairness, merely because it was procedurally premature and branded as invalid. The categorisation of the dismissal as invalid leads automatically to reinstatement, a sanction not in keeping with the purpose of the LRA. Section 193(2)(d) of the LRA for instance makes it clear that reinstatement is not a competent remedy for procedural unfairness. A declaration of invalidity and consequential relief in the form of automatic reinstatement on the grounds of procedural non-compliance is therefore inconsistent with the intention of the legislature to generally limit relief for procedural lapses.[42] Other remedies exist to deal with the problem of prematurity which in their application will lead to more proportionate and less capricious consequences in keeping with the aim of the LRA to promote

[42] Section 189A(13)(c) of the LRA does allow for a reinstatement order to be made pending compliance with a fair procedure. Such an order differs from an ordinary order of reinstatement in that it is essentially restores the *status quo* until the retrenchment process has run its proper course in accordance with due process.

orderly collective bargaining and the effective resolution of labour disputes.[43] The purpose of providing the expeditious remedies of a retaliatory strike or a procedural interdict under section 189A(13) of the LRA would be defeated if employees were allowed to claim reinstatement long after the event on grounds of invalidity predicated on procedural non-compliance.

[51] These considerations find additional support in the provisions of section 189 of the LRA dealing with operational requirement dismissals in general. The section imposes a number of duties on the consulting parties in apparently peremptory terms. Thus, for instance, the employer "must" consult, "must" issue a written notice and "must" select according to fair criteria. Employers frequently fail to comply with these provisions. The courts have not in the past regarded such failures to result in invalid dismissals leading to automatic reinstatement. The remedy for non-compliance will be compensation or a pre-emptive interdict where the failure is exclusively of a procedural nature,[44] or otherwise reinstatement or re-employment at the discretion of the court after taking account of a range of factual considerations. Again, the notion that a retrenchment which does not comply with the requirements of the section must be deemed to be invalid and a nullity, is foreign to the scheme and purpose of section 189A of the LRA which provides discrete and effective remedies for redressing flaws in the process.

[52] It accordingly could not have been the intention of the legislature that a failure to comply with section 189A(8), read with section 189A(2)of the LRA, would result in the dismissals being invalid.

[53] Counsel for the respondents predictably argued that it was consistent with the purpose of section 189A of the LRA that where notice has not been given in accordance with the provisions of the statute the contracts are not terminated. It is doubtful, considering the principles and precedents discussed above, that an employer's unilateral and premature act of termination would have that result in the law of contract. As explained, a termination in violation of contractual terms would be in breach of contract and possibly a wrongful

[43] See section 1(d) of the LRA.
[44] Section 193(2)(d) and section 189A(13) of the LRA.

termination entitling the employee to seek specific performance, a remedy not automatically available but granted at the discretion of the court. The fact that the notice provisions are of a statutory nature, and are thus terms implied by statute, could justify a different approach, along the lines of past judicial precedent before the enactment of the LRA. But that submission flounders where the Constitution and the legislature have quite evidently appointed different remedies, namely those provided in section 189A(9) and 189A(13) of the LRA, which, consistent with the overall scheme and approach of section 189A of the LRA to collective bargaining and dispute resolution, permits the union to elect either to resort to retaliatory strike action or expedited litigation to safeguard procedural propriety in the consultative process.

[54] Mr van der Riet SC, on behalf of NUMSA, submitted that non-compliance with the notice provisions is not a procedural fairness issue. We cannot agree. Premature notice of termination of employment, where the termination was substantively fair, relates to the manner in which the termination was effected and would found a cause of action under section 189A(13) of the LRA that the employer had not complied with a fair procedure in the form of due notice. In any event, the categorisation of the issue as procedural or substantive has no bearing upon the remedy available under section 189A(9) of the LRA. Nor do we accept the contention that the reference to dismissal in section 189A(9) of the LRA should be read to mean “purported” dismissal. There is no textual or logical reason supporting that interpretation, especially considering that section 186(1)(a) of the LRA contemplates a termination without notice as constituting a dismissal.

[55] By the same token, a failure to refer the dispute to conciliation before the issuing of notices of termination is also a procedural issue in that it involves the failure to follow a statutory procedure. While such an obligation must be read in to section 189A(8) of the LRA, no basis has been advanced, and there seems to us to be none, for elevating that requirement to a jurisdictional requirement for any application to court in terms of section 189A(13) of the LRA to redress a procedural unfairness. Unlike referrals of unfair dismissal disputes where conciliation is a jurisdictional requirement by virtue of section

191(1)(a) read with section 191(5) of the LRA, there is no statutory basis to support the contention that conciliation is required before a section 189A(13) application. The remedy exists to compel further conciliation or consultation if the court considers such a procedure to be desirable before resort is had to industrial action or litigation. Dispensing with the requirement of conciliation under both section 189A(9) and 189A(13) of the LRA is an expedient of urgency in the specific context of seeking immediate resolution of a procedural issue. Any precipitate issuing of notices of termination, either in the form of a failure to resort to conciliation or in a premature notice of termination, is a procedural lapse that can be remedied by an urgent court application or immediate industrial action, which will be competent and protected despite themselves not being preceded by conciliation, and which will have as their purpose the restoration of the process and further consultation on the disputed subjects of consultation.

[56] In the premises, we are persuaded that non-compliance with section 189A(8) of the LRA was not intended by the legislature to result in the invalidity or nullity of any ensuing dismissals. Consequently, we are of the opinion that the decisions in *De Beers Group Services (Pty) Ltd v NUM* and *Revan Civil Engineering Contractors and Others v NUM* were wrongly decided.

[57] This Court may depart from its previous decisions and overrule earlier precedents where it concludes that such were obviously wrong. However, in the *De Beers* case the employer petitioned the Supreme Court of Appeal (the SCA) for leave to appeal against the decision of the LAC. The SCA refused the petition. The question now arises whether the refusal of the petition has the consequence that the SCA can be considered to have adopted the decision of the LAC as its own and that this Court is as a consequence bound to apply the *De Beers* principle.

[58] The SCA has decided that a refusal of a petition does not mean that the judgment of the lower court becomes the judgment of the court of appeal. In

Hyprop Investments Ltd v NSC Carriers and Forwarding CC and Others[45] Lewis JA said the following:

> 'The mere fact that an appeal court does not grant leave to appeal to it does not mean that it necessarily confirms the correctness of the judgment in the court below. The court that refuses leave has not heard debate on the issues and does not give a fully reasoned judgment as to why there are no real prospects of success on appeal. Moreover, the appeal lies against the order and not against the reasoning.'[46]

[59] Accepting that the interpretation of the LAC in *De Beers* was wrong and that this Court is not bound to follow it, there is no need to deal with the relief sought by Edcon in terms of the Constitution. The applicant is entitled to the declaratory relief it seeks. There is no reason why the costs should not follow the result. The fourth, fifth and further respondents did not actively oppose the application and should therefore attract no liability.

[60] The following orders are issued:

> 1. It is declared that the interpretation of section 189A(2)(a) read with section 189A(8) of the LRA by this Court in *De Beers Group Services (Pty) Ltd v NUM* [2011] 4 BLLR 319 (LAC) and *Revan Civil Engineering Contractors and Others v NUM* [2012] 33 ILJ 1846 (LAC) that non-compliance with the provisions of section 189A(2)(a) read with section 189A(8) results in the invalidity of any ensuing dismissal is wrong and an erroneous interpretation and therefore that non-compliance with these provisions does not lead to an invalid dismissal.
>
> 2. The first, second and third respondents are ordered to pay the costs of the application, jointly and severally, the one paying the others to be absolved, such costs to include the employment of two counsel.

[45] 2014 (5) SA 406 (SCA).
[46] At para [21]; See also *Independent Outdoor Media (Pty) Ltd and Others v City of Cape Town* [2013] 2 All SA 679 (SCA) at paras [7] and [8]. See *Mphahlele v The First National Bank of South Africa* Case CCT23/98 decided on 1 March 1999 with regard to the constitutionality of the petition procedure.

_____

Tlaletsi DJP

_____

Musi JA

_____

JR Murphy AJA

APPEARANCES:

FOR THE APPLICANT:	Adv Myburgh SC and Adv Feroze Boda
	Instructed by Norton Rose Fulbright
FOR THE FIRST, FIFTH and	
FURTHER RESPONDENTS:	Adv ESJ van Graan SC
	Instructed by Keith Whitaker Attorneys
FOR THE THIRD RESPONDENT:	Adv Van der Riet SC and Adv L H Barnes
	Instructed by Ruth Edmonds Attorneys