

Notes

LARGE-SCALE OPERATIONAL REQUIREMENTS DISMISSALS: HOW EFFECTIVE ARE THE REMEDIES? A DISCUSSION OF *STEENKAMP & OTHERS v EDCON LTD (NATIONAL UNION OF METALWORKERS OF SA INTERVENING)* (2016) 37 ILJ 564 (CC)

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1 INTRODUCTION

The official unemployment rate in South Africa hovers around the 27,7% mark.¹ Against the background of the Constitution of 1996, which seeks to nurture a society in which social justice prevails, there can be no doubt that when employers contemplate dismissing large numbers of employees on operational grounds this should be done with the greatest circumspection. Employers should meticulously heed all the requirements of the Labour Relations Act (LRA)² which are crafted to avert, or minimise as far as possible, the number of dismissals based on operational grounds. Mere lip service in this regard will not suffice.

This case note examines the seminal Constitutional Court decision in *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)*³ and poses the question whether the court came to the correct decision. The contribution further investigates whether the remedies envisaged by the LRA are sufficient in instances where the prerequisites established for large-scale operational requirements dismissals are not complied with.

2 FACTS OF THE CASE

Edcon employed approximately 40 000 sales and administrative staff across nine southern African countries. By April 2013 Edcon's business began to falter and the employer commenced with restructuring on operational grounds. By mid-2014 this exercise had resulted in the dismissal of roughly 3 000 employees.⁴

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¹ Statistics South Africa <http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2017.pdf>, accessed 16 August 2017. The expanded unemployment rate which includes the unemployed who are not searching for work or have become frustrated is 36,6%.

² Act 66 of 1995.

³ (2016) 37 ILJ 564 (CC).

⁴ *ibid* para 89.

A dispute arose because the employer issued notices of termination of contracts of employment before the LRA's statutory notice periods had elapsed. The crisp question before the court was whether the dismissal of employees in breach of the s 189A(8) notification periods in terms of the LRA resulted in the dismissals being null and void.⁵ The employees did not contest any other aspect relating to either the procedural or substantive fairness of their dismissals. The only issue for consideration was the giving of 'short notice' and the effect of non-compliance with the required notification provisions.⁶

3 LEGISLATIVE SETTING

The Constitution enshrines everyone's right to fair labour practices.⁷ This constitutional commitment pursues the ideal that both employees and employers should be treated in a manner that is just and fair⁸ and presupposes that employees faced with operational requirements dismissals will be treated accordingly.⁹ Despite this commitment, the Constitution does not provide further details regarding the right to fair labour practices. The task to give effect and meaning to this significant constitutional right has been assigned to the legislature and the courts.¹⁰

The LRA gives effect to the constitutional right to fair labour practices and amongst other things it aims to ensure that labour disputes are resolved effectively in a manner that fosters industrial harmony.¹¹ Section 185 of the LRA provides that every worker has the right not to be 'unfairly dismissed' or to be 'subjected to an unfair labour practice'. Section 188(1)(a) provides that every dismissal that is not 'automatically unfair' is unfair if the employer fails to prove that the particular reason for, and the procedure applied to, the dismissal are 'fair'.

More to the point for purposes of this discussion, the LRA recognises that an employee's misconduct and incapacity, or an employer's 'operational requirements', may potentially constitute fair reasons for

⁵ *ibid* para 87.

⁶ *ibid* para 8.

⁷ s 23(1) of the Constitution. See also Du Toit et al *Labour Law Relations: A Comprehensive Guide* (LexisNexis 2015) 73.

⁸ The right to fair labour practices is further augmented in s 23 of the Constitution by the right to freedom of association and the right to strike. See s 23(2)(c) of the Constitution.

⁹ Cheadle & Davis 'Structure of the Bill of Rights' in Cheadle, Davis & Hayson (eds) *South African Constitutional Law: The Bill of Rights* (Butterworths 2002) 373 state that the unfair labour practice jurisprudence was developed in South Africa under the badly formulated provisions of the LRA of 1956 which stated that there was a right not to be unfairly dismissed.

¹⁰ In *National Education Health & Allied Workers Union v University of Cape Town & others* (2003) 24 ILJ 95 (CC) para 40 it was held that 'in giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices'.

¹¹ s 1 of the LRA.

dismissal.¹² Apart from defining 'operational requirements' as reasons based on the 'economic, technological, structural or similar needs of an employer' the LRA does not provide more details regarding the substantive fairness of such dismissals.¹³ For example, it does not direct that contracts may only be terminated should the employer experience dire financial circumstances that threaten the sustainability of the employer's enterprise.

It is problematic that the LRA does not provide insight into the scope and content of substantively fair reasons for operational requirements dismissals.¹⁴ The labour courts have attempted, but failed, to develop clear tests which may assist in ascertaining the fairness of an employer's economic, technological or structural needs.¹⁵

Thus in *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union*¹⁶ the Labour Appeal Court (LAC) adopted an approach which took as a starting point the employer's commercial rationale for the decision to dismiss, but also examined whether the decision was fair to the affected party. Evaluating the reasonableness of the decision to dismiss, it found that the proper test was less deferential to the employer than that postulated in *SA Clothing & Textile Workers Union & others v Discreto — A Division of Trump & Springbok Holdings*.¹⁷ The court aimed to protect employees from unfair decisions through an examination of fairness in respect of both the employees and the employer. However, it only considered fairness and not the correctness of the decision.¹⁸ In *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd*¹⁹ the same court adopted a more invasive 'non-deferential' test that also examined the common sense or logic, or correctness, of an employer's decision to dismiss. The LAC held that

'the court should not hesitate to deal with an issue which requires no special expertise, skills or knowledge that it does not have but simply requires common sense or logic, especially where the employer has had an opportunity of commenting on such an issue and has not said anything that indicates that any special knowledge or expertise is required'.²⁰

The LAC has also confirmed that an employer may justify dismissal on operational grounds to increase profits.²¹ In *Mazista Tiles (Pty) Ltd*

¹² s 188(1)(a) of the LRA.

¹³ s 213 of the LRA.

¹⁴ Grogan *Dismissals* (Juta 2014) 404. See also Du Toit et al n 7 above 473.

¹⁵ Du Toit et al n 7 above 475. See also Le Roux *Retrenchment Law in South Africa* (LexisNexis 2016) 196.

¹⁶ (2001) 22 ILJ 2264 (LAC).

¹⁷ (1998) 19 ILJ 1451 (LAC) para 19.

¹⁸ *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union* (2001) 22 ILJ 2264 (LAC) para 19.

¹⁹ (2003) 24 ILJ 1917 (LAC) para 69.

²⁰ *ibid* para 70.

²¹ See Thompson 'Bargaining over Business Imperatives: The Music of the Spheres after Fry's Metals' (2006) 27 ILJ 704 at 715.

*v National Union of Mineworkers & others*²² the LAC, in approving the approach adopted in *Fry's Metals (Pty) Ltd v NUMSA & others*,²³ held that an employer's right to dismiss for operational reasons applies both in the 'context of a business the survival of which is under threat and a business which is making a profit and wants to make more profit'.²⁴

Authors such as Grogan and Le Roux confirm that it remains a challenge to ascertain the substantive fairness of operational requirements dismissals.²⁵ However, despite any uncertainty that may exist regarding the appropriateness of the reasons for operational requirements dismissals, the LRA does prescribe that a fair procedure must be followed and that an employee may not be dismissed for participating in a protected strike,²⁶ or to compel employees to accept a demand in respect of a matter of mutual interest.²⁷

4 FAIR PROCEDURE

Whereas the appropriate pre-dismissal procedures in respect of misconduct and incapacity are set out in the Code of Good Practice: Dismissal,²⁸ the processes leading to operational requirements dismissals are contained in the body of the LRA. The detailed provisions of ss 189 and 189A were especially crafted to avert dismissals on operational grounds, or at the very least, to minimise the number of employees so affected.²⁹

The parties must engage in a meaningful joint consensus-seeking process and relevant information must be provided to employees or their representatives by means of a s 189(3) notice to enable them to participate

²² (2004) 25 ILJ 2156 (LAC).

²³ (2003) 24 ILJ 133 (LAC) para 23.

²⁴ *Mazista Tiles* n 22 above para 57. See also *South African Transport and Allied Workers Union and Others v G4S Aviation Secure Solutions* 2016 ZALCJHB JS49/12 para 17 where the Labour Court noted that 'the LRA recognises the right of an employer to dismiss employees for a reason based on its operational requirements without distinguishing between a business struggling to survive and a profitable business wanting to increase its profits'.

²⁵ Grogan n 14 above 420. See also Le Roux n 15 above 196-7 where she acknowledges the problematic aspect of such a subjective enquiry.

²⁶ s 67(4) of the LRA. However, s 67(5) makes provision for an exception in so far as an employer may fairly dismiss an employee based on the operational requirements of the job. See *SA Chemical Workers Union & others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) para 32 in this regard.

²⁷ s 187(1)(c) of the LRA lists such a dismissal as an 'automatically unfair dismissal'. Although Le Roux n 15 above at 37 contends that the distinction between automatically unfair retrenchments and fair operational requirements dismissals has become relatively settled — Newaj & Van Eck 'Automatically Unfair and Operational Requirement Dismissals: Making Sense of the 2014 Amendments' (2016) 19 *Potchefstroom Electronic Law Journal* 1 at 25-7 argue that the latest amendment of the section has not resolved uncertainty in this regard.

²⁸ See item 4 of the Code of Good Practice: Dismissal, Schedule 8 to the LRA.

²⁹ Du Toit et al n 7 above 493. See also Bosch 'A Survey of the 2002 Labour Legislation Amendments: Is There Really "Something for Everyone"?' (2003) 24 ILJ 23 at 32.

in deliberations.³⁰ This consultative process should not be equated with collective bargaining and there is no duty on the employer to reach consensus with the employees or their representatives.³¹ Nevertheless, the objective of such consultation is to minimise or avert job losses.³²

The distinction between the procedures contained in ss 189 and 189A of the LRA is that s 189A is uniquely formulated to regulate large-scale operational requirements dismissals. It applies only to employers with more than 50 employees and who contemplate terminating the services of more than ten employees.³³ Section 189 applies to all operational requirements dismissals, and includes small-scale dismissals.

There are a number of key differences between s 189 and s 189A dismissals. Section 189A makes provision for the appointment of a facilitator from the Commission for Conciliation, Mediation and Arbitration (CCMA) during which time employees may not be dismissed;³⁴ it provides the parties with the right to refer a dispute to the Labour Court regarding the fairness of the reason or the procedure for the dismissal;³⁵ and it provides workers with a right to strike should they contest the fairness of the reason for dismissal.³⁶

4.1 Facilitation

An employer may request the appointment of a CCMA facilitator in the s 189(3) notification of the contemplated dismissal.³⁷ Alternatively, consulting parties representing the majority of employees whom the

³⁰ Section 189(2) of the LRA states: 'The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on', amongst other things, measures to avoid the dismissals and to minimise the number of dismissals. Section 189(3) of the LRA states that the employer must disclose in writing, amongst other things, the alternatives to dismissal that the employer deliberated on, the number of employees likely to be affected and the proposed objective method for selecting employees to be dismissed.

³¹ In *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A) 1252 the court held that 'consultation provides an opportunity, inter alia, to explain the reasons for the proposed retrenchment, to hear representations on possible ways and means of avoiding retrenchment (or softening its effect) and to discuss and consider alternative measures. It does not require an employer to bargain with its workers Furthermore, the ultimate decision to retrench is one which falls squarely within the competence and responsibility of management'.

³² See Van Niekerk & Smit (eds) *Law@work* (LexisNexis 2015) 325; and Rycroft 'Employer and Employee Obligations with regard to Alternatives to Retrenchment' (2015) 36 ILJ 1775 at 1777.

³³ s 189A(1) of the LRA sets out a formula regarding the number of employees to be covered for larger employers.

³⁴ s 189A(2)(a) of the LRA.

³⁵ s 189A(13)(a) of the LRA.

³⁶ s 189A(10)(b) of the LRA.

³⁷ s 189(3)(a) of the LRA states that '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' amongst other things, the reasons for the proposed dismissals, alternatives that the employer considered, the method for selecting which employees to dismiss, the severance pay proposed, and the possibility of the future re-employment of the employees who are dismissed.

employer contemplates dismissing may also request facilitation within 15 days of the s 189(3) notice.³⁸ The facilitator is allowed a maximum of 60 days to conciliate the pending dismissal.³⁹ Should neither party request facilitation, the parties are granted 60 days in which to consult and seek agreement.⁴⁰ It is significant for the purposes of this discussion that the employer may only give notice of termination of contracts of employment in accordance with s 37(1) of the Basic Conditions of Employment Act (BCEA) once these facilitated and non-facilitated notice periods have expired.⁴¹

In *De Beers Group Services (Pty) Ltd v NUM*⁴² the LAC held that the 60-day period is preemptory and that non-compliance with it renders the termination notices invalid.⁴³ This principle was taken on appeal to the Constitutional Court in *Steenkamp* and is discussed in more detail below.

4.2 Adjudication by the Labour Court

One of the purposes of the s 189A procedures is to exclude procedural issues from the question whether or not the dismissal on operational grounds may have been fair. In terms of 189A(13) if an employer does not comply with a fair procedure, any consulting party may apply for a Labour Court 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) mak[ing] an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate’.

³⁸ s 189A(3)(b) of the LRA.

³⁹ s 189A(7) of the LRA.

⁴⁰ s 189A(8) of the LRA states: ‘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).

⁴¹ Section 37 of the BCEA entitled ‘Notice of termination of employment’ states that a contract of employment may only be terminated on notice of not less than ‘one week, if the employee has been employed for six months or less; ‘two weeks, if the employee has been employed for more than six months but not more than one year; ‘four weeks, if the employee — (i) has been employed for one year or more; or (ii) is a farm worker or domestic worker who has been employed for more than six months’.

⁴² (2011) 32 ILJ 1293 (LAC).

⁴³ See also *Revan Civil Engineering Contractors & others v National Union of Mineworkers & others* (2012) 33 ILJ 1846 (LAC) which held that s 189A dismissals on short notice are invalid.

However, the remedy of reinstatement in terms of s 189A(13)(c) of the LRA is short-lived. It applies only until a fair procedure has been followed.⁴⁴ Furthermore, the remedies, which include an interdict and reinstatement, are applicable only if they are 'appropriate'.

This indicates that reinstatement or re-employment would probably occur only where it is practically feasible as the employees' jobs may no longer be available by the time the court rules on the matter.⁴⁵ Section 194(1) of the LRA also caps the compensation for procedurally unfair dismissals to 12 months' remuneration after consideration of just and equitable reasons.⁴⁶ Likewise, this limit applies to substantively unfair dismissals, and where the dismissal is both procedurally and substantively unfair.⁴⁷

It is important to note that the 2014 amendments deleted s 189A(19) which set out the elements upon which a finding by the court that a dismissal was substantively fair was predicated.⁴⁸ Prior to the amendments, s 189A(19)(b) stated that in respect of any large-scale operational requirements dismissal the Labour Court must hold the dismissal to be fair if, amongst other things, the 'dismissal was operationally justifiable on rational grounds'.⁴⁹

4.3 *The right to strike*

Section 189A's inclusion of the right to strike during operational requirements dismissals is innovative and exceptional.⁵⁰ This is so because, as far as the resolution of disputes is concerned, a distinction is often made between disputes of right and disputes of interest.⁵¹ Disputes of right relate to the interpretation of legal questions associated with

⁴⁴ Also note that in terms of s 193(2)(d) of the LRA, where the dismissal is unfair only because the employer did not follow a fair procedure, the Labour Court may not order reinstatement or re-employment.

⁴⁵ Le Roux n 15 above 184. See also Du Toit et al n 7 above 496.

⁴⁶ Giles & Du Toit 'Compensation for Unfair Dismissal: How Will the New Section 194 Work?' (2002) 6 *Law, Democracy & Development* 124 at 125.

⁴⁷ Le Roux n 15 above 183-4.

⁴⁸ Memorandum of Objects — Labour Relations Amendment Bill, 2012 <http://bit.ly/2vWupFd> accessed 17 August 2017 explains that '[s]pecifying the test to be applied in section 189A retrenchments has led to uncertainty about whether and to what extent this should apply to cases of retrenchment where section 189 applies. The courts should retain their discretion to develop the jurisprudence in this area'. See also Rycroft 'Strikes and the Amendments to the LRA' (2015) 36 *ILJ* 1 at 15 who questions the efficacy of the Labour Court in relation to retrenchment disputes.

⁴⁹ s 189A(19) of the LRA. See also Le Roux 'Assessing Employer Decisions to Dismiss Based on Operational Requirements' (2012) 21 *Contemporary Labour Law* 51 at 55.

⁵⁰ Section 189 of the LRA does not include a provision which allows strikes. It follows that employees working for employers with fewer than 50 workers do not have the right to strike during operational requirements dismissals. Whether this constitutes legislative discrimination is a question worthy of deliberation. See Bosch (2003) 24 *ILJ* 23 at 32 where it is stated that trade unions lobbied for the inclusion of the right to strike against strong opposition from the employer representatives during the policy formulation stage.

⁵¹ Du Toit et al n 7 above 350-2.

existing rights.⁵² Dispute resolution bodies such as the CCMA and the Labour Court are most often tasked to arbitrate and adjudicate such disputes. Despite this, employees have the right to elect to exercise their right to strike during large-scale operational requirements dismissals.⁵³ Section 64 of the LRA, which deals with the referral of mutual interest disputes to the CCMA or bargaining council, applies when workers decide to strike during large-scale operational requirements dismissals.⁵⁴ However, if a facilitator is appointed there is no need for referral in terms of s 64(1) as a referral to a third party has already been made. Furthermore, an employer may only lock out in response to a strike notification.⁵⁵

Interest disputes, such as wage disagreements,⁵⁶ are generally resolved through strikes and collective bargaining.⁵⁷ Strikes form an intrinsic corollary to the right to engage in collective bargaining and an employer's failure to meet employees' demands will result in their withdrawing their labour in an effort to pressure the employer to reconsider its collective bargaining position.⁵⁸ Against this backdrop it seems logical that economic coercion should not be used during the resolution of disputes of right, but should rather remain confined to disputes of interest. However, legislation may convert matters of interest into rights.⁵⁹

Section 189A of the LRA creates an option for consulting parties. They are allowed either to resolve a large-scale operational requirements dispute through strike action or to refer it to the Labour Court for adjudication. It is clear that the right to strike and Labour Court remedies are unique deterring sanctions aimed at ensuring compliance with s 189A. However, it remains questionable whether the sanctions for a contravention of the provision prohibiting employers from dismissing

⁵² Van Niekerk & Smit n 32 above 188.

⁵³ s 189A(11) of the LRA. See also Du Toit et al n 7 above 496.

⁵⁴ s 189A(11) of the LRA.

⁵⁵ Furthermore, s 189A(11) of the LRA states that before exercising the right to strike, advisory awards in terms of s 64(2)(a) should be sought; collective bargaining agreements in terms of s 65(1) and (3) are binding; picketing rules in terms of s 69 apply; the use of replacement labour must be in compliance with s 75; and s 68 will be applicable where there is non-compliance with the provisions of the Act. It must also be noted that a secondary strike in support of a retrenchment strike should comply with s 66 and that the notification period is at least 14 days.

⁵⁶ Van Niekerk & Smit n 32 above 444. See also Novitz *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union* (Oxford University Press 2003) 50-4; and Spielmans 'Labour Disputes on Rights and on Interests' (1939) 29 *The American Economic Review* 299.

⁵⁷ Kahn-Freund *Labour and the Law* (Stevens 1972) 139. See also Davies & Freedland *Kahn-Freund's Labour and the Law* (Stevens 1983) 166 regarding collective *laissez-faire*.

⁵⁸ Kahn-Freund *ibid* 223 notes that people do not go on strike without a real or imaginary grievance.

⁵⁹ See Spielmans n 56 above 300. See also Davies & Freedland n 57 above 21 who state that labour legislation and collective agreements should complement each other in the promotion of collective bargaining.

workers during the dismissal-free time period are effective. The split decision in *Steenkamp* illustrates the concern raised in this contribution.

5 MAJORITY JUDGMENT

In *Steenkamp Zondo J*, writing for the majority, held that 'just because the employer gave notices of termination or effected dismissals contrary to the procedural requirements of subsection (7) or (8) does not mean that the notices or dismissals are a nullity'.⁶⁰ The court further held that the word 'must' in s 189A(2) of the LRA should not be interpreted in a mandatory fashion that justifies the conclusion that the dismissals are null and void. Zondo J reasoned that a number of considerations are relevant in determining the effect of the breach. These include

'the purpose of the statute, whether the breach relates to an obligation that did not exist at common law and that has been created specially by the statute, whether the statute provides for remedies for such a breach and whether, having regard to all relevant provisions of the statute, it can be said that its purpose is that a breach of the relevant obligation results in the invalidity of the thing done contrary thereto'.⁶¹

To the majority, the applicants' contention that their dismissal was null and void was founded on the premise that the employer's conduct was unlawful. However, the court quite correctly pointed out that the LRA has created a special dispensation that embodies the constitutional right to fair labour practices. This framework has created unique processes and fora for the enforcement of the right to fair labour practices in a manner that is fair.⁶² With regard to the remedies available to aggrieved parties in case of non-compliance, Zondo J noted that:

'If non-compliance with s 189A results in dismissals being procedurally unfair, the ordinary unfair dismissal provisions of the LRA as well as the special remedies that s 189A provides may be invoked. If the employer's operational requirements for dismissals are inadequate, this can be challenged as rendering the dismissal substantively unfair with the advantage of immediate access to the Labour Court or the right to strike provided for in s 189A may be invoked'.⁶³

Furthermore, the court reasoned that the conspicuous absence of any references to 'unlawfulness' and 'unlawful dismissal' is a strong indicator 'that, if a dismissed employee wishes to raise the unlawfulness of their dismissal, they must categorise it as unfair if they are to obtain

⁶⁰ *Steenkamp* n 3 above para 99.

⁶¹ *ibid.*

⁶² *Steenkamp* n 3 above at para 105 states that 'the requirement for the referral of dismissal disputes to conciliation is one of the processes created by the LRA. The CCMA, bargaining councils and the Labour Court are some of the fora. The principles, processes, procedures and fora were specially created for the enforcement of the special rights and obligations created in the LRA. Indeed, the LRA even provides for special remedies for the enforcement of those rights and obligations. The special remedies include interdicts, reinstatement and the award of compensation in appropriate cases. These special rights, obligations, principles, processes, procedures, fora and remedies constitute a special LRA dispensation'.

⁶³ *ibid* para 124.

relief under the LRA'.⁶⁴ As a matter of convenience, Zondo J coined the phrase 'LRA remedy for an LRA breach'.⁶⁵ Against the background of this reasoning Zondo J concluded that

'the provisions of the LRA, including its scheme, the purpose of s 189A, the remedies in subsection (13) and the availability of the strike option, drives one to the conclusion that the giving of notices of the termination of contracts of employment in breach of subsection (8) or the effecting of dismissals in breach of subsection (8) does not result in the notices of dismissals or the resultant dismissals being null and void'.⁶⁶

6 MINORITY JUDGMENT

Cameron J, writing for the minority, distinguished himself from the majority judgment by stating:

'The difference with the analysis here lies in the extent to which one recognises as distinctive the protections s 189A sought to introduce into a workplace at risk of large-scale retrenchments. More particularly, it depends on appreciating the power that making a short-notice dismissal invalid has to constrain an employer to think again before effecting a mass retrenchment'.⁶⁷

The minority judgment makes the sound argument that the majority's interpretation of non-compliance 'sullies' the effectiveness of the s 189A remedy.⁶⁸ This is because s 189A creates mandated dismissal-free time zones which are aimed at radically constraining an employer's discretion and providing the opportunity to focus on consensus in order to save jobs. Against the backdrop of South Africa's high unemployment rate it makes sense that employers should not pay mere lip service to mechanisms introduced to curtail job losses.

Cameron J continued by emphasising that the issue of non-compliance should not be reduced to one of mere procedural unfairness,⁶⁹ but that it should rather be viewed as a flagrant disregard of uniquely legislated dismissal-free time zones during large-scale operational requirements dismissals. It is against this logic that such non-compliant conduct should be seen as unlawful and the only remedy for this is to classify it as being null and void.

Cameron J criticised the remedies available to employees in terms of s 189A which require them to 'rush to court, or to invoke "the nuclear option", namely a strike, in an effort to secure compliance with s 189A(8)'.⁷⁰ With regard to the exercise of the right to strike during retrenchments, he stated:

⁶⁴ *ibid* para 107.

⁶⁵ *ibid* para 137.

⁶⁶ *ibid* para 99.

⁶⁷ *ibid* para 58.

⁶⁸ *ibid* para 59.

⁶⁹ *ibid* para 60.

⁷⁰ *ibid* para 59.

'The strike remedy is inapposite. It does not properly deal with the mischief s 189A(8) seeks to prevent. Indeed, the strike option is of cold comfort, compared to the protection a statutory prohibition on dismissal for a 30-day period would afford. A strike accentuates the workplace calamities s 189A seeks to avoid. Strike action imposes severe perils on an already declining employer ...'⁷¹

It is against this reasoning that Cameron J stated that 'nullity of non-compliant dismissals seems both sound and sensible'.⁷² The purpose of the s 189A procedures, he said, is to create an environment that is conducive to the reaching of consensus between the affected parties to minimise or avert job losses. Therefore, 'unless disregard of the dismissal-free zone during a mass retrenchment process has a distinctive consequence, that pivotal statutory purpose will remain unattained'.⁷³

7 EVALUATION OF THE JUDGMENT

Operational requirements dismissals spell the end of the road for employees – thereafter they become part of the statistics. Such terminations are not ascribed to fault on the side of employees. Added to this, the employer controls the process by initiating the proceedings.⁷⁴ Despite these imbalances in the power relationship, employers' decisions regarding operational requirements dismissals are understandably most often dictated by harsh labour market realities and the forces of supply and demand.⁷⁵ Employers take such decisions in order to realise the objectives of their businesses. However, the LRA seeks to establish a fair arrangement between business objectives and a society that does not view workers as commodities.

Both the majority and minority judgments recognise that operational requirements dismissals must comply with ss 189 and 189A. Both judgments recognise that large-scale dismissals lead to severe consequences for employees as they sever the employment relationship. Furthermore, both judgments recognise that the s 189A procedure has the central objective of establishing a mechanism that establishes a protected period during which consensus can be reached between the affected parties in an effort to prevent job losses.⁷⁶

However, this is where the similarities end. The majority and minority are divided on the nature of the remedies and their efficacy to ensure compliance with the scheme established by s 189A. The majority

⁷¹ *ibid* para 61.

⁷² *ibid*.

⁷³ *ibid* para 60.

⁷⁴ Van Niekerk & Smit n 32 above 313.

⁷⁵ Collins *Justice in Dismissal* (Oxford University Press 1992) 10. See also Davies *Perspectives on Labour Law* (Cambridge University Press 2009) at 24 who states that the labour market is influenced by the economic principles of supply, demand and prices. The complexity associated with the labour market justifies some form of regulation of the market because of its human interaction.

⁷⁶ s 189(2) of the LRA. Geldenhuys 'The Reinstatement and Compensation Conundrum in South African Labour Law' (2016) 19 *Potchefstroom Electronic Law Journal* 1 at 8 states that the legislative intention of the LRA is to ensure that employees have reinstatement as a primary remedy and that compensation be reserved for exceptional circumstances.

prefers the more flexible approach which holds that a disregard of the procedures results in unfairness and most probably a compensation award. The minority favours a stricter approach which is based on unlawfulness and an outcome that would render non-compliance with the dismissal notice period null and void.

Zondo J's well-reasoned judgment is based on the phrase that an 'LRA remedy' is appropriate for an 'LRA breach'. His reasoning resonates with the constitutional right to fair labour practices and the labour relations dispensation envisaged by the LRA. Zondo J's reasoning also underlines the fact that employees subjected to non-compliant (short-notice) dismissals have all the LRA remedies available to them. However, the majority does not emphasise the fact that none of the LRA remedies adequately addresses the serious mischief which non-compliance with the dismissal-free zones may occasion.

It is against this setting that the minority judgment by Cameron J advocates a more stringent approach. His argument is that large-scale dismissals 'must' comply with the carefully crafted mechanism of s 189A. Non-compliance poses a serious threat to the livelihoods of the affected persons and society.⁷⁷ The minority decision in essence questions whether the more lenient 'LRA remedies' would in fact deter employers from following procedures that do not seriously seek to avert job losses. Added to this, exercising the right to strike during operational requirements dismissals may only aggravate already negative business sentiment and conditions. The infliction of economic harm will most likely result in more dismissals. It is against this logic that Cameron J refers to the strike remedy as a 'nuclear option'.

The minority judgment's point of view that the current s 189A remedies are ineffective is apposite.⁷⁸ A mere referral to the Labour Court will most likely not have the desired outcome for employees seeking to hold on to their jobs. This is because the Labour Court can only order the reinstatement of the employees until the requirement for fair procedures has been complied with and if the Labour Court finds the circumstances 'appropriate'.⁷⁹ Therefore, where the jobs are non-existent, or new operational structures have been established, such employees seem to be capable of claiming compensation only.⁸⁰ Furthermore, the compensation available to the affected employees who cannot be reinstated or re-employed is limited in terms of s 194(1) of the LRA. It provides that compensation awarded to an employee 'may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal'. Against this backdrop, Cameron J's call for a more deterrent sanction sounds plausible.

⁷⁷ Grogan n 14 above 106.

⁷⁸ *Steenkamp* n 3 above para 61.

⁷⁹ *Le Roux* n 15 above 22. See also *Geldenhuis* n 76 above at 7 who states that employee representatives were opposed to remedies other than reinstatement or re-employment.

⁸⁰ s 189A(13)(d) of the LRA.

Despite these arguments, one cannot fault Zondo J's judgment in as far as the LRA clearly caters for LRA remedies which do not include unlawfulness and the remedy of nullity. Nevertheless, the cogency of Cameron J's advocacy for strict legislative compliance should be recognised. Although the minority judgment may have been flawed in so far as its proposal of nullity of the dismissals as a remedy based on unlawfulness amounts to a disregard of the LRA's fairness dispensation, Cameron J does emphasise a serious and pertinent problem — that the current formulation of the LRA does not provide adequate sanctions that would prevent employees from being subjected to procedurally non-compliant large-scale operational requirements dismissals.

8 CONCLUSION AND RECOMMENDATION

Section 189A(13) of the LRA does not provide for adequate remedies to prevent the mischief of non-compliance in relation to the dismissal-free zone established by s 189A. Every opportunity to minimise job losses in a country with already high levels of unemployment should be encouraged to the fullest. The non-compliant short-term notice dismissal of employees constitutes a serious breach of the LRA and should be sanctioned in a severe manner. Policy makers and the courts should encourage all attempts to introduce measures aimed at minimising job losses during dismissal-free time periods.

Such sanctions ought to be proportionate to the transgression and also inspire compliance. Therefore it is recommended that the LRA should be amended. The Act should provide that a procedurally non-compliant operational requirements dismissal should be regarded as an automatically unfair dismissal — the most severe 'LRA remedy'. This would have the effect that s 194(3), which applies to automatically unfair dismissals, would also be applicable to cases of non-compliance with the dismissal-free time zones. The section caters for a compensatory award of 'not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal'. Section 193(3) already provides that in respect of both an automatically unfair dismissal and in instances where 'a dismissal [is] based on the employer's operational requirements [and] is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances'.

It is not uncommon to link the automatically unfair dismissal remedies to particular serious incidences in terms of the LRA. So, for example, these remedies also apply to unfair treatment of employees when workers are dismissed for participating in a strike, when a business is transferred as a going concern, and when a protected disclosure has been made in terms of the Protected Disclosures Act.⁸¹

⁸¹ Act 26 of 2000.