CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 29/18

In the matter between:

KARIN STEENKAMP First Applicants

FURTHER 1817 APPLICANTS 2nd to 1818th Applicants

and

EDCON LIMITED Respondent

Neutral citation: *Steenkamp v Edcon Limited* [2019] ZACC 17

Coram: Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J

Judgment: Basson AJ (unanimous)

Heard on: 14 November 2018

Decided on: 30 April 2019

Summary: Labour Relations Act 66 of 1995 — dismissal for operational requirements — application in terms of section 189A(13) brought outside of time limits — condonation refused — failed legal strategy alone not sufficient to show good cause — labour matters are expeditious in nature — section 189A(13)(d) compensation remedy not a stand-alone remedy and dependent on the inappropriateness of remedies (a)-(c)

ORDER

On appeal from the Labour Appeal Court:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

JUDGMENT

BASSON AJ (Mogoeng CJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J concurring):

Introduction

[1] This is an application for leave to appeal against the judgment of the Labour Appeal Court refusing the applicants condonation for the late launching of an application in terms of section 189A(13) of the Labour Relations Act[1] (LRA), challenging the procedural fairness of their retrenchment. It is the sequel to protracted litigation between the parties that came before this Court in *Steenkamp v Edcon.*[2] In a majority judgment, this Court found against the applicants and held that a dismissal pursuant to notices issued in breach of section 189A(8) of the LRA does not result in the invalidity of the dismissal.

[2] Undeterred by this setback, the applicants renewed their quest and referred a claim in terms of section 189A(13) of the LRA to the Labour Court, now claiming

[1] 66 of 1995.

[2] *Steenkamp v Edcon Ltd* [2016] ZACC 1; 2016 (3) SA 251 (CC); 2016 (3) BCLR 311 (CC) (*Steenkamp I*).

compensation in terms of section 189A(13)(d) on the basis that their retrenchments were procedurally unfair.

[3] Because the applicants' referrals in terms of section 189A(13) were out of time, they applied for condonation. The Labour Court granted condonation.[3] On appeal, the Labour Appeal Court overturned the Labour Court's decision to grant condonation and dismissed the application for condonation with costs.[4]

Parties

[4] The first applicant is Ms Karin Steenkamp. She and the further 1817 applicants all claim that they were unfairly retrenched by the respondent. They fall into different categories depending on how they were dealt with during the retrenchment process or what process they followed after their dismissals.[5]

[5] The application is opposed by Edcon Limited (Edcon), the erstwhile employer.

Background

[6] Edcon initially employed approximately 40 000 staff in 1 300 outlets across the country. Edcon fell on hard times and in April 2013 it commenced a process of restructuring for operational requirements. Approximately 3 000 employees were retrenched between 2013 and 2015. The 1818 applicants in this matter formed part of this group. Because of the size of the workforce and the scale of the proposed retrenchments, section 189A of the LRA applied to the dismissals.[6] The retrenchment

[3] *Karin Steenkamp v Edcon Ltd* [2017] ZALCJHB 487 (*Steenkamp* Labour Court judgment).

[4] *Edcon Ltd v Karin Steenkamp* ZALAC 81; (2018) 39 ILJ 531 (LAC) (*Edcon*).

[5] Group 1 consists of employees who were not dismissed but elected to take voluntary retrenchment packages. Some also took early retirement. Group 2 employees were retrenched pursuant to a section 189A process. Group 3 consists of Steenkamp and others who were dismissed alleging that section 189A had not been complied with. Group 4 consists of miscellaneous employees (the parties were in agreement that this group was not before court) and Group 5 consists of employees who were retrenched but subsequently re-employed.

[6] Section 189A(1) headed "Dismissals based on operational requirements by employers with more than 50 employees" defines a large-scale dismissal as follows:

> "(1) This section applies to employers employing more than 50 employees if—

process commenced with Edcon issuing written notices in terms of section 189(3) of the LRA.[7] In terms of these notices the employees were informed that Edcon was contemplating to dismiss for operational requirements. They were also invited to take part in a consultation process in terms of the LRA.

(a) the employer contemplates dismissing by reason of the employer's operational requirements, at least—

(i) 10 employees, if the employer employs up to 200 employees;

(ii) 20 employees, if the employer employs more than 200, but not more than 300, employees;

(iii) 30 employees, if the employer employs more than 300, but not more than 400, employees;

(iv) 40 employees, if the employer employs more than 400, but not more than 500, employees; or

(iv) 50 employees, if the employer employs more than 500 employees; or

(b) the number of employees that the employer contemplates dismissing together with the number of employees that have been dismissed by reason of the employer's operational requirements in the 12 months prior to the employer issuing a notice in terms of section 189(3), is equal to or exceeds the relevant number specified in paragraph (a)."

[7] This section sets out what must be contained in the notice:

"(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to—

(a) the reasons for the proposed dismissals;

(b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;

(c) the number of employees likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which employees to dismiss;

(e) the time when, or the period during which, the dismissals are likely to take effect;

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the employees likely to be dismissed;

(h) the possibility of the future re-employment of the employees who are dismissed;

(i) the number of employees employed by the employer; and

(j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months."

[7] Section 189A of the LRA provides for the appointment of a facilitator. The parties may agree to appoint a facilitator[8] or, if they cannot agree, either the employer or a representative of a registered trade union may request the appointment of a facilitator.[9] Once appointed, the parties will engage in a joint consensus-seeking process. Where a facilitator has been appointed, the employer is precluded in terms of section 189A(7) of the LRA from giving notice to terminate the contracts of employment, unless a 60-day period from the date on which notice was given in terms of section 189(3) of the LRA has lapsed.

[8] If a facilitator has not been appointed, section 189A(8) of the LRA precludes the employer from issuing dismissal notices in accordance with section 37 of the Basic Conditions of Employment Act[10] for a period of 30 days from the date of the giving of the section 189(3) notice. Once the period of 30 days has lapsed, the employer must wait for the periods provided for in section 64(1) of the LRA to lapse before it may issue the dismissal notices.[11] A party to the consultation process is likewise precluded from referring a dispute to a bargaining council or the Commission

[8] Section 189A(4).

[9] Section 189A(3).

[10] 75 of 1997.

[11] Section 189A(8) provides as follows:

> "If a facilitator is not appointed—
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> (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
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> (b) once the periods mentioned in section 64(1)(a) have elapsed—
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> (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
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> (ii) a registered trade union or the employees who have received notice of termination may—
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> (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)."

for Conciliation, Mediation and Arbitration (CCMA) before the lapse of this period of time.

[9] It is common cause that no facilitator was appointed. Section 189A(8) of the LRA was therefore applicable and Edcon was precluded from issuing notices of dismissal before the lapse of the 30-day period. Edcon nonetheless issued dismissal notices prior to the lapse of the time periods provided for in section 189A(8).

Litigation history

[10] Despite the availability of a statutory remedy in terms of section 189A(13) of the LRA to approach the Labour Court on an expedited basis to compel Edcon to comply with a fair procedure or to interdict or restrain it from dismissing them before having complied with a fair procedure, the applicants elected not to do so. They also elected neither to resort to a retaliatory strike action in terms of section 189A(8)(b)(ii)(aa) of the LRA, nor did they elect to refer a dispute about their unfair dismissals to the CCMA in terms of section 191(1)(a) of the LRA.[12] The applicants therefore placed no reliance on a claim for unfair dismissal in terms of the LRA on the basis of procedural and substantive unfairness.

[11] Instead, the applicants elected to refer a dispute to the Labour Court for an order of reinstatement challenging the validity of their dismissals on the narrow basis of Edcon's non-compliance with the statutory notice periods under section 189A(2)(a) and (8) of the LRA. They relied on two earlier judgments of the Labour Appeal Court

[12] Section 191(1) headed "Disputes about unfair dismissals and unfair labour practices" provides:

> "(a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to—
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> (i) a council, if the parties to the dispute fall within the registered scope of that council; or
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> (ii) the Commission, if no council has jurisdiction."

in *De Beers*[13] and *Revan*[14] where the contention was upheld that a dismissal on a short notice as prescribed in terms section 189A, is invalid and of no force and effect.[15]

[12] The Labour Appeal Court, sitting as a court of first instance, reconsidered what colloquially became known as the "*De Beers* principle" and concluded that the two earlier decisions in *De Beers* and *Revan* were "obviously wrong" and that the dismissals were not invalid.[16]

[13] Dissatisfied with the decision of the Labour Appeal Court, the applicants sought leave to appeal to this Court in *Steenkamp I*. They challenged the Labour Appeal Court's decision, restating their reliance on the *De Beers* principle that the failure to comply with prescribed procedures in section 189A(8) rendered the dismissals invalid and of no force and effect.

[14] The majority in *Steenkamp I* agreed with the Labour Appeal Court and held that dismissals pursuant to the non-compliance with the time periods prescribed in section 189A(8) of the LRA were not invalid.[17] This Court, however, recognised that its judgment did not necessarily mean that this was the end of the road for the applicants:

> "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

[13] *De Beers Group Services (Pty) Ltd v National Union of Mineworkers* [2010] ZALAC 26; (2011) 32 ILJ 1293 (LAC) (*De Beers*).

[14] *Revan Civil Engineering Contractors v National Union of Mineworkers* (2012) 33 ILJ 1846 (LAC) (*Revan*).

[15] The Labour Appeal Court in *De Beers* above n 13 at para 36 held:

> "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."

[16] *Edcon v Steenkamp* [2015] ZALAC 2; 2015 (4) SA 247 (LAC) at para 57.

[17] *Steenkamp I* above n 2 at para 188.

and pursue remedies under the LRA. Obviously, Edcon would be entitled to oppose that."[18]

Labour Court

[15] Following their setback and within 30 days of the judgment in *Steenkamp I*, the applicants reinvented their case. They launched an application in the Labour Court in terms of section 189A(13) of the LRA, now claiming 12 months' compensation in terms of paragraph (d) on the basis that Edcon did not comply with the peremptory provisions of section 189A which resulted in their procedurally unfair dismissals.

[16] Because the application in terms of section 189A(13) was not brought within the prescribed 30 day time period in section 189A(17)(a), they applied for condonation in terms of section 189A(17)(b) of the LRA.[19] The length of the delay varies between 10 months to two and a half years because the applicants were not all dismissed at the same time.

[17] Before the Labour Court the applicants explained that the reason for the delay was that they had pursued an overturned legal strategy. The Labour Court accepted that the applicants' reliance on the *De Beers* principle provided a plausible explanation as to why they did not pursue the section 189A(13) application from the outset. The Labour Court reasoned that it would be grossly unjust to bar the applicants from pursuing a remedy which was competent and more favourable to them at the time, only later to be told by this Court that the remedy is incompetent. Further, it held that this constituted a significant factor on why the applicants should be permitted to pursue the less favourable remedy even at a later stage.

[18] Id at para 193.

[19] Section 189A(17) provides:

"(a) 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.

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

[18] The Labour Court granted condonation and held that, should the applicants be successful in their procedural unfairness claim, they would at least be entitled to relief under section 189A(13)(d), if relief in terms of paragraphs (a)-(c) is not appropriate.

[19] Aggrieved by this outcome, Edcon approached the Labour Appeal Court. The issue for consideration was whether the Labour Court correctly granted condonation after the expiry of the prescribed 30-day period in terms of section 189A(13). The Labour Appeal Court upheld the appeal, stating that the application by the applicants was "fatally flawed and the judgment *a quo* in error", principally on the basis that the Labour Court misconceived the purpose and functioning of section 189A(13) of the LRA.[20]

[20] In overturning the Labour Court's decision on condonation, the Labour Appeal Court further expressed the view that a "failed legal strategy is doom" and cannot form the basis of a condonation application where an application in terms of section 189A(13) was filed years out of time.[21]

In this Court

Issues

[21] The pertinent issues before this Court are: first, whether the Labour Appeal Court was correct in overturning the decision of the Labour Court granting condonation to the applicants, in circumstances where they launched their procedurally unfair dismissal claim years outside of the 30-day statutorily prescribed time period and where the cause of action initially relied upon was found to be inappropriate by this Court in *Steenkamp I*, and second, whether compensation for procedural unfairness can be claimed as a self-standing remedy in the context of large-scale retrenchments in terms of section 189A(13)(d) of the LRA.

[20] *Edcon* above n 4 at para 15.

[21] Id at para 32.

Jurisdiction and leave to appeal

[22] This matter engages this Court's jurisdiction as it concerns the interpretation and application of the provisions of the LRA, which give effect to the right to fair labour practices entrenched in section 23 of the Constitution.[22]

[23] The right of access to courts is also directly in issue. The LRA is the statute that regulates access to dispute resolution procedures and courts in labour disputes. The issues raised in this matter are constitutional in nature and this Court therefore has jurisdiction.

[24] This matter is also of fundamental importance to the labour market and employment relations, particularly in the context of large-scale retrenchments. It is therefore in the interests of justice that leave be granted.

Principles applicable to appeals against the grant or refusal of condonation

[25] The primary issue in this Court is whether the Labour Appeal Court ought to have interfered with the Labour Court's discretion to condone the late referral of the applicants' claim.

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[22] See *National Union of Metalworkers of SA v Intervalve (Pty) Ltd* [2014] ZACC 35; (2015) 36 ILJ 363 (CC); 2015 (2) BCLR 182 (CC) at para 25; *South African Commercial, Catering and Allied Workers Union v Woolworths (Pty) Ltd* [2018] ZACC 44; (2019) 40 ILJ 87 (CC) at para 20. In *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) this Court held at para 14:

> "The LRA was enacted 'to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution'. In doing so the LRA gives content to section 23 of the Constitution and must therefore be construed and applied consistently with that purpose. Section 3(b) of the LRA underscores this by requiring that the provisions of the LRA must be interpreted 'in compliance with the Constitution'. *Therefore, the proper interpretation and application of the LRA will raise a constitutional issue*. This is because the legislature is under an obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. In many cases, constitutional rights can only effectively be honoured if legislation is enacted. Such legislation will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution. Where the legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter. In this way, the courts and the legislature act in partnership to give life to constitutional rights." (Emphasis added).

[26] The principle is firmly established in our law that where time limits are set, whether statutory or in terms of the rules of court, a court has an inherent discretion to grant condonation where the interests of justice demand it and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the court. In *Grootboom* this Court held that—

> "[i]t is axiomatic that condoning a party's non-compliance with the rules of court or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation."[23]

[27] And that—

> "It is by now axiomatic that the granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the court seized with a matter based on the facts of that particular case."[24]

[28] As a point of departure, this Court must determine the nature of the discretion applied by the Labour Court when considering whether or not to grant condonation: whether it was discretion in the true sense or the loose sense. The nature of the discretion applied will determine the standard of interference this Court must adhere to in this circumstance.

[29] The discretion to grant or refuse condonation is wide[25] and allows for a court to consider a wide range of "available courses"[26] each of which falls within the ambit of its powers, as this Court in *Trencon* explained:

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[23] *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at para 20.

[24] Id at para 35.

[25] *Van Der Berg v Coopers & Lybrand Trust (Pty) Ltd* [2000] ZASCA 73; 2001 (2) SA 242 (SCA); *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 682C-D; *Mndebele v Xstrata SA (Pty) Ltd t/a Xstrata Alloys* (*Rustenburg Plant*) [2016] ZALAC 28; (2016) 37 ILJ 2610 (LAC) at paras 4-5.

[26] *Media Workers Association of South Africa v Press Corporation of South Africa Ltd* ('*Perskor*') [1992] ZASCA 149; 1992 (4) SA 791 (A) (*Media Workers Association*) at para 30 explained—

> "A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of the Restitution of Land Rights Act. It is 'true' in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.
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> In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in *Knox*, a discretion in the loose sense—
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> > 'mean[s] no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision'."[27]

[30] An indicator of a discretion being "true" is when, in making the decision, "it is possible that there could be a legitimate difference of opinion as to the proper outcome of the exercise of the discretion".[28] It is permissible for the decision-maker to choose any of the options available before them.[29] The discretion is thus "true" where the lower court "has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible".[30]

[31] The decision to grant condonation is either yes or no: there is no wide range of available options for the decision-maker as envisaged in *Trencon*. A court can either grant or deny the condonation.[31] But the election of either option is equally

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> "The essence of a discretion in [the true] sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him."

[27] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*) at para 85-6.

[28] *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* [2008] ZACC 13; 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) at para 93.

[29] See *Media Workers Association* above n 26 at para 30, as endorsed in *Trencon* above n 27 at para 84.

[30] Id at para 85.

[31] There is thus no "wide" range of available options for the decision-maker as envisaged in *Trencon* above n 27 at para 85.

permissible and is something that reasonable judges could disagree on. To grant condonation is an exercise of judicial discretion that is only fettered by being judicially explained.[32]

[32] This distinction "is now deeply rooted in the law governing the relationship between appeal courts and courts of first instance" and determines the standard of interference that a court sitting as a court of appeal must apply.[33]

[33] Where the nature of the discretion is one in the "true" sense, an appellate court should be slow to substitute a decision of the lower court with that of its own.[34] The possibility that an appellate court would have arrived at a different outcome within the permissible range of outcomes, does not entitle that appellate court to interfere with such a discretion. As this Court articulated in *Florence*—

> "This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making."[35]

[34] Something more is required. In *Florence* this Court held that a court may not interfere "unless it is clear that the choice the court has preferred is at odds with the law".[36]

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[32] *Grootboom* above n 23 at para 35.

[33] This Court in *Trencon* above n 27 at para 87 further accepted:

> "An appellate court must heed the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded."

[34] Id at para 88.

[35] *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) at para 113.

[36] Id. See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*) at para 11. See also *Mabaso v Law Society of the Northern Provinces* [2003] ZASCA 138; 2004 (3) SA 453 (SCA).

[35] Given this, the question is: what was the Labour Court required to consider when the application for condonation came before it and did it exercise its discretion judicially?

[36] Granting condonation must be in the interests of justice. This Court in *Grootboom* set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:

> "[T]he standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.
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> It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.
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> 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 individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."[37]

[37] All factors should therefore be taken into account when assessing whether it is in the interests of justice to grant or refuse condonation.

Broader object of the LRA

[38] Before turning to the judgments of the two courts *a quo*, it is necessary to briefly consider the legislative context within which the Labour Court exercised its discretion whether or not to grant condonation. Such an application for condonation must be considered taking into account not only the broader objects of the LRA but the nature, purpose and functioning of section 189A(13) of the LRA.

[39] This Court in *Toyota* accepted that the expeditious resolution of disputes in the context of labour disputes is one of the primary objects of the LRA:

> "Time periods in the context of labour disputes are generally essential to bring about timely resolution of the disputes. The dispute-resolution dispensation of the old Labour Relations Act was uncertain, costly, inefficient and ineffective. The new Labour Relations Act (LRA) introduced a new approach to the adjudication of labour disputes. This alternative process was intended to bring about the expeditious resolution of labour disputes which, by their nature, require speedy resolution. Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years."[38]

[40] In *Myathaza* four judges of this Court, recognising the adverse effects delays impose on both the employers and employees, pronounced that—

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[37] *Grootboom* above n 23 at paras 22-3 and 51.

[38] *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* [2015] ZACC 40; (2016) 37 ILJ 313 (CC); 2016 (3) BCLR 374 (CC) (*Toyota*) at para 1.

> "[e]mployment disputes by their very nature are urgent matters that require speedy resolution so that the employer's business may continue to operate and the employees may earn a living."[39]

[41] In giving effect to this primary object, the LRA imposes strict time limits within which various applications and referrals must be launched.[40] Non-adherence to these time limits may be condoned. Both the Labour and the Labour Appeal Courts have incorporated the general principles for condonation referred to above.[41] But they have also infused factors and considerations specific to labour law: Condonation in the case of disputes over individual dismissals will not readily be granted.[42] The explanation for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand.[43] Whether the delay was a result of a deliberate, wilful decision not to comply with a lawful and binding award in terms of the LRA is also an important factor to consider.[44] Where the explanation for the delay is the internal processes and procedures of trade unions, the Labour Court has taken a stricter view.[45]

[42] A 30-day time limit for launching an application to the Labour Court is set in section 189A(17) of the LRA:

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[39] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus* [2016] ZACC 49; 2018 (1) SA 38 (CC); 2017 (4) BCLR 473 (CC) at para 33.

[40] In terms of section 145(1) of the LRA, a review application must be launched with the Labour Court must be approached within six weeks after the issuing of an award. Similarly, a referral to the Labour Court for a dismissal that is allegedly automatically unfair, based on operation requirements must be made within 90 days after conciliation fails. See section 191(11)(a) read with section 191(5)(b).

[41] See *National Union of Mineworkers v Council for Mineral Technology* [1998] ZALAC 22; [1999] 3 BLLR 209 (LAC) at para 10.

[42] Conradie JA in *Queenstown Fuel Distributors CC v Labuschagne NO* [1999] ZALAC 24; (2000) 21 ILJ 166 (LAC) remarked at para 25:

> "I think that the Labour Court would give effect to the intention of the legislature to swiftly resolve individual dismissal disputes by means of a restricted procedure, and to the desirable goal of making a successful contender, after the lapse of six weeks, feel secure in his award".

[43] Id at para 24.

[44] *Librapac CC v FEDCRAW* [1999] ZALAC 6; (1999) 20 ILJ 1510 (LAC) at para 10; *Maseko v CCMA* [2003] 11 BLLR 1148 (LC).

[45] *NEHAWU v Vanderbijlpark Society for the Aged* 2011 32 ILJ 1959 (LC).

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

[43] The Labour Court has on occasion dealt with condonation applications under section 189A(13) of the LRA. In *CPFWU* the court refused an application that was launched 284 days late.[46] In *Zero Appliances* the court likewise refused an application for condonation where the retrenched employees brought a section 189A(13) application 238 days late.[47] In *Parkinson* the Labour Court refused to condone a delay of about 5 months in launching a section 189A(13) application because (a) the applicant did not properly explain her delay; (b) the delay was excessive; and (c) there were no prospects of success.[48] The court emphasised that the procedure in section 189A(13) is supposed to be speedy and pre-emptive, so granting condonation is strict in this context:

> "This Court has made clear on more than one occasion that the purpose of section 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".[49]

[44] And in *Clinix I,* the parties delayed by some nine months in launching their section 189A(13) application.[50] Similar to what is contended in this case, the applicants argued that their delay should be condoned because they relied on the *De*

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[46] *Catering Pleasure & Food Workers Union v National Brands Ltd* (2007) 28 ILJ 1064 (LC) (*CPFWU*) at paras 25-6.

[47] *Zero Appliances (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* [2007] ZALC 19; (2007) 28 ILJ 1836 (LC).

[48] *Parkinson v Edcon Ltd* [2016] ZALCJHB 540 (*Parkinson*).

[49] Id at para 4.

[50] *Ramiyal v Clinix Selby Park Hospital (Pty) Ltd*) [2016] ZALCJHB 485 (*Clinix I*).

Beers principle to invalidate their dismissals. They then launched their section 189A(13) application after this Court in *Steenkamp I* declared that the *De Beers* cause of action was incompetent. The Labour Court did not accept this as a ground for condoning their delay. This, the Labour Court held, was because the applicants could easily have invoked the section during the consultation process.[51] In respect of the application for condonation, the Court held that there were no prospects of success and that after the Labour Appeal Court's decision to overturn the *De Beers* principle in *Steenkamp I*, the employees should have been aware of the risk of relying on *De Beers* and that an order of compensation or reinstatement would severely prejudice the employer after a long period of time has lapsed.

Nature, purpose and functioning of section 189A(13)

[45] The LRA provides for a consultative framework within which employees facing possible retrenchment may participate in the consultation process in an attempt to either avoid a possible retrenchment or, where retrenchments are unavoidable, to participate in attempts to ameliorate the adverse effects of such a retrenchment.

[46] Where a retrenchment exercise involves a large number of employees, section 189A of the LRA applies. This section not only strives to enhance the effectiveness of the consultation process by providing for the appointment of a facilitator, but also provides for mechanisms to pre-empt and resolve disputes about substantive and procedural unfairness issues as and when they arise during the consultation process.

[47] A distinctive feature of section 189A(13) of the LRA is the separation of disputes about procedural fairness from disputes about substantive fairness. Disputes about substantive fairness may be dealt with by resorting to strike action[52] or by

[51] Id at para 5.

[52] Section 189A(8)(b)(ii)(aa) of the LRA.

referring a dispute about the substantive fairness of the dismissals to the Labour Court in terms of section 191(11)[53] of the LRA.[54]

[48] Disputes about procedural fairness have been removed from the adjudicative reach of the Labour Court and may no longer be referred to the Labour Court as a distinctive claim or cause of action that a dismissal on the basis of operational requirements was procedurally unfair.[55]

[49] Although a clear policy decision has been made to remove claims of procedural unfairness from the *ex post facto* jurisdictional competence of the Labour Court, employees are not left without a remedy. In what the Labour Appeal Court referred to as a "partial claw-back of jurisdiction",[56] they may approach the Labour Court in terms of section 189A(13) of the LRA for an order compelling the employer to comply with a fair procedure.[57] Where employees have already been dismissed, the Labour Court has the additional power in terms of section 189A(13)(c) of the LRA to reinstate such an employee to allow for the consultation process to run its course.

[50] Only where these orders are not appropriate, may the Labour Court, where it is appropriate to do so, order compensation in terms of subsection (d).

[51] The rationale for the removal of the Labour Court's jurisdiction in respect of procedural issues from the ambit of section 191(5)(b)(ii) of the LRA, must be viewed

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[53] The referral must be made within 90 days after a bargaining council with jurisdiction or the CCMA has certified that the dispute remains unresolved. In terms of section 191(11)(b) of the LRA, the Labour Court may condone a late referral on good cause shown.

[54] Section 189A(8)(b)(ii)(bb) of the LRA.

[55] Section 189A(18) provides as follows:

> "The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii)."

[56] *Edcon* above n 4 at para 20.

[57] Clause 2.45 of the *Memorandum on the Objects of the Labour Relations Amendment Bill 2001 The Labour Relations* (RS 44, 2003 AA2-p180) explains the purpose of subsection (13) as being to—

> "enable workers to refer a complaint about the procedural fairness of an operational requirements dismissal to the labour Court on an expedited basis and allow the Labour Court to compel an employer to comply with a fair procedure"

against the broader context and purpose of section 189A as a whole. Recognising that large-scale retrenchments may benefit from the intervention of third parties, section 189A provides for an assisted consultative framework in the context of large-scale retrenchments albeit only for a limited time.

[52] Where procedural irregularities arise, the process provided for in section 189A(13) of the LRA allows for the urgent intervention of the Labour Court to correct any such irregularities as and when they arise so that the integrity of the consultation process can be restored and the consultation process can be forced back on track. The purpose of section 189A(13) has been recognised in a long line of cases. In *Insurance & Banking Staff Association* the Labour Court explained:

> "The overriding consideration under section 189A is to correct and prevent procedurally unfair retrenchments as soon as procedural flaws are detected, so that job losses can be avoided. Correcting a procedurally flawed mass retrenchment long after the process has been completed is often economically prohibitive and practically impossible. All too often the changes in an enterprise with the passage of time deter reinstatement as a remedy. So, the key elements of section 189A are: early expedited, effective intervention and job retention in mass dismissals."[58]

[53] Similarly in *SA Five Engineering* the Labour Court held that—

> "Suffice it now to say that the intention of section 189A(13), read with section 189A(18), is to exclude procedural issues from the determination of fairness where the employees have opted for adjudication rather than industrial action, providing instead for a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication or industrial action."[59]

[58] *Insurance & Banking Staff Association v Old Mutual Services & Technology Administration* (2006) 27 ILJ 1026 (LC) at para 9.

[59] *NUMSA v SA Five Engineering* [2005] 1 BLLR 53 (LC); (2004) 25 ILJ 2358 (LC) (*SA Five Engineering*) at para 7.

[54] In exercising its powers in terms of section 189A(13) of the LRA, the Labour Court thus acts "as the guardian of the process"[60] and exercises a "degree of judicial"[61] management or oversight over the process. The aim is to proactively foster the consultation process by allowing parties to seek the intervention of the Labour Court on an expedited basis to ensure that procedural irregularities do not undermine or derail the consultation process before it ends. The Labour Court in *Anglo American* expounds:

> "Section 189A(13) was introduced in 2002 and was intended, broadly speaking, to provide for the adjudication of disputes about procedural fairness in retrenchments at an earlier stage in the ordinary dispute-resolution process, and by providing for their determination, inevitably as a matter of urgency, on application rather than by way of referral. The section empowers employees and their representatives to approach the court to require an employer to apply fair procedure, assuming, of course, that the jurisdictional requirements set out in section 189A are met. The section affords the court a broad range of powers, most of which appear to suggest that where a complaint about procedure is made by a consulting party, the court has a broad discretion to make orders and issue directives, thereby extending to the court an element of what might be termed a degree of judicial management into a contested consultation process."[62]

[55] Where the strict temporal limits set out in section 189A(17) are not adhered to, the Labour Court may, on good cause shown, condone the failure to adhere to the strict time limits. Although the Labour Court retains its discretion to grant condonation, it has consistently held that, given the strict temporal limits attached to a

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[60] *Edcon* above n 4 at para 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."

[61] Id.

[62] *National Union of Mineworkers v Anglo American Platinum* Ltd [2013] ZALCJHB 262; (2014) 35 ILJ 1024 (LC) (*Anglo American*) at para 19.

section 189A(13) application, even a delay of five months is too long and therefore condonation was refused.[63]

[56] It is not difficult to see why even a relative short delay of five months is considered too long in the context of section 189A(13) of the LRA: the purpose of this procedure is remedial in nature and the "intent no doubt is to allow for early corrective action so that a process failure will not escalate into a substantive injustice".[64] Once the delay becomes too protracted, the purpose of this process – which is to allow the Labour Court to interfere with the consultation process and to make an appropriate order which will remedy the procedural flaw – will be undermined.

[57] However, the length of the delay is only one of the factors to be considered in an application for condonation.

Is section 189A(13)(d) a self-standing remedy?

[58] A central dispute between the parties is the question whether the remedy of "compensation" provided for in section 189A(13)(d) is a self-standing remedy. The applicants insist that it is. Edcon disputes this.

[59] The remedies provided for in section 189A(13)(a)-(d) must be considered in the broader context of section 189A of the LRA and keeping in mind the overall purpose of section 189A(13).

[60] The primary purpose of section 189A(13) is thus to allow for early corrective action to get the retrenchment process back on track. Paragraphs (a)-(d) establish a hierarchy[65] of appropriate relief. Only where it is not appropriate to grant an order in

[63] *Parkinson* above n 48.

[64] *AMCU v Piet Wes Civils CC* (2017) 38 ILJ 1128 (LC); [2017] 5 BLLR 501 (LC) at para 23 with reference to Thompson & Benjamin, *South African Labour Law* (Service no 66, 2016) at AA1-517.

[65] *Forbes v SA Municipal Workers Union* (2014) 35 ILJ 689 (LC) at para 19.

terms of paragraphs (a)-(c) may an order for compensation be granted in terms of paragraph (d).

[61] Can it be said then that the compensation remedy provided for in paragraph (d) is self-standing? The answer is no. The remedy provided for in section 189A(13)(d) cannot, as contended by the applicants, be divorced from the remainder of this section and given self-standing meaning.

[62] Before this Court, counsel for the respondent conceded that a postponement by a Judge of the consideration of the paragraph (d) compensation remedy may create the basis for compensation being considered separately. I think not.

[63] Whereas a postponement of the consideration of compensation at a later stage may separate its determination procedurally, a Judge who postpones consideration of paragraph (d) compensation would at least have had the benefit of considering the other three remedies and determined their inappropriateness.

[64] On its own terms, paragraph (d) provides for an exceptional remedy which is granted only where the primary remedies provided for in paragraphs (a)-(c) are inappropriate. From the reading of the language in the text of paragraph (d), it is cogent that remedy (d) will only be considered where (a)-(c) are "not appropriate". This therefore means that a Judge who reaches the decision to postpone the consideration of paragraph (d) would have considered remedies in paragraphs (a)-(c) first and would have found these remedies inappropriate. Thus the compensation remedy can never be a stand-alone remedy. This was made clear by this Court in *Steenkamp I*, where it stated:

> "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)-(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)-(c)."[66]

[65] Second, considering the purpose and overall scheme of section 189A(13) and against the background of what is stated in section 189A(18) of the LRA, the wording of the legislation is to remove the option of claiming compensation for procedural unfairness long after retrenchment from the arsenal of remedies available to retrenched employees who are dissatisfied with the process followed during the consultation. Third, section 189A(13) does not contemplate a procedure claiming compensation at some future remote time. As the Labour Court held in *Parkinson*:

> "The time limits applicable to an application in terms of section 189A(13) are well known. . . This court has made clear on more than one occasion that the purpose of section 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."[67]

[66] The main purpose of the section and the remedies it provides is thus to "get the retrenchment process back onto a track that is fair."[68] Even the remedy of compensation must be read in the context of the short-term remedies provided for in the same subsection and in light of the jurisdictional restriction provided for in section 189A(18). Compensation in terms of section 189A(13)(d) cannot be the primary relief.[69]

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[66] *Steenkamp I* above n 2 at para 162.

[67] *Parkinson* above n 48 at para 4.

[68] *Edcon* above n 4 at para 24.

[69] Id.

Should the Labour Appeal Court have interfered?

[67] The Labour Court exercised a true discretion when granting condonation. An appellate court's powers to interfere with the exercise of a true discretion are limited. It can only interfere where the discretion was not exercised judicially or where it had been influenced by wrong facts or principles or where the decision reached is one which "could not reasonably have been made by a court properly directing itself to all the relevant facts and principle".[70]

[68] The Labour Appeal Court's interference was justified. Not only was the discretion exercised by the Labour Court influenced by wrong principles, it resulted in a decision which could not reasonably have been made by a court properly directing itself to the relevant principles. It was not in the interests of justice that condonation be granted

[69] The Labour Appeal Court interfered with the Labour Court's discretion because of the Labour Court's misconception about the purpose and functioning of section 189A(13) of the LRA. Here the Labour Appeal Court criticises the Labour Court's acceptance that it has the jurisdiction to adjudicate disputes about unfair procedure in the context of large scale retrenchments. It concludes by emphasising the point that the jurisdictional competence assigned to the Labour Court in section 189A(13) cannot be read disjunctively from sections 191(5)(b)(ii) and 189A(18) because "plainly, this power is an exception to the primary prescription that no adjudication can occur about unfair procedure".[71]

[70] The Labour Appeal Court's criticism is warranted. The Labour Court misunderstood the jurisdictional competence conferred on it by section 189A(13) of the LRA. This much is clear if regard is had to the order granted by the Labour Court. In its order the Labour Court consolidated the application for compensation in respect

[70] *National Coalition* above n 36 at para 11.

[71] *Edcon* above n 4 at para 21.

of procedural unfairness under section 189A with the main action and referred it to trial.[72] This is wrong. The jurisdiction of the Labour Court to adjudicate on the procedural fairness of a dismissal based on the employer's operational requirements has been ousted by section 189A(18) of the LRA. As the Labour Appeal Court correctly stated, the Labour Court's jurisdictional competence "cannot be read disjunctively from section 191(5)(b)(ii) of the LRA and section 189A(18) of the LRA".[73]

[71] Moreover, the procedure within section 189A(13) of the LRA provides for an urgent remedy on application whilst the parties are still locked in consultations or shortly thereafter in circumstances where the reinstatement of the dismissed employees can still salvage the consultation process by restoring the *status quo ante*. This process does not contemplate a trial at some further time after the horse has bolted. It cannot be said that the application had any prospects of success and thus it could not be said to have been in the interests of justice to grant condonation.

[72] The delay in referring this matter to the Labour Court in terms of section 189A(13)(d) of the LRA ranges from 10 months to two and a half years. The Labour Court's view simply is that it would be "grossly unjust" to bar the applicants from pursuing their remedies under section 189A(13) merely because they have pursued a remedy that was later found to be incompetent.[74] It further said that the principle that section 189A(13) is not a remedy that is available well after dismissals have been effected should not be elevated to an immutable principle and be applied in circumstances where the applicants have taken another legitimate course of action only to be later dispossessed of the cause of action and after the lapse of the 30-day period.[75] The Labour Appeal Court is decidedly critical of this view taken by the

[72] *Steenkamp Labour Court* judgment above n 3 at para 48.

[73] *Edcon* above n 4 at para 21.

[74] *Steenkamp Labour Court* judgment above n 3 at para 35.

[75] This view was espoused in *Parkinson* above n 48 at para 4.

Labour Court, as it ignores the fact that the process provided for in section 189A(13) is designed for expeditious use only.[76]

[73] This criticism is also warranted. The Labour Court does not appear to have fully embraced the intrinsic urgency within which judicial intervention must be sought pursuant to section 189A(13). Although the Labour Court refers to the 30-day period within which the application must be launched, the Labour Court appears to merely accept that because the applicants have provided a plausible explanation as to why the section 189A(13) application was not pursued from the outset, condonation should be granted. Again, having regard to the primary purpose of section 189A(13), which is to get the consultation process back on track whilst parties are still engaged in consultation or in timeous proximity to the dismissal of the employees when the process may still be salvaged, a long delay in seeking remedies provided for this purpose is simply inappropriate. The mere fact that the applicants' application in terms of section 189A(13) has been delayed as a result of their pursuit of a remedy that has subsequently been found to be wanting, does not entitle the court to ignore the purpose of the process provided for in section 189A(13).

[74] This brings me to the explanation for the delay. Although the explanation for the delay is an important factor to be considered in any condonation application, it is but one of the factors. Whether an unsuccessful cause of action may form the basis of a condonation application will depend on whether it constitutes an acceptable explanation for the delay in the particular circumstances of the case. The Labour Appeal Court found that as a matter of principle it does not.[77]

[75] Although I do accept that a subsequently overturned legal strategy may constitute a reasonable explanation for the delay, this explanation must be viewed in its proper context. The section 189A(13) procedure has always been available to the applicants at that time. Yet they made an informed and deliberate choice to follow the

[76] *Edcon* above n 4 at 42.

[77] *Edcon* above n 4 at paras 28-32.

De Beers avenue as opposed to the section 189A(13) procedure, because they regarded it a "slam dunk" with no fall-back position. Only once this avenue had been closed off, did they turn to the section 189A(13) procedure.

[76] Lastly, the LRA specifically provides for a dispute resolution mechanism designed to deal with procedural flaws that arise during or immediately after the consultation process and to allow the Labour Court, acting as the guardian of the process, to set the consultation process back on track. Despite having this process available, the applicants have decided to rather pursue the common law remedy. This Court in *Steenkamp I* expressed its disapproval of the applicants' choice of the *De Beers* cause of action:

> "The second basis for my conclusion that the applicants' appeal should be dismissed is a principle that, for convenience, I call 'LRA remedy for an LRA breach. The principle is that, if a litigant's cause of action is a breach of an obligation provided for in the LRA, the litigant, as a general rule, should seek a remedy in the LRA. It cannot go outside of the LRA and invoke the common law for a remedy. A cause of action based on a breach of an LRA obligation obliges the litigant to utilise the dispute resolution mechanisms of the LRA to obtain a remedy provided for in the LRA.
>
> . . .
>
> [A] litigant who bases its case on a breach of an obligation in the LRA must seek a remedy in the LRA and not outside of the LRA. This court has already laid down this principle. In one of the two majority judgments in *Chirwa* Ngcobo J said:
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> > 'Where, as here, an employee alleges non-compliance with provisions of the LRA, the employee must seek the remedy in the LRA. The employee cannot, as the applicant seeks to do, avoid the dispute resolution mechanisms provided for in the LRA by alleging a violation of a constitutional right in the Bill of Rights. It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of section 157(2). To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute resolution provisions of the LRA. This would inevitably give rise to forum shopping simply

> because it is convenient to do so or as the applicant alleges, convenient in this case 'for practical considerations'. What is in essence a labour dispute as envisaged in the LRA should not be labelled a violation of a constitutional right in the Bill of Rights simply because the issues raised could also support a conclusion that the conduct of the employer amounts to a violation of a right entrenched in the Constitution.'"[78]

Conclusion

[77] The Labour Court did not exercise its discretion judicially and that justified the interference by the Labour Appeal Court.

Costs

[78] Although both parties sought costs if they were successful, the dictates of fairness and equity require that no order as to costs should be made. This is a labour matter and it raised an important issue of law which had to be considered by this Court.

Order

[79] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

[78] *Steenkamp I* above n 2 at paras 137 and 140.

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