IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 125/2017

In the matter between:

EDCON LTD **Appellant**

and

STEENKAMP, KARIN AND 1817 OTHERS **Respondents**

Heard: **23 November 2017**

Delivered: **18 December 2017**

Summary: Section 189A(13) of LRA– proper function – an intrinsically urgent set of remedies to address alleged unfair procedure in a retrenchment – four remedies in section 189A(13)(a) - (d) must be read together, not disjunctively - compensation order in terms of section 189A(13)(d) is not available as primary relief – any condonation application must take account of that intrinsic character of the application whose function is to supervise a retrenchment process

Condonation of a late filing of a section 189A(13) application years out of time – explanation offered was that the respondents relied on a particular view of the law, based on case law that was reversed later to justify a delay, is in principle unacceptable; ie the respondents had pleaded a case based on the invalidity of a dismissal where a breach of section 189A had been alleged, the appellant had successfully challenged that view leaving respondents with no cognisable causa having been pleaded- moreover, on the facts, the litigant had abandoned a case

based on procedural unfairness and had delayed seeking condonation unduly, changing tack only when the Constitutional Court had held against their appeal of the LAC reversing the view of the law

***Parkinson v Edcon (LC)* and *Ramiyal v Clinix Selby Hospital (LC*) applied**

Decision of the Labour Court granting condonation set aside.

Coram: Musi, Coppin and Sutherland JJJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] The appeal is against an order of the Labour Court given on 13 June 2017, which echoed the relief sought by the respondents (applicants *a quo)* in their notice of motion. The order reads:

> '(48.1) The referrals to the Court under cases numbers in annexure NOM 1[1] hereto are consolidated into a single trial.
>
> (48.2) The late filing of this application, insofar as it pertains to the application for condonation for the late filing of the application for compensation in terms of section 189A(13)(d) of the Labour Relations Act 66 of 1995 (LRA) is condoned.
>
> (48.3) The application for compensation referred to under paragraph 48.2 above in respect of procedural fairness under section 189A is referred to trial and consolidated with the main action.'

[1] NOM 1 is a schedule of 101 cases before the Labour Court. Some are in respect one applicant, many have several applicants. All the applicants were formerly employees of the appellant and were retrenched. A total of 1817 persons are respondents in this appeal, but not all respondents are applicants in these 101 Labour Court cases.

[2] The principal controversy in the appeal is whether the granting of condonation to the respondents to bring an application in terms of section 189A(13) of the Labour Relations Act 66 of 1995 (LRA) after the expiry of the prescribed 30 day-period was an incorrect exercise of judicial discretion. Upon the fate of that issue, hangs the propriety of consolidating the several other cases.[2]

[2] The relevant provisions of Section 189A provide:
Dismissals based on operational requirements by employers with more than 50 employees
(1) …..
(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) …..(d)
(3) The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if-
(a) the employer has in its notice in terms of section 189 (3) requested facilitation; or
(b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice.
(4) …..(7)
(8) 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 mentioned 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).
(9) 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).
(10) ….(12)
(13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order-
(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;
(d) make an award of compensation, if an order in terms of paragraphs *(a)* to *(c)* is not appropriate.
(14) Subject to this section, the Labour Court may make any appropriate order referred to in section 158 (1) *(a)*.
(15) An award of compensation made to an *employee* in terms of subsection (14) must comply with section 194.
(16) ….
(17) *(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)*.

[3] This case is the latest chapter in the course of protracted litigation arising from retrenchments effected by the appellant between April 2013 and October 2015. The Litigation has reached a point that is characterised by forensic untidiness which, insofar necessary for the purposes of this judgment, an attempt is made to unravel the critical threads and provide a measure of coherence.

The geography of this matter

[4] It is common cause that over a period of some two and half years, the appellant, a major retailer in South Africa, terminated the employment of at least 1817 employees. Of these employees, the appellant claims that only 23 employees have actually referred a dispute to conciliation. The Respondents do not deny this allegation, which must therefore stand.[3] The appellant categorised the respondents into five categories as follows:

4.1. Category 1: 801 employees who were not "dismissed" but elected to enter into agreements to terminate their employment and take voluntary retrenchment packages, of which 121 also took early retirement.[4]

4.2. Category 2: 1236 employees who were retrenched in a process that was indeed conducted pursuant to section 189A.[5]

4.3. Category 3: Steenkamp and others who were retrenched and referred a case for conciliation, alleging that section 189A had not been complied with.[6]

4.4. Category 4: Miscellaneous employees.[7]

4.5. Category 5: Employees who were retrenched and were reemployed.[8]

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(18) 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).
(19) .....(20).
[3] AA: 117/9; RA411/6.
[4] AA117/10.1; RA 411/7.3.
[5] AA117/10.2; RA 413/8.
[6] AA117/10.3: RA 416/9.
[7] AA118/10.4; RA 417/10.

[5] The validity of such characterisation is faintly disputed by the respondents, save as to category 4, "miscellaneous", in respect of which it is properly conceded there is no case to advance for its inclusion in these proceedings. Thus, of category 4 no more need to be said. Of category 1, the respondents' attorney says that the agreements are invalid for want of proper consent. Of Category 5, the respondents' attorney says that these factual confusions can be sorted out in the trial contemplated by the order *a quo.*

[6] Neither the founding affidavit nor the replying affidavit is deposed to by a respondent but, rather, by their attorney.

6.1. Only Steenkamp, herself, deposed to a confirmatory affidavit. It has been argued that the attorney's say-so is hearsay and upon that ground, the application should have been dismissed.

6.2. In rebuttal, it is said that the management of the litigation was in the attorney's hands and much of what is necessary to say, especially about condonation, he has first-hand knowledge. That an attorney has a contribution to make in condonation applications is true of many cases including this one, but misses the point in this particular case. The replying affidavit is replete with confessions of ignorance about important aspects of the retrenchment process and albeit that the riposte is offered that the appellant chose not to reveal such facts until the answering affidavit, it is blatantly obvious that the attorney cannot depose to the several individuals' causes of action, nor purport to refute important facts alleged by the appellant, even in reply, leaving open the suspicion that the attorney has not been in contact which very many of the respondents on whose behalf he has been expected to advance a case.

6.3. This hole in the respondents' case is huge and is fatal to the case in several respects.

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[8] AA118/10.5: RA 417/11.

6.4. However, because of the view we have taken about the legal intricacies and the primary controversy, which it is appropriate to resolve because more litigation is likely in one form or another, we have not decided this matter on the basis of the absence of properly adduced evidence.[9]

History of the litigation

[7] To make sense of the controversies that rage at present, it is necessary to succinctly summarise the critical history. The finer details of the clashes are already fully captured in the judgments which precede this judgment, and do not warrant regurgitation.

[8] In 2013, the first of a series of retrenchment began. Ms Steenkamp, whose name is given to the saga, and a few other co-employees, referred a dispute to conciliation. The conciliation failed. In due course she and her co-applicants, pleaded a case before the Labour Court. That case was formulated on the basis that the failure to adhere to section 189A rendered her subsequent dismissal invalid; alternatively, procedurally unfair.

[9] In response, the appellant pleaded that no cause of action existed in our law to justify a claim of invalidity for want of compliance with section 189A. Two judgments in this Court had, prior thereto, held unequivocally that dismissals in contravention of section 189A were invalid.[10] This view became known as the *De Beers Principle*. The appellant dealt with that hurdle to its defence by seeking an order that these judgments were clearly wrong and resulted in an unconstitutional outcome.

[10] Because of that controversy and its wider implications for Labour litigation, the matter was especially set down before this Court sitting as a court of first

[9] Examples of the hearsay problem appear as follows in the record:
RA 117/9.
RA 117/102.
RA 416/8.12.
RA 421/ 19.3.

[10] *De Beers Group Services (Pty) Ltd v NUM* [2011] 4 BLLR 319 (LAC) *and Revan Civil Engineering Contractors and Others* [2012] 33 ILJ 1846 (LAC).

instance. Steenkamp and her co-applicants then amended their claims to abandon the alternative cause of action relying on unfairness. This was reiterated in the minute of the pre-hearing conference. The minute, of 6 February 2014, records:

> '5.2: The issues have been narrowed as a result of the amendment. The applicant abandons all allegations that the dismissal was substantively and procedurally unfair under section 189.
>
> 5.3: the applicant's claim is that the dismissal was *void ab intio* the respondents disagrees.'

[11] This Court thereupon heard the matter and found the two earlier decisions of this Court and the *De Beers Principle* to be in error. The result was that dismissals in contravention of section 189A were indeed valid.[11] Whether or not the respondents' dismissals were unfair was not an issue put to this Court in those proceedings, nor in the light of the pleadings and the pre-trial conference minute, could such an issue arise.[12] That judgment of this Court was delivered on 3 March 2015, and was confirmed in the Constitutional Court which delivered its judgment on 22 January 2016.[13]

[12] Within 30 days of the Constitutional Court's judgment being delivered, the respondents initiated the present proceedings.

[13] The complications that this present application envisages resolving arise from the fact that the sole issue upon which the respondents' grievances have hitherto been advanced have been the alleged invalidity of their dismissals, having expressly abandoned claims for procedural and substantive unfairness claims under the circumstances described. Because the viability of the "invalidity" premise, as a cause of action, dashed by this Court and by the Constitutional Court, what the respondents want now is a chance to get a compensation order for procedural unfairness using section 189A(13)(d) as a hook. The foundation of

[11] *Edcon v Steenkamp and Related Matters* 2015 (4) SA 247 (LAC); (2015) 36 ILJ 1469 (LAC).
[12] ibid see at [28].
[13] *Steenkamp v Edcon Ltd (NUM intervening)* (2016) 37 ILJ 564 (CC).

the present claim rests on two legs; (1) first, that it can pursue a trial about unfair procedure to obtain relief in terms of section 189A(13)(d), and (2) second, they can obtain condonation of the late referral of a section 189A(13) application, years out of time, on the basis of the alleged reasonableness of pursuing an invalidity claim until the Constitutional Court scotched that hope, and thus the delay is satisfactorily explained. In this latter regard they draw inspiration from a *dictum* of Zondo J in the Constitutional Court at [193]:

> '[193] The appeal must fail. Does this mean that this is the end of the road for the employees in this case? Not necessarily. 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 s 189A but instead to simply seek orders declaring their dismissals invalid. It is arguably open to them to seek condonation and pursue remedies under the LRA. Obviously, Edcon would be entitled to oppose that.'

[14] Premised upon that foundation, it is advanced on behalf of the respondents that there ought to be a consolidation of the several cases claiming invalidity as a *causa,* already before the Labour Court, with section 189A (13) applications, their late filing duly condoned.

Section 189A (13) – what is it for and how does it work?

[15] In our view, the application by the respondents is fatally flawed and the judgment *a quo* in error. Upon these grounds the appeal has to succeed. The principal reason for this outcome is the misconception about the purpose and functioning of section 189A(13).

[16] Section 189A was enacted by an amendment to the LRA in terms of section 45 of Act 12 of 2002. There were further amendments in 2014 to section 189A in

terms of Section 33 of Act 6 of 2014, but those amendments are irrelevant to this controversy.

[17] Section 191 of the LRA regulates, generally, how disputes about unfair dismissals are dealt with. In particular, in relation to dismissals as a result of retrenchments, section 191(5)(b)(ii) provides that a dispute unresolved by conciliation, may be referred:

> '…to the Labour Court for adjudication, if the employee has alleged that the reason for dismissal is …based on the employer's operational requirements'.

[18] An employer who dismisses an employee must justify the decision to do. Section 189 regulates that obligation. Furthermore, in large scale retrenchments, like that in this case, additional obligations are imposed on the employer by section 189A. Central to the present controversy is section 189A(18) which provides that:

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

[19] There could be no clearer indication that after a dismissal had taken place under the stipulated circumstances of operational requirements of an employer, the Labour Court is bereft of jurisdiction, save in respect of substantive fairness. That express exclusion of jurisdiction to evaluate procedural unfairness *ex post facto* is in stark contrast to the jurisdictional competence of the Labour Court in other kinds of dismissal disputes.

[20] This policy choice in the LRA goes hand in hand with what can be described as a partial claw - back of jurisdiction. This claw - back is the burden of section 189A (13):

> '(13) If an employer *does not comply with a fair procedure*, a consulting party may approach the Labour Court by way of an application for an order-
>
> *(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;

(d) make an award of compensation, if an order in terms of paragraphs *(a)* to *(c)* is not appropriate.'

[21] This jurisdictional competence cannot be read disjunctively from Section 191(5)(b)(ii) and section 189(18). Plainly, this power is an exception to the primary prescription that no adjudication can occur about unfair procedure. A reading of section 189A as a whole reveals that it is envisaged that the dynamics of large scale retrenchments are beneficially managed in many cases by third party intervention in the form of facilitation. Either the employer or, in certain prescribed circumstances, the affected employees, may request facilitation, whereupon the CCMA must intervene. If, for whatever reason, no facilitation occurs, a 30- day moratorium, calculated from the date of the notice contemplated by section 189(3) notifying employees that they are at risk of retrenchment, is imposed on all parties from referring a dispute to the CCMA. After that 30-day period, a dismissal notice may not be given until a further 30 days, as contemplated in section 189(8)(b)(i) have elapsed. Section 189A(2)(a) makes it plain that a dismissal "….must give notice of termination of employment in accordance with the provisions of this section".

[22] The effect of these provisions, in short, is that an employer must wait at least 60 days from the date upon which an employee is notified of being at risk of retrenchment before giving notice of dismissal in a large-scale retrenchment exercise.[14]

[23] There are time limits placed on the bringing of such an application. Section 189A (17) provides:

[14] See the LAC decision in *Edcon v Steenkamp* (supra) at [8]-[9] concerning section 189A(2).

‘(17) *(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)*.’

[24] In context, these time periods speak plainly to the intrinsic urgency of judicial intervention pursuant to section 189A(13), if a party wishes a procedural fairness dispute to be addressed. The relief that a court might grant in terms of Section 189A(1)(a) – (d) must be understood in that context. The remedies are designed to be available when an aggrieved applicant brings the application by not later than 30 days after the notification of the possible retrenchment, and thus, 30 days before a dismissal notice may be given. The primary purpose is to get the retrenchment process back onto a track that is fair. Remedies (a) and (b) plainly are appropriate before a dismissal is effected. Remedy (c) is aimed at not only reversing a dismissal, but obligating the employer *in future* to comply with fairness during an implicitly resumed process, which implies timeous proximity to the dismissals. Remedy (d) is plainly contingent on remedies (a) (b) or (c) being inappropriate in given circumstances; it is thus subordinated to the first three options, and cannot be read disjunctively from the rest. Were it appropriate to separate remedy (d) from the rest, the effect of the section would be to totally contradict section 189A(18). Such an interpretation cannot therefore be sustained, and it is not open to a party to seek *primary* relief in terms of section 189A(13) (d). The function of section 189A(13)(d) is a residual power, if the given circumstances make the first three remedies inappropriate.

[25] In summary, Section189A (13) is a procedure designed to enable the Labour Court to urgently intervene in a large-scale retrenchment to ensure that fair procedure is followed. It is not designed to offer a platform for *ex post de facto* adjudication of unfair procedure disputes. Although a failure to comply with the 30-day period can be condoned, the merits of any condonation application must

be understood within the context of an urgent intervention, that being the critical functional characteristic of an application in terms of section 189A(13).

[26] Moreover, the intervention contemplated, by its nature does not contemplate a trial at some future remote time. It exists not to facilitate a *post mortem* but, rather, to oversee the process of retrenchment while it is taking place or shortly thereafter where precipitate dismissals make intervention before actual dismissal impossible, and to reverse the dismissals.[15] Remedy (d) is a last resort back up to cater only for the inappropriateness of remedies (a) (b) or (c).[16]

The flaws in Respondents' case and in the judgment a quo

The Nature of Section 189A(13)

[27] The case offered by the respondents is wholly at odds with the function of section 189A(13) and must therefore fail.

The explanation offered to support condonation of the late referrals

[15] See: CC in *Steenkamp v Edcon* (Supra), at [162] – [164]:
[162] Subsection (13)*(d)* provides that a consulting party may apply to the Labour Court for an award of compensation 'if an order in terms of paragraphs *(a)* to *(c)* is not appropriate'. It seems to me that the phrase 'if an order in terms of paragraphs *(a)* to *(c)* is not appropriate' constitutes a condition precedent that must exist before the court may award compensation. The significance of this condition precedent is that its effect is that the Labour Court is required to regard the orders provided for in subsection (13)*(a)* to *(c)* as the preferred remedies in the sense that the Labour Court should only consider the remedy in subsection (13)*(d)* when it is not appropriate to make any of the orders in subsection (13)*(a)* to *(c)*.
[163] This is a reversal of the legal position that obtains in the case of dismissals for the employer's operational requirements governed by only s 189 where dismissal is only procedurally unfair and not substantively unfair as well. In these cases, the Labour Court is required not to order reinstatement at all. So, in making the remedy of reinstatement available for a procedurally unfair dismissal and also making it one of the preferred remedies in subsection (13), the legislature has gone out of its way to give special protection for the rights of employees and to protect the integrity of the procedural requirements of dismissals governed by s 189A.
[164] The extensive remedies in subsection (13) provide at least partial compensation for the fact that in respect of disputes concerning the procedural fairness of dismissals the employees have been deprived of the right to adjudication that other employees have. In part the extensive remedies in subsection (13) for non-compliance with procedural fairness have been provided because of the importance of the pre-dismissal process.'

[16] In what factual circumstances might this back up remedy be appropriate? It is unnecessary for this court to pronounce on that question. However, the obvious candidates are where the business has closed or the substantive need for dismissal is unchallengeable.

[28] There can be no doubt that the decision to initiate litigation on the premise of the invalidity of the dismissals was taken in the light of the *De Beers Principle.* As much as the decision to rely on a stance founded on judicial precedent is understandable, recognising that fact in this case is where the criticism-free zone ends.

[29] The abandonment of the alternative unfairness *causa* in the face of a direct and open challenge to the correctness of the invalidity *causa* is not explained. It was a huge risk, with no apparent forensic advantages to weigh up.

[30] When this Court in March 2015 upheld the appellant's challenge, instead of a referral of a section 189A(13) application being made then, together with an application for condonation, the respondents threw their only egg into the Constitutional Court's basket, despite its by now cracked condition. Then only after the Constitutional Court tossed it out of the basket did the respondents change tack.

[31] Plainly, a litigation strategy had been adopted that rested on a single premise, and notwithstanding challenges to it, no fall-back position was adopted. Indeed, the procedural unfairness *causa* had been expressly abandoned.

[32] The fate of a failed legal strategy is doom. That risk is intrinsic to our system of litigation. Moreover, a fair litigation system demands that the adversaries know what cases they have to meet. It is not unknown to commence litigation, whether as a claimant or a defendant, having designed and formulated a claim or a defence on a given premise, only to be upended by developments in the law by the end of the case. This phenomenon is an occupational hazard in litigation. It is unthinkable that a party can claim a right to bite at the cherry, if the raspberry, initially chosen, is sour. This explanation, offered by the respondents for the choice not to pursue a procedural unfairness case by way of a section 189A(13) application, is unacceptable in principle. Moreover, in these particular circumstances the opportunities spurned by the respondents to remain in the

game, and later to try to get back in the game, must be weighed too, and weighed against them. As a result, no proper case for condonation is made out.

The Judgment a quo

[33] The Judgment a quo addressed itself to the norm of 'interests of justice' to conclude that condonation ought to be granted. In doing so the court *a quo* declined to follow *Parkinson v Edcon (Parkinson)*[17] and, on appeal, it was argued that despite the court *a quo* being referred to *Ramyidal v Clinix Selby Park Hospital (Pty) Ltd (Clinix),*[18] the court *a quo* did not deal with that decision. Both decisions were binding on the court *a quo,* unless found to be clearly wrong.

[34] As regards the very concept of the "interests of justice" some clarification is warranted. It has been said of the fairness jurisprudence of the Labour Courts that the prescribed measure of fairness is not a warm fuzzy feeling you experience in your tummy. The same caution needs to be expressed about the "interests of justice". In real life, losses are experienced and they have to fall somewhere. Much of our law is devoted to the development of norms, principles and rules to decide where such losses must fall; this is evidenced most starkly in the law of delict. This, sometimes, daunting exercise of weighing the interests of justice aims at even-handedness among adversaries too. Accordingly, the enquiry into the "interests of justice" always occurs within a fact-specific context. The notion that the respondents have been denied access to a court to ventilate a grievance cannot be examined within a paradigm that ignores the interests of the adversary, nor of the ordinary dynamics of litigation, more especially, because the reality is that litigation is a process in which adversaries make choices. If the consequences of choices that are made are that opportunities to pursue other options are forfeited, it does follow that there is a failure of justice. The litigation system affords litigants a process within which they must navigate their own routes; it is no failure of justice if their journey culminates in a dead end.

[17] [2016] ZALCJHB 540 (28 June 2016).
[18] [2016] ZALCJHB 485 (17 June 2016).

[35] Both *Parkinson* and *Clinix* were decisions in point and against the proposition upheld by the court *a quo*.

[36] The court *a quo* held that the way to read *Parkinson* was that Van Niekerk J did not depart from the norm of the interests of justice. However, if that was correct, and the decision was binding, on what proper basis could it be distinguished?

[37] In *Parkinson,* a contest between Ms Parkinson and Edcon (and thus one episode in the same saga has this appeal must address) Ms Parkinson brought a section 189A(13) application on 6 February 2015, the 30-day period having expired on 25 August 2014, her dismissal notice being dated 25 July 2014. What had she done in between these dates? She had referred a dispute to the CCMA, a certificate was refused, and a review had been contemplated but not pursued. Then, she was advised to use the procedure of section 189A(13). Van Niekerk J held that:

> 'The explanation for the delay is curious- it appears to amount to no more than that when the applicant sought advice in relation to her legal options concerning a challenge to the commissioner's ruling, she was advised to file the present application and [her] legal representative became [aware] of the time constraints and [that stage]. This is not an acceptable explanation'.[19]

[38] Van Niekerk J then went onto say:

> 'The time limits applicable to an application in terms of s189A (13) are well known. The fact that the applicant gave consideration to a remedy in terms of s 189A(13) only at a late stage she did, or that she was advised [at] that stage to pursue that remedy, cannot be the basis for an explanation not to have brought the application timeously. Even if I were to grant to the applicant the benefit of the doubt in relation to the explanation for the delay in bringing this application, she has no prospect of success on the merits. This court has made clear on more than one occasion that the purpose of s 189A(13) is one that enables this court to supervise an ongoing retrenchment process or one that has recently

[19] At para 4. The paragraph in the judgment contains typographical errors which I have edited.

> been concluded; it is not a remedy that is available well after dismissals have been effected. The section intends to ensure that a fair process is followed; it is not a means to thwart retrenchment itself (see *Insurance and Banking Staff Association v Old Mutual Services and Technology* (2006) 27 *ILJ* 1026 (LC)). In the present instance, the applicant's date of dismissal, as I have indicated, is 25 August 2014, a little short of two years ago. The irresistible conclusion to be drawn is that having abandoned her unfair dismissal claim, the applicant seeks redress in terms of s 189A (13), a provision ordinarily reserved for urgent intervention in a consultation process involving a significant number of employees. There is no basis, in these circumstances, for the court to intervene in the present dispute, and the applicant's prospects of success are accordingly minimal, if they exist at all.'[20] [own emphasis]

[39] The court *a quo* said this of the emphasized portion of the judgment of Van Niekerk J:

> '...Van Niekerk J alluded in *Parkinson* that had the application for condonation had prospects of success, the lateness of the application would have been favourably considered despite its lateness.'

[40] The passage was interpreted by the court *a quo* as disaggregating the litigant's prospects of success from the proper utilisation of a section 189A(13) application. This reading is incorrect; the point of the enquiry is not whether some case for unfair procedure could possibly be made out, rather the point of the enquiry is whether a section 189(13) application could be justified at the time the application was launched. The cited passage from *Parkinson* is plain that the section 189A(13) application had to have merits and on the assessment made, there had been an abandonment of the opportunity to use that expeditious instrument.

[41] Moreover, the Court *a quo* expressed the view that the remarks of Van Niekerk J that:

[20] At para 4.

> '[section 189A(13)] is not a remedy that is available well after dismissals have been effected. The section intends to ensure that a fair process is followed; it is not a means to thwart retrenchment itself it is not a remedy that is available well after dismissals have been effected'

must not be:

> 'elevated to an immutable principle and apply it to circumstances where an applicant had taken another legitimate course during the ongoing retrenchment process and/or within the permitted time frames only to be disavailed of that cause of action later and after the lapse of the 30-day period'

[42] This observation by the Court *a quo* is misdirected. First, it is not open to a court to ignore the function of the section, and it is no gloss on the section to conclude that it is designed for expeditious use only. Second, the description of the respondents' choice of the invalidity premise to run its case as a "legitimate course" is incorrect. That course was wrong in law. The law was not "changed" by statutory amendment; the invalidity premise was always wrong. Regrettable though it be that a litigant is upended because the Courts now correct an error of interpretation given in earlier decisions, such mishap does not "legitimise" the view taken of law.

[43] In *Clinix*, the employees were retrenched on 1 June 2015 and the section 189A(13) application was brought on 22 February 2016, a delay of nine months. The explanation offered was identical to that offered in this matter; ie a reliance on the invalidity premise, and a change of strategy after the Constitutional Court had spoken. The case is on all fours with this matter. Van Niekerk J had this to say, which we fully endorse:

> '[5] I am not persuaded that the explanation proffered by the applicants is satisfactory. The fact that the present application was brought within 30 days of the Constitutional Court's judgment is neither here nor there – it was always open to the applicants to invoke the remedies established by s 189A (13). They could have done so at any time during the consultation process conducted in March to

May 2015, which they now seek to impugn. Indeed, they could have done so at any time during June 2015, the 30-day period that followed their termination of employment on 31 May 2015. The applicants chose to challenge the validity of their dismissals by way of a referral filed in mid-September. I fail to appreciate how the decision by the Constitutional Court issued in January 2016 has any bearing on a matter such as the present, where for 3 months after their dismissals, the applicants did not seek to challenge the consultation procedure through any of the mechanisms available to them. To the extent that the applicants now rely on the dictum by Zondo J to the effect that it remains open to employees who elected not to resort to the dispute resolution mechanism established by the Act and to challenge the validity of their dismissals to seek condonation and pursue remedies under the LRA. It is not at all clear that Zondo J was referring to the remedy afforded by s 189A (13). That remedy must necessarily be seen in terms of its proper context and purpose. It is a mechanism 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. In short, the section intends to ensure that a fair process is followed; it is not a means to thwart retrenchment itself (see *Insurance and Banking Staff Association v Old Mutual Services and Technology* (2006) 27 *ILJ* 1026 (LC)).

[6] In any event, the applicants (or their advisers) ought to have been aware by March 2015, when the Labour Appeal Court overturned *De Beers*, of any change in the law. The applicants were retrenched some 2 months later and ought to have anticipated, if they intended to limit their strategy to a challenge to the validity of their dismissals, the attendant risks.

[7] The failure to furnish a reasonable explanation for an inordinate delay has the consequence that any prospects of success in the main application and the respective prejudice to the parties are not relevant. I would mention though given the strict temporal limits that attach to a s 189A (13) application, I fail to appreciate what prospects there are at this late stage that this court will order the respondent to recommence the consultation process. To the extent that the applicants seek an alternative remedy of compensation, it is not the purpose of s 189A to provide for compensation for any procedural shortcomings in the

consultation process well after any retrenchments have been effected. Further, what the applicants primarily seek is an order of reinstatement with effect from 22 January 2016, the date of the Constitutional Court's judgment. That would impose a burden on the respondent of the unproductive cost of the applicants' salaries for the almost six months between that date and the hearing of this application, and the period of any consultation process. To grant condonation would significantly prejudice the respondent, who at this point, more than a year after the applicants were retrenched, is entitled to finality in proceedings that have been brought about solely by the applicants having adopted an ill-advised legal strategy'.

[44] At paragraph [43] of the judgment *a quo,* the findings are premised on the assumption that a self-standing remedy in terms of section 189A(13)(d) exists. As addressed above, that reading is incorrect.

[45] The Court *a quo* therefore misdirected itself in the several respects addressed in this judgment; ie the proper purpose of section 189A(13) and its limitations were not recognised and the explanation in support of condonation, relying on a failed legal strategy to justify the delay is not acceptable, especially, as alluded to above, because earlier opportunities to seek condonation were spurned, causing further delay, to which must be added the express and fatal abandonment of the alternative cause of action.

Conclusions

[46] Accordingly, our findings can be summarised thus:

On the Law:

46.1. Section 189A(13) is a procedure to be utilised expeditiously, to address an ongoing retrenchment process and is not available long after.

46.2. Section 189A(13)(d) is not a self-standing remedy that can be disaggregated from (a) (b) and (c), because it is subordinate and ancillary to those provisions.

46.3. The explanation that a failed legal choice of strategy is the reason why a delay occurred to exercise a legal option is not an acceptable explanation.

On the facts:

46.4. The respondents made out no sound case for condonation.

46.5. The appeal must succeed.

Costs

[47] Both parties initially sought costs. At the hearing, counsel for appellant persisted. Counsel for the respondents suggested that no order be made.

[48] In my view, costs should follow the result having regard to the palpable lack of merit in the respondents' stance. Both parties employed two counsel which was appropriate to the matter.

The Order

(1) The appeal is upheld.

(2) The order of the court *a quo* is set aside.

(3) The order is substituted with an order that the application be dismissed with costs.

(4) The respondents shall bear the costs of the appeal, including the costs of two counsel, the one paying the others to be absolved.

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Sutherland JA

Sutherland JA (with whom Musi and Coppin JJA concur)

APPEARANCES:

FOR THE APPELLANT:	Adv A Myburgh SC with him Adv F Boda SC,
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FOR THE RESPONDENTS:	Adv R Beaton SC with him, Adv M Mtombeni
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