CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 46/15 and CCT 47/15

In the matter between:

KARIN STEENKAMP First Applicant

MZIMKHULU DE BOOI AND 3 OTHERS

VICTORIA SEKHOTO AND 132 OTHERS

GOODNESS KHUMALO AND 65 OTHERS Second and Further Applicants

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA Intervening Applicant

and

EDCON LIMITED Respondent

Neutral citation:	*Steenkamp and Others v Edcon Limited* [2016] ZACC 1
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J
Judgments:	Cameron J (Van der Westhuizen J concurring): [1] to [86] Zondo J (Mogoeng CJ, Moseneke DCJ, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J and Wallis AJ concurring): [87] to [195]
Heard on:	8 September 2015
Decided on:	22 January 2016

Summary: *Labour Relations Act — dismissal for operational requirements — non-compliance with section 189A(8) — premature notices of termination — dismissal not invalid but may be unfair — requirements of section 189A(8) relating to procedural fairness — LRA remedy for LRA breach not common law remedy — workers to use LRA mechanisms — remedies in section 189A(8)(9) and (13) adequate — reinstatement not competent for invalid dismissal — appeal from LAC — application dismissed*

Minority judgment — section 189A(7) and (8) create a dismissal-free zone — dismissals in breach of section 189A invalid

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ORDER

On appeal from the Labour Appeal Court:

(a) Leave to appeal is granted.

(b) The appeal is dismissed.

(c) There is no order as to costs.

JUDGMENT

CAMERON J (Van der Westhuizen J concurring)

Introduction

[1] The Labour Relations Act[1] (LRA) provides that an employer undertaking large-scale retrenchments may give notice to terminate the contract of employment only once 60 days have elapsed after extending an invitation to consult on an

[1] 66 of 1995.

impending retrenchment.[2] The statute further provides that, in these retrenchments, notice of termination of employment "must" be given in accordance with its provisions. If an employer dismisses in violation of this injunction, are the dismissals invalid? The applicants (employee applicants), joined by the National Union of Metalworkers of South Africa (NUMSA), say Yes. The respondent, Edcon Limited (Edcon), says No. Contradictory decisions of the Labour Appeal Court point in opposite directions.[3] These proceedings seek an answer from this Court.

Background

[2] Edcon employed almost 40 000 sales, administrative and other staff in 1 300 retail outlets across nine countries in Southern Africa. But its business began to falter. During April 2013, it started restructuring for operational requirements.[4] By mid-2014, the process had resulted in the retrenchment of about 3 000 employees.

[3] During the retrenchment process, Edcon first issued written notices in terms of section 189(3) of the LRA.[5] These informed its workforce in general terms that it was contemplating dismissal for operational requirements and invited consultation. Because of the size of the workforce, and the scale of the proposed retrenchments, section 189A applied.[6] This requires that, in respect of any dismissal it covers, "an

[2] Section 189(3) read with section 189A(8)(a) of the LRA.

[3] Both *De Beers Group Services (Pty) Ltd v National Union of Mineworkers* [2010] ZALAC 26; [2011] 4 BLLR 319 (LAC) (Davis JA, Waglay DJP and Hendricks AJA concurring) (*De Beers*) and *Revan Civil Engineering Contractors and Others v National Union of Mineworkers and Others* (2012) 33 ILJ 1846 (LAC) (Landman AJA, Davis JA and Hlophe AJA concurring) (*Revan*), say Yes, while *Edcon v Steenkamp and Others* [2015] ZALAC 2; 2015 (4) SA 247 (LAC) (Murphy AJA, Tlaletsi DJP and Musi JA concurring) (Labour Appeal Court judgment) says No. *De Beers* and *Revan* endorsed the approach taken in an earlier first-instance decision, *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Limited* [2006] ZALC 65; 2006 27 ILJ 1909 (LC) (Freund AJ).

[4] Section 213 of the LRA defines "operational requirements" as "requirements based on the economic, technological, structural or similar needs of an employer".

[5] Section 189(3) requires an employer to invite the other consulting party to consult. This is to be done on notice that must disclose the following information: the reasons for the proposed dismissals, alternatives that have been considered, the method for selecting employees to dismiss, the timing of the dismissals, severance pay, the possibility of future re-employment, the number of employees employed by the employer and the number of employees dismissed for operational reasons in the preceding 12 months.

[6] Section 189A of the LRA provides:

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

(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
  (v) 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).

(2) In respect of any dismissal covered by this section—

(a) an employer must give notice of termination of employment in accordance with the provisions of this section;

(b) despite section 65(1)(c), an employee may participate in a strike and an employer may lock out in accordance with the provisions of this section;

(c) the consulting parties may agree to vary the time periods for facilitation or consultation;

(d) a consulting party may not unreasonably refuse to extend the period for consultation if such an extension is required to ensure meaningful consultation.

(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) This section does not prevent an agreement to appoint a facilitator in circumstances not contemplated in subsection (3).

(5) If a facilitator is appointed in terms of subsection (3) or (4) the facilitation must be conducted in terms of any regulations made by the Minister under subsection (6) for the conduct of such facilitations.

(6) The Minister, after consulting NEDLAC and the Commission, may make regulations relating to—

(a) the time period, and the variation of time periods, for facilitation;

(b) the powers and duties of facilitators;

(c) the circumstances in which the Commission may charge a fee for appointing a facilitator and the amount of the fee; and

(d) any other matter necessary for the conduct of facilitations.

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

(a) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and

(b) a registered trade union or the employees who have received notice of termination may either—

(i) give notice of a strike in terms of section 64(1)(b) or (d); or

(ii) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).

(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) (a) A consulting party may not—

(i) give notice of a strike in terms of this section in respect of a dismissal, if it has referred a dispute concerning whether there is a fair reason for that dismissal to the Labour Court;

(ii) refer a dispute about whether there is a fair reason for a dismissal to the Labour Court, if it has given notice of a strike in terms of this section in respect of that dismissal.

(b) If a trade union gives notice of a strike in terms of this section—

(i) no member of that trade union, and no employee to whom a collective agreement concluded by that trade union dealing with consultation or facilitation in respect of dismissals by reason of the employer's operational requirements has been extended in terms of section 23(1)(d), may refer a dispute concerning whether there is a fair reason for dismissal to the Labour Court;

(ii) any referral to the Labour Court contemplated by subparagraph (i) that has been made, is deemed to be withdrawn.

(11) The following provisions of Chapter IV apply to any strike or lock-out in terms of this section:

(a) Section 64(1) and (3)(a) to (d), except that—

(i) section 64(1)(a) does not apply if a facilitator is appointed in terms of this section;

(ii) an employer may only lock out in respect of a dispute in which a strike notice has been issued;

(b) subsection (2)(a), section 65(1) and (3);

(c) section 66 except that written notice of any proposed secondary strike must be given at least 14 days prior to the commencement of the strike;

(d) sections 67, 68, 69 and 76.

(12) (a) During the 14-day period referred to in subsection (11)(c), the director must, if requested by an employer who has received notice of any intended secondary strike, appoint a commissioner to attempt to resolve any dispute, between the employer and the party who gave the notice, through conciliation.

(b) A request to appoint a commissioner or the appointment of a commissioner in terms of paragraph (a) does not affect the right of employees to strike on the expiry of the 14-day period.

(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) The Labour Court may not make an order in respect of any matter concerning the disclosure of information in terms of section 189(4) that has been the subject of an arbitration award in terms of section 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).

(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) For the purposes of this section, an 'employer' in the public service is the executing authority of a national department, provincial administration, provincial department or organisational component contemplated in section 7(2) of the Public Service Act, 1994 (promulgated by Proclamation 103 of 1994).”

employer must give notice of termination of employment in accordance with the provisions of this section".[7] The effect of non-compliance with this provision is at issue.

[4] For large-scale retrenchments, section 189A provides the option of facilitation.[8] This meant Edcon reached a critical point in the process. Under the statute the parties may agree on facilitation,[9] or, if not, either the employer or a representative trade union may request that the matter be facilitated. This entails a joint consensus-seeking process to mitigate adverse consequences.[10]

[5] But, if a facilitator is not appointed, section 189A(8) imposes a minimum 30-day time bar.[11] The period is calculated from the date on which the employer issues notices in terms of section 189(3). During that period, employees and employers are barred from taking further steps. Neither party may refer a dispute about the impending retrenchments to the applicable bargaining council or to the Commission for Conciliation Mediation and Arbitration (CCMA). It follows that employers, in particular, are not entitled to invoke the power the provision confers on them after the periods have elapsed, namely to give notice to terminate contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act[12] (BCEA).

[6] The dispute arose because Edcon issued notices of termination before this 30-day period had elapsed. In consequence, the employee applicants made 51 referrals, involving 1 331 employees, to the Labour Court. These challenged the

[7] Section 189A(2)(a).

[8] Regulations in terms of section 189A(6), for the conduct of facilitations in terms of the provision, were promulgated under GN 1445, *Government Gazette* 25515 of 10 October 2003.

[9] Section 189A(4) above n 6.

[10] Section 189A(2), (3) and (4).

[11] This minimum time period is subject to extension by agreement between the parties. See the judgment of Zondo J at [92] and [151].

[12] 75 of 1997. See below n 71.

validity of the dismissals. The first, second and further applicants are employees involved in four of these referrals.

[7] The time between Edcon's section 189(3) notices and the notices of termination varied. In the case of Ms Karin Steenkamp, the first applicant, it was six days. In other cases, it was more than 60 days.[13] Neither Edcon nor the applicants referred a dispute to the CCMA in terms of section 189A(8). None of the employees sought to embark on a retaliatory strike and none approached the Labour Court to compel Edcon to comply with a fair procedure or to interdict or restrain it from dismissing them before complying with a fair procedure.[14] Nor did the applicants refer an unfair dismissal dispute to the CCMA in terms of section 191(1)(a) of the LRA.

[8] More importantly, none of the employee applicants contest any aspect of the procedural or substantive fairness of the dismissals. They have not sought to impugn the fairness of Edcon's unauthorised conduct. Nor have they tendered to return the severance packages Edcon paid them. Their sole ground of complaint is formal. It is that Edcon gave short notice under section 189A(2)(a) and (8). And so the single issue before us is the effect of not complying with those provisions.

Labour Appeal Court

[9] Confronted with its non-compliance with the notice periods, Edcon initiated these proceedings with the specific object of challenging *De Beers* and *Revan*, the Labour Appeal Court decisions holding section 189A dismissals on short notice invalid.[15] The Judge President specially constituted the Labour Appeal Court, sitting

[13] Labour Appeal Court judgment above n 3 at para 28. Individual employees issued with notices of termination in excess of 30 days of the date on which notices in terms of section 189(3) were issued were not notified prematurely; this does not detract from the question the Court must resolve. The parties agree that Edcon failed to comply with the time periods in section 189A(8)(a) and (b) of the LRA.

[14] See generally section 189A(13) above n 6.

[15] Edcon initially framed a constitutional challenge to the provision, citing the Ministers of Labour and of Justice and Constitutional Development, and seeking an order declaring that section 189A(2)(a) read with section 189A(8), as interpreted in *De Beers* and *Revan* above n 3, are unconstitutional and inconsistent with sections 9(1) and 23 of the Constitution. See the Labour Appeal Court judgment at para 25. It later amended its notice of motion to claim first re-interpretation of the provisions, and then only constitutional invalidity, in the alternative. The Minister of Labour filed opposing papers in the constitutional challenge, contending that the

as a court of first instance, to hear the case.[16] Edcon invited the Court to reinterpret section 189A(2)(a) read with section 189A(8) so as to conclude that dismissals in violation of those provisions' time periods were not invalid. The Court accepted the challenge, and upheld it. It found in favour of Edcon. It found the approach in that Court's two earlier decisions "obviously wrong".[17]

[10] At the base of the Court's judgment lies the distinction between a failure by an employer to give proper and valid notice of termination in terms of the contract, on the one hand, and failure to give valid notice in breach of a statutory provision. The former, the Court said, can be construed as a breach of contract. If that breach is material, it may result in a wrongful or unfair termination of employment. This in turn entitles the employee to seek specific performance or damages for wrongful termination, but also reinstatement or compensation for unfair dismissal under section 193 of the LRA.[18]

[11] By contrast, breach of a statutory notice requirement violates the principle of legality. This allows the employee to challenge the lawfulness of the action by means of review proceedings to obtain an order of invalidity and reinstatement. In essence, the Court held that the latter breach, with its consequences, is not found in the LRA. Instead, it found, the statute contemplates and provides remedies for one kind of dismissal only: unfair dismissal, as defined in the statute. This takes place when an employer unfairly terminates a contract of employment. And a dismissal so defined is an unfair dismissal, whether or not the termination also violates section 189A(2)(a) and (8).

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provisions of section 189A are peremptory and that failure to comply should lead to invalidity of the dismissal. But in this Court the sole issue was the interpretation of the provisions, and neither Minister filed papers nor were they cited.

[16] Section 175 of the LRA provides that the Judge President may direct that any matter before the Labour Court be heard by the Labour Appeal Court sitting as a court of first instance.

[17] Labour Appeal Court judgment at para 57, referring to *De Beers* and *Revan* above n 3.

[18] Section 193 provides remedies for unfair dismissal and unfair labour practices. See also below n 44.

[12] The Court located this approach in the LRA's definition of "dismissal". This, the statute provides, means amongst others that "an employer has terminated employment *with or without notice*".[19] The Court reasoned that the word "terminated" must be given its ordinary meaning. This is "bringing to an end" – regardless whether the action is lawful, fair or otherwise. A termination by an employer without giving proper or valid notice still constitutes a "dismissal" under the LRA.[20] The statute provides remedies to address any wrongfulness or unfairness. But this does not alter the factual consequence of the termination. The employee is dismissed, fairly or unfairly, lawfully or unlawfully.

[13] The Court evoked the history of employment law jurisprudence in South Africa. It explained that the concept of an employment relationship is broader than the concept of a contract of employment. So a "dismissal" under the statute is not the equivalent of a lawful cancellation of a contract of employment. It is much broader:

> "The statutory concept of dismissal is therefore not restricted to the contractual notion of lawful cancellation and recognises that contract law is an insufficient instrument to regulate the modern employment relationship."[21]

The Court found an "implicit acceptance" in *Schierhout*[22] that a wrongful or "invalid" termination can nevertheless in fact bring a contract of employment to an end. This belief, it said, has persisted in our law.

[14] The purpose of the LRA's wide definition of "dismissal" is to extend the statute's scope to protect dismissed employees. The important practical result is that a wrongful termination without notice that does not constitute a lawful cancellation or

[19] Section 186(1)(a) of the LRA. (Emphasis added.) See below n 27 for the effect of the 2014 amendment to this provision.

[20] Labour Appeal Court judgment above n 3 at para 49.

[21] Id at para 40.

[22] *Schierhout v Minister of Justice* 1925 AD 99. See *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Another* 1982 (4) SA 151 (T); (1982) 4 All SA 566 (T) (*Stag Packings*).

rescission of an employment contract may still constitute an effective dismissal under the LRA.[23]

[15] By contrast, the Court held, where dismissals contravene provisions in statutes other than the LRA, a fundamental principle comes into play; that they are void and of no effect, even though, the Court noted, this doctrine has softened somewhat because the remedies available are discretionary.

[16] Accordingly, the general principle that something done in contravention of a statute is void and of no effect, which *Schierhout* applied in the employment context, no longer applies in all cases. It depends on the proper construction of the particular legislation.[24] And the consequence of the contravention depends on the nature of the discretionary remedies available. The enquiry is thus contextual. The Court held that it involves consideration of: the right sought to be enforced and the wrong sought to be rectified; the subject matter of the prohibition; its purpose in the context of the legislation; the nature of the mischief the prohibition was designed to remedy or avoid; and any cognisable impropriety that may flow from invalidity.

[17] Here, the Court found, it was important that section 189A already offers the parties remedies to counteract non-compliance. Section 189A(9) licenses an immediate retaliatory strike. And section 189A(13) provides for an order compelling the employer to comply with a fair procedure, or for an interdict, reinstatement or compensation.

[18] Most pertinently, the Court held, *De Beers* and *Revan* introduce an anomaly: they remove a conventional dismissal from the scope of the LRA so that it cannot be assessed on the basis of fairness. This is because categorising the dismissal as totally invalid leads automatically to reinstatement. By contrast, the remedies the LRA

[23] Labour Appeal Court judgment above n 3 at para 40.

[24] *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A); [1986] 2 All SA 288 (A) at 188A-J and *Swart v Smuts* 1971 (1) SA 819 (A); [1971] 2 All SA 153 at 829E-H.

provides make it clear that reinstatement is not a competent remedy for mere procedural unfairness.[25]

[19] The Court concluded that *De Beers* and *Revan* were wrong. Non-compliance with these provisions does not lead to an invalid dismissal. The employee applicants, NUMSA and the Minister of Labour were ordered to pay Edcon's costs.

In this Court

[20] The employee applicants and NUMSA in essence contend that the Labour Appeal Court misread the clear language of the provisions. Their purpose is to limit the employer's unilateral use of economic power by imposing a time bar on dismissals. The time bar creates a compulsory cooling off period for conciliation and for the possibility of settlement, thus avoiding job losses, to be explored. The time bar is imperative and not directory. It must be complied with. And because disregard of it entails breach of a statutory prohibition, the remedy of specific performance must be available.

[21] NUMSA contends that section 189A(2)(a) of the LRA imports two effects into the mass retrenchment process. It makes a notice of termination the only way to terminate the employment of an employee marked for retrenchment. And it provides that the termination notice must be in accordance with section 189A(7)(a), where there is facilitation, or section 189A(8)(b)(i), where there is not.

[22] Edcon contends that, contrary to *De Beers* and *Revan*, where facilitation is not sought, an employer's failure to refer a dispute to the CCMA for conciliation in terms of section 189A(8)(a) (where the employee does not do so), and the lapse of the time period thereafter, does not result in the ensuing dismissals being invalid. The employees are dismissed for all purposes under the statute – and the statute confines

[25] Labour Appeal Court judgment above n 3 at para 50. Section 193(2)(d) provides that an employer must be required to reinstate an unfairly dismissed employee unless amongst others "the dismissal is unfair only because the employer did not follow a fair procedure".

them to their unfair dismissal remedies. Section 189A affords them no additional contractual claim arising from an invalid dismissal when its notice provisions are breached.

[23] Edcon argues that the definition of "dismissal" in the statute must be interpreted widely, so as to include employees affected by a dismissal without proper notice (an "unlawful dismissal").[26] The recent amendment of the definition,[27] Edcon urged, demonstrates that the section must be interpreted broadly. The purpose is to afford employees wide-ranging protection against unfair dismissal. And taking "unlawful" dismissal out of it would prejudicially harm that protection. Hence short-notice terminations should not be held invalid.

Issues

[24] The issues are—

a) whether leave to appeal should be granted;

b) whether non-compliance with the statutory time periods in section 189A of the LRA invalidates dismissals; and

c) costs.

Jurisdiction and leave to appeal

[25] Leave to appeal must be granted. The interpretation of the LRA, a statute that gives effect to the constitutional right to fair labour practices,[28] is a constitutional issue.[29] In addition, the ambit of the employment rights flowing from section 189A is

[26] Section 186(1)(a).

[27] In 2014, section 186(1)(a) was amended to replace "a contract of employment" with "employment", so that the provision includes a dismissal where "an employer has terminated employment with or without notice". The amendment came into force on 1 January 2015, after the Labour Appeal Court had reserved judgment in this matter.

[28] Section 23(1) of the Bill of Rights provides that "[e]veryone has the right to fair labour practices".

[29] *National Union of Metal Workers of South Africa v Intervalve (Pty) Ltd and Others* [2014] ZACC 35; 2015 (2) BCLR 182 (CC) at para 25; *Food and Allied Workers Union v Ngcobo NO and Another* [2013] ZACC 36; 2014 (1) SA 32 (CC); 2013 (12) BCLR 1343 (CC) at para 24; *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU)* at para 14.

an arguable point of law of general public importance, which this Court ought to hear.[30] And prospects seem to me propitious.

Merits

The purpose of section 189A of the LRA

[26] The starting point is the provision that sets out the purpose of the LRA – section 1. This provides:

> "The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are—
>
> (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;
>
> (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
>
> (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can—
>
> (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
>
> (ii) formulate industrial policy; and
>
> (d) to promote—
>
> (i) orderly collective bargaining;
>
> (ii) collective bargaining at sectoral level;
>
> (iii) employee participation in decision-making in the workplace; and
>
> (iv) the effective resolution of labour disputes."

[27] This shows that the LRA places particular emphasis on promoting the participation of employees in decision-making in the workplace and the effective resolution of labour disputes.

[30] Section 167(3)(b)(ii) of the Constitution. For recent authority see *DE v RH* [2015] ZACC 18; 2015 (5) SA 83 (CC); 2015 (9) BCLR 1003 (CC) at paras 8 and 10 and *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC) at para 16.

[28] Section 189A was inserted into the LRA in 2002.[31] As the Labour Appeal Court noted, it aimed to enhance the effectiveness of consultation in large-scale retrenchments by reducing friction.[32] There had to be a better way to manage disputes about dismissals for operational requirements affecting large numbers of employees. Section 189A sought to provide it.[33]

[29] First, the provision gave employees in mass retrenchments a new right. It offered them a choice between industrial action and adjudication as the means to try to resolve the dispute. Second, it introduced the option of facilitation at an early stage and spelt out the requirements and elements of due and fair process. To minimise strikes and litigation, the provision allows for compulsory facilitation by the CCMA, if either the employer or a consulting party representing the majority of at-risk employees asks for it. The parties are also free to agree to a voluntary facilitation.[34]

[30] The appointment of a facilitator suspends the employer's power to dismiss for 60 days. Once the notice of termination is given, the employees have the choice of either embarking on industrial action – an option not open in other dismissals – or referring a dispute regarding substantive fairness to the Labour Court.[35] If facilitation is not requested or agreed, there is a 30-day bar on referring a dispute to a bargaining council or the CCMA from the date on which notice in terms of section 189(3) is given, and in addition the employer may give notice to terminate only once the further period mentioned in section 64(1)(a) has elapsed. Edcon breached both time periods by issuing termination notices to retrenched employees early.[36] But once a referral to the Labour Court has been made, the right to strike is no longer available.[37]

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[31] Section 45 of the Labour Relations Amendment Act 12 of 2002.

[32] Labour Appeal Court judgment above n 3 at para 3.

[33] What follows draws largely on the illuminating expositions of section 189A by Murphy AJ in *National Union of Metalworkers of SA v SA Five Engineering* [2004] ZALC 81; (2004) 25 ILJ 2358 (LC) at paras 6-8, and by Murphy AJA in the Labour Appeal Court judgment above n 3 at paras 3-21.

[34] Section 189A(3) and (4) of the LRA above n 6.

[35] Section 189A(7)(b).

[36] Labour Appeal Court judgment above n 3 at para 43.

[37] Section 189A(10)(a)(i) above n 6.

Thereafter the employer is free to give notice of termination. For their part, once the periods have elapsed and notice of termination has been given, aggrieved employees may opt for industrial action or to refer a dispute about the substantive fairness of the dismissals to the Labour Court.[38]

[31] Section 189A expressly limits the disputes that can be referred to the Labour Court. Only those concerning a fair reason for the dismissal can be referred – in other words disputes about substantive fairness.[39] Both referral options expressly impose a time bar.[40] Disputes about procedure under section 189A cannot be referred to the Labour Court by statement of claim, but must instead be brought by the speedier means of motion proceedings.[41]

[32] The effect of the provisions,[42] where the employees have opted for adjudication rather than to strike, is to separate process issues from questions of fairness. Instead the section provides a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication or industrial action.

[33] Seen thus, the first question is this: how distinctive are the provisions of section 189A? What do they add to the LRA's other provisions dealing with dismissal and particularly with retrenchments? The answer to that question may indicate the true purpose of their enactment, and hence the effect of non-compliance with what they demand.

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[38] Section 189A(8)(b)(ii).

[39] Id at section 189A(7)(b)(ii) and 189A(8)(b)(ii)(bb).

[40] The referral must in either case be made in terms of section 191(11). This provides that the referral to the Labour Court for adjudication *inter alia* of a dismissal for operational requirements in terms of section 191(5)(b) must be made within 90 days after the bargaining council having jurisdiction or the CCMA commissioner certifies that the dispute remains unresolved (section 191(11)(a)). Section 191(11)(b) provides that the Labour Court may condone non-observance of the timeframe on good cause shown.

[41] As contemplated in section 189A(13) above n 6.

[42] Section 189A(13), read with section 189A(18).

[34] In argument, counsel for Edcon described section 189A as a "bolt-on" to section 189. Its sole purpose, he contended, is to add extra fair process protections to those that section 189 already affords. Section 189 itself, counsel maintained, prescribes what steps the employer has to take. And section 185, which confers the right not to be unfairly dismissed, or to be subjected to an unfair labour practice,[43] forms the basis of a comprehensive legislative scheme that provides remedies for *all* unfair dismissals[44] – including dismissals in breach of section 189A's time periods. Section 189A thus provides no distinctive remedies on dismissal.

[35] In this way, according to Edcon, a termination of employment that is premature under section 189A(2)(a) and (8) is just another section 186-defined dismissal, with

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[43] Section 185 provides:

> "Every employee has the right not to be—
>
> (a) unfairly dismissed; and
>
> (b) subjected to unfair labour practice."

[44] Section 193, headed, "Remedies for unfair dismissal and unfair labour practice", provides:

> "(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—
>
> (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
>
> (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
>
> (c) order the employer to pay compensation to the employee.
>
> (2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless—
>
> (a) the employee does not wish to be reinstated or re-employed;
>
> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
>
> (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
>
> (d) the dismissal is unfair only because the employer did not follow a fair procedure.
>
> (3) If a dismissal is automatically unfair or, if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.
>
> (4) An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation."

merely ordinary section 185 unfair dismissal remedies that ensue to sanction it. On this approach, the provisions of section 189A do confer on the employee at risk of being dismissed in a mass retrenchment the extra facilitation, strike and interdict tools the provision spells out. But when it comes to the crunch of dismissal, they offer no special protection; in particular, they do not inflict the sanction of invalidity on short-notice dismissals.

[36] This argument, like the reasoning of the Labour Appeal Court, is not without persuasive impact. Its force rests on two considerations. First, the statutory definition of unfair dismissal specifically encompasses dismissals without notice. Second, section 189A itself seems to provide remedies to the at-risk employees in a mass retrenchment and their representatives. The question is whether its design and purpose indicate that non-compliant dismissals are, in addition, invalid.

[37] As the Labour Appeal Court pointed out, the contrary approach introduces an anomaly to the statute's treatment of dismissals. This is because it removes a non-compliant section 189A dismissal entirely from the scope of Chapter 8 of the LRA.[45] Hence it "will not be assessed on the basis of fairness, merely because it was procedurally premature and branded as invalid".[46]

[38] The Labour Appeal Court's response to this anomaly was to treat the concept of dismissal under the statute as uniform. This approach, which Edcon supported in this Court, seeks to meld the dismissal provisions of the statute into a uniform whole, so that dismissal under section 189A doesn't stick out. Its correlative is that it offers the attraction of a unified taxonomy of remedies: one statutory concept of dismissal, with one single set of statutory remedies. These are the remedies for unfair dismissal only, plus the specific strike and interdict remedies section 189A itself provides during the mass retrenchment process – but without the novel remedy of nullity for a failure to

[45] Id at sections 185-197B.

[46] Labour Appeal Court judgment above n 3 at para 50.

give proper notice, which is otherwise alien to the conceptions and scheme of the LRA.

[39] But there are considerable difficulties with this approach. First, to see section 189A as a mere "bolt-on" to section 189 is to understate its significance. Section 189 covers all retrenchments, big or small, individual or mass. By contrast, section 189A deals with mass retrenchments only. It exempts employers employing fewer than 50 employees from its provisions. For those employing 50 plus, it provides a graduated scale of application, depending on how big the workforce is, and what proportion of it the employer proposes to retrench.[47]

[40] So the provision sequesters off large-scale retrenchments for special treatment. By doing this, the legislature recognised their distinctive power to trigger labour unrest. More importantly, it recognised their impact on large numbers of employees' lives, and the lives of their dependants, should joblessness ensue.

[41] In keeping with this, the provision creates processes that are distinctive from those applicable to other retrenchments. They do not apply to smaller employers. It interposes compulsory facilitation, if either the employer[48] or consulting parties[49] ask for it. And it makes facilitation available also if the parties agree.[50] In addition, it creates special remedies – mandatory order or interdict,[51] plus strike[52] – that are otherwise foreign to the employee's armoury in retrenchments and unfair dismissals.[53]

[47] Section 189A(1)(a)(i)-(v) above n 6.

[48] Section 189A(3)(a).

[49] Section 189A(3)(b).

[50] Section 189A(4).

[51] Section 189A(13).

[52] Section 189A(9).

[53] Labour Appeal Court judgment above n 3 at para 11 held that by affording employees and employers the right to participate in industrial action "despite section 65(1)(c)", section 189A(2)(b) of the LRA, creates an exception to the general prohibition on industrial action in relation to rights issues.

[42] Section 189A thus goes further than the general obligation, which the statute already imposes in section 189, to engage before retrenching in "a meaningful joint consensus-seeking process" so as to reach consensus on avoiding or minimising the threatened retrenchments.[54] It creates a framework of inducements and constraints whose design is to impel the employer to engage in that exercise with added focus and with particular single-mindedness.

[43] The obligation the provision imposes on the employer to give notice in accordance with its provisions ("must") has to be seen against this background. It is not a mere procedural add-on to the processes that section 189 already creates. Nor is it a mere palliative for the impending retrenchment. On the contrary, it is foundational to the change of tone that section 189A signals, and pivotal to the shift of power its provisions seek to effect.

[44] In short, a dismissal that violates section 189A's time periods does "stick out". It cannot be smoothed into the larger fabric of the LRA's treatment of dismissals. While it also constitutes a dismissal without notice under section 186(1)(a),[55] it is also signally different from other dismissals covered by Chapter 8. Section 189A is exceptional, in wording and remedy and object and effect. It was enacted precisely to oblige the employer to deal differently with big retrenchments.

[45] The obligation it imports to respect the time periods it sets out ("must") was enacted to create a dismissal-free zone during which consensus may be sought and alternatives may be explored. In other words, the employees must be safe from dismissal while the stipulated statutory periods elapse.

[46] To treat the time period obligation as merely directory – in other words, as having no consequence other than making the dismissal procedurally unfair for the

[54] Section 189(2) of the LRA.

[55] NUMSA initially argued that a non-compliant dismissal under section 189A is not a section 186 dismissal at all, but abandoned this approach during oral argument.

purposes of section 185's remedies – is to deny the powerful novelty the provision imports as well as to misjudge its structure. The provision sought to effect a power shift from employers in mass retrenchments – and it did so in the best and most effective way. It rendered dismissals in disregard of its notice provisions invalid.

[47] Recognising this consequence has indisputable clout. It deprives the employer, for a specified period, of the ultimate power in the employment relationship – that of termination. Dismissal has been called "tantamount to capital punishment" in the employment relationship.[56] Section 189A abolishes this sanction for the limited time its provisions decree.

[48] At the same time, even though only temporarily, it affords at-risk employees the continued advantage of their employment benefits and security. And all this in the service of focusing the employer's attention, during the time freeze, on the possibility of avoiding the retrenchments altogether. The employer must stay its hand, while the employees remain protected. The possibly unappealing prospect of discussions and alternatives may, through force of circumstance, become more enticing. That is the statutory design.

[49] So the time period is to run unhindered. It is intended to quell employer steps that imperil the provision's joint consensus-seeking aims. The judgment of Zondo J, which I have had the pleasure of reading, finds that the LRA does not expressly confer a right to be dismissed lawfully. It bolsters this conclusion through an exposition of

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[56] "In the Firing Line" (1987) 4 *Employment Law* 1, stated that:

> "[O]ne of the fundamental principles of industrial justice is that a dismissal is a remedy of last resort. It has been described as the industrial relations equivalent of capital punishment because it sounds the death knell to the employment relationship. It is a result of this that the industrial court requires an employer faced with redundancy to explore all the alternatives to retrenchment, and to dismiss for misconduct only if the offence is so grievous as to render the continuance of their relationship intolerable."

See also *Timothy v Nampak Corrugated Containers (Pty) Ltd* [2010] ZALC 29; **(**2010) 31 ILJ 1844 (LAC) at 1849E-F; *Engen Petroleum Ltd v Commissioner for Conciliation Mediation and Arbitration and Others* [2007] ZALAC 5; [2007] 8 BLLR 707 (LAC) at para 131; *National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd* 1997 (4) SA 51 (SCA); [1997] 2 All SA 595 (A) at 61E; and *Riveiro and Another v JSN Motors* [1995] 10 BLLR 93 (IC) at 102G-I.

the LRA's predecessors. It notes the removal of a criminal sanction for unauthorised conduct.[57] It reasons that, since the LRA does not expressly provide for a right to a lawful dismissal, a litigant is not entitled to a declaratory remedy when dismissed in breach of the LRA's provisions.[58] This approach narrows the entitlement to a lawful dismissal. It infers from the absence of an express provision in the statute that protection against unlawful conduct must be understood to have been absorbed into the statute's fairness protections.

[50] These are not unattractive propositions. But ultimately they do not seem convincing to me. First, fairness and lawfulness overlap. We cannot rigidly separate them, banishing the latter from the purview of the statute. Evaluating fairness requires a judgment on competing interests and rights of both workers and employers. This is a value judgment.[59] In this, a court must have regard to the statutory provisions before it, its scope and its objects.[60] In this weighing, lawfulness and fairness are not exclusionary opposites.

[51] Second, the LRA has not impoverished a wronged worker's cache of weapons. That the LRA creates specific remedies for most labour and employment disputes does not mean that it does not concomitantly create other remedies, especially when the claim is rooted in the language and logic of the LRA itself.[61] The lawfulness ground, in other words, is a claim seeking to enforce compliance with the provisions of section 189A.

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[57] Zondo J's judgment at [110] to [112] where he refers to section 66 of the Labour Relations Act 28 of 1956 and other similar provisions in old labour law legislation that provided criminal sanctions for the victimisation of workers for actual or suspected union membership.

[58] Id at [102].

[59] *National Union of Metalworkers of SA v Vestak Co-operative Ltd and Others* 1996 (4) SA 577 (A) at 589C-D quoted and endorsed in *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] ZASCA 52; 2007 (5) SA 552 (SCA) at para 7.

[60] Id and *South African Maritime Safety Authority v McKenzie* [2010] ZASCA 2; 2010 (3) SA 601 (SCA) at para 16.

[61] See *Coetzee v Fick and Another* 1926 TPD 213 at 216 in which it was held that "[we] have no right to assume, merely from the fact that a special remedy is laid down in a statute as a remedy for a breach of a right given under a statute, that other remedies are necessarily excluded." *Coetzee* was approved in *Da Silva and Another v Coutinho* 1971 (3) SA 123 (A) at 135 and quoted with approval in *McKenzie* at para 16.

[52] Reliance on *Chirwa* is inapposite.[62] The LRA did not extinguish causes of action. It supplemented existing remedies. It is open to a litigant to choose her remedy and to do so at her own peril. This Court dealing with *Chirwa* in *Gcaba*, came to precisely this conclusion. Van der Westhuizen J said:

> "Furthermore, the LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies in the High Court, section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in *Chirwa* speaks of a court for labour and employment disputes, it refers to labour – and employment – related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common law or other statutory remedies."[63]

[53] The applicants do not seek a remedy outside the LRA. Nor do they seek a remedy alien to its provisions. They rely on a unique remedy that section 189A has specifically afforded those vulnerable to mass retrenchment.

[54] Third, the failure to provide for a criminal sanction does not entail that there is no need to hold a party accountable for violating the provision's prohibition on short-service terminations. When an employer trespasses onto the minimum 30-day period, it rides roughshod over the aim of encouraging consensus and seeking to avoid mass dismissals. No criminal sanction is needed to spell this out.[64]

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[62] *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC). See Zondo J judgment at [138] to [143].

[63] *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 73.

[64] *Simplex (Pty) Ltd v Van der Merwe and Others NNO* 1996 (1) SA 111 (W) at 112H-113D.

[55] What of the remedies internal to section 189A? The interdict to compel a fair procedure, and the retaliatory strike? Understanding the unique character of section 189A's dismissal protection entails certain correlative conclusions. The first is that the provision's compulsory time periods are not aspects of "a fair procedure" envisaged in section 189A(13). The second is that employees given short notice may not go on strike for that reason.

[56] The Labour Appeal Court suggested that the mandatory and interdictory remedies of section 189A(13) are available to employees who receive short notice of termination.[65] It also considered that employees in this position have available the retaliatory strike that subsection (9) envisages. From the availability of these remedies, the Court drew the conclusion that nullity did not follow from non-compliance.

[57] The judgment of Zondo J reasons that the availability of these remedies must mean that non-compliance with section 189A(8) gives rise to a question of unfair procedure. Hence, nullity is not visited upon non-compliance.[66] It also suggests that the other remedies in 189A provide "employees [with] . . . strong weapon[s] to deal with the employer".[67]

[58] The difference with the analysis here lies in the extent to which one recognises as distinctive the protections section 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.

[59] The approach of the Labour Court and the judgment of Zondo J inhibit the efficacy of the process section 189A seeks to command. It seems to me to place a

[65] Labour Appeal Court judgment above n 3 at para 48.

[66] Zondo J judgment at [175].

[67] Id at [171].

burden on employees, requiring them to rush to court, or to invoke "the nuclear option", namely a strike, in an effort to secure compliance with section 189A(8).[68]

[60] If the consequence of invalidity is central to the shift of power the provision introduces, and if it is integral to the provision's purpose of seeking, if at all possible, to avoid mass retrenchments, then the Labour Appeal Court's characterisation of the other remedies in section 189A cannot be accepted. The remedies in subsections (9) and (13) are not available for short notice.[69] This is because short notice is not merely a question of "fair procedure". It serves a more powerful and more radical purpose – to constrain a rethink. And, unless disregard of the dismissal-free zone during a mass retrenchment process has a distinctive consequence, that pivotal statutory purpose will remain unattained.

[61] A further difference stems from the purposive interpretation of section 189A. The strike remedy is inapposite. It does not properly deal with the mischief section 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 section 189A seeks to avoid. Strike action imposes severe perils on an already-declining employer, on the industry as a whole and, worst, on employees who are not at risk of retrenchment, for the whole enterprise may be shut down. Against these alternatives, reading the provisions at issue to entail the nullity of non-compliant dismissals seems both sound and sensible.

[62] Hence it is preferable to find that the dismissal is a nullity, and that a different set of statutory remedies ensues – those the employee applicants are seeking in these and related proceedings. This purposive approach favours an interpretation that

[68] Id at [131], [146], [153], [158], [159] and [165].

[69] For an incisive analysis of the operation of section 189A(13), see the judgment of Murphy AJ in *RAWUSA v Schuurman Metal Pressing (Pty) Ltd* [2004] ZALC 74; (2004) 25 ILJ 2376 (LC); [2005] 1 BLLR 78 (LC) holding at para 32 that the provision is aimed "at unjustifiable intransigence". Its aim "is to provide a remedy to employees to approach the Labour Court to set their employer on the right track where there is a genuine and clear cut procedural unfairness which goes to the core of the process". The provision "is aimed at securing the process in the interests of a fair outcome". It follows that "not every minor transgression of a procedural nature will invite the benefit of the court's discretionary power to grant a remedy".

non-compliance with section 189A(8) goes to unlawfulness. It results in nullity and affords the workforce affected remedies the provision itself creates, rather than reducing their armoury to only procedural fairness. This to me strikes an appropriate balance between workers' and employers' rights and interests. Compliance with the notice period ought not to be construed as encouraging a "check list" approach to realising the protections in section 189A.[70] Requiring employers to adhere to the dismissal-free zone is not for ticking boxes in the interests of formal compliance with the LRA. It is in the public interest to ensure, as far as possible, some measure of certainty in turbulent employment times.

[63] The provision's wording reinforces this conclusion. So does its cross-incorporation of the provisions of the BCEA. Section 189A(2)(a) stipulates that an employer "must give notice of termination" in accordance with the provisions of the section. Section 189A(7)(a) provides that, where a facilitator is appointed, after the expiry of 60 days from the date of the section 189(3) notice of invitation to consult, an employer "may give notice to terminate the contracts of employment in accordance with section 37(1)" of the BCEA.[71] Its companion provision, section 189A(8)(b)(i), similarly provides that, where a facilitator is not appointed, after the expiry of the stipulated periods, the employer "may give notice to terminate the contracts of employment in accordance with section 37(1)" of the BCEA.

[64] The provision's reference to "notice to terminate" is, as NUMSA contended, redolent of the language of the contractual termination of employment, rather than merely of statutory unfair dismissal. Under the common law of contract, conduct by the employer that constitutes a repudiation of the contract does not, of itself, put an end to the contract. What it does is to vest the employee with an election. She can

[70] A mechanical, check list approach is inappropriate. See *Johnson & Johnson (Pty) Ltd v CWIU* (1999) 20 ILJ 89 (LAC); [1998] 12 BLLR 1209 (LAC) at para 29 quoted with approval in *Alpha Plant & Services (Pty) Ltd v Simmonds* [2000] ZALAC 26*;* [2001] 3 BLLR 261 (LAC). See also *Robinson v PriceWaterhouseCoopers* [2005] ZALC 99; [2006] 5 BLLR 504 (LC) at para 11 and *Chester Wholesale Meats (Pty) Ltd v NIWUSA* [2006] 3 BLLR 223 (LAC) at para 23.

[71] Section 37 of the BCEA provides for the timing and form of a notice of termination. While section 38 of the BCEA provides for circumstances in which payment may be made instead of a notice in terms of section 37.

stand by the contract. Or she can choose to accept the employer's repudiation and bring the contract to an end.[72]

[65] But at common law, that choice is the employee's. Except where summary dismissal is warranted,[73] the unilateral act of the employer in terminating the contract, whether by notice or other conduct, does not without more bring an end to the contract of employment.[74] The same applies to an employee who gives short notice in violation of the contract: he or she may be obliged to serve out the notice period.[75] In neither case does the unlawful repudiation of the contract have to be accepted by the other party.[76]

[66] It has been observed that the common law contract of employment is "the key relationship" in the application of South Africa's labour relations legislation.[77] Understanding its terms is essential to appreciating how the LRA and its predecessor legislation use, and generally expand, the terminology of dismissal, termination and notice. It is trite that a lawful termination of the contract of employment will not suffice to render the termination fair under the LRA. But the requirement that a termination be fair does not entail that an employer need not adhere to the requirements of terminating the contract lawfully,[78] whether these arise from the contract itself, or, as here, from statute.

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[72] *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A); [1977] 3 All SA 267 at 945A and *Myers v Abramson* 1952 (3) SA 121 (C); [1952] 1 All SA 267 (C) at 123.

[73] *Venter v Livni* 1950 (1) SA 524 (T); [1950] 1 All SA 173 (T) at 528.

[74] Wallis *Labour and Employment Law* (Butterworths, Durban 1992) at 39 and Brassey *Commentary on the Labour Relations Act* (Service 2, 2006) at A8-18.

[75] See *Nationwide Airlines (Pty) Ltd v Roediger* 2008 (1) SA 293 (W) in which an airline pilot who left his employment before effluxion of the three-month contractual notice period was required by order of court "to continue serving as a captain of the Boeing 767 aircraft" of the airline.

[76] See *Lottering and Others v Stellenbosch Municipality* [2010] ZALC 67; (2010) 31 ILJ 2923 (LC) for the effect of short notice on the part of an employee who resigns. The conclusions at para 41 may be at variance with the approach adopted in this judgment, but the question of resignation is not the issue here.

[77] Wallis "The LRA and the Common Law" (2005) *Law, Democracy and Development* 181 at 187. See also Wallis above n 74 at 8.

[78] *Member of the Executive Council for Health, Eastern Cape v Odendaal* and Others [2008] ZALC 161; (2009) 30 ILJ 2093 (LC) at para 50.

[67] By corollary, the LRA's remedies have not supplanted the whole of the common law of contract.[79] The right not to be unfairly dismissed, which the LRA affords, finds its application pre-eminently in circumstances where the employee's contractual security of employment is tenuous. Where, by contrast, the contract of employment affords the employee larger and firmer rights, and the employee wishes to rely on them, rather than on the LRA's unfair labour practice remedies, he or she is entitled to do so.[80] The LRA did not extinguish entirely common law rights arising from an agreement of employment.[81] Hence, in this provision, the LRA by invoking the common law inhibition on unlawful termination, gives the employees additional protection.

[68] It is this common law location of the statute as a whole that the language of section 189A invokes. The same applies to the BCEA. Under that statute, it is well accepted that a dismissal on short notice is not effective to terminate the contract of employment.[82] When either employer or employee seek to terminate, the BCEA requires that each give notice in terms of section 37. If either party does not, the contract of employment continues to subsist, affording both employee and employer a range of statutory remedies to enforce it.

[69] During the hearing, counsel for Edcon was asked whether, if the provisions of section 189A had appeared in the BCEA, rather than in the LRA, as a "bolt-on" to section 189, its stipulated notice periods would have to be considered peremptory. His answer was Yes. And it had to be Yes, for it would have been plain beyond contest, within the BCEA, that the provision's notice requirements, like those of

[79] *Fedlife Assurance Ltd v Wolfaardt* [2001] ZASCA 91; 2002 (2) SA 49 (SCA) (*Fedlife*), which this Court approved in *NEHAWU* above n 29 at paras 52-3.

[80] *Fedlife* id at para 22.

[81] Id at paras 21-2.

[82] *Anderson v Toyota SA Motors (Pty) Ltd* (1993) 14 ILJ 452 (IC) in which it was held that notice in violation of section 14(2) of the Basic Conditions of Employment Act 3 of 1983 is invalid and results in the subsequent dismissal being null and void at 454C-D and *Tsetsana v Blyvooruitzicht Gold Mining Co Ltd* [1999] ZALC 13; [1999] 4 BLLR 404 (LC) in which it was held that the notice of termination given while an employee was on leave, in violation of section 14(2)(ii) of the Basic Conditions of Employment Act 3 of 1983, is invalid and null and void at paras 25 and 27. Both cases predate the Basic Conditions of Employment Act 75 of 1997; however the logic of the reasoning is apposite in this matter.

section 37, are peremptory, and that notice given in violation of them is null and void. Counsel's reply is nevertheless telling. For it concedes the logic of the provision's structure and language. And those the location of the provision, in the LRA, rather than in the BCEA, cannot change.

[70] When section 189A was enacted in 2002 and provided that the employer "may" give notice of termination in mass retrenchments in accordance with the BCEA, but only after the specified periods had elapsed, its provisions had a specific meaning and effect. This was to render short notice invalid, and to make any ensuing dismissals null and void. The opposing reading would substantially attenuate the effect of the enacted employment protections.

[71] In addition to being faithful to statutory language of the provision, the conclusion here conforms with the doctrinal development of employment law, as overwritten by statute law. Since the Labour Appeal Court derived support for its approach from that history, it is necessary to pause to consider it.

[72] In perhaps the most celebrated case, *Schierhout*, a public servant who had been "illegally retired"[83] in breach of a peremptory provision of a statute sought, on tender of his services, to claim the salary he had lost. His entitlement depended on whether his removal was a nullity. The Appellate Division held per Innes CJ it was and applied the "fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no force".[84] In doing so, it distinguished Mr Schierhout's position as a statute-protected employee from that of ordinary employees who, on wrongful or "arbitrary" dismissal,[85] cannot claim their salary, but instead are confined to claiming whatever damages they may be able to prove they suffered in consequence of the employer's wrongful act in dismissing them.

[83] *Schierhout* above n 22 at 106.

[84] Id at 109.

[85] Id.

[73] *Schierhout* thus afforded support for two propositions. The first is that disregard of peremptory statutory requirements leads to nullity. The second is that specific performance of an irregularly terminated contract of employment is not available to ordinary (non-statutory) employees. Innes CJ said that "the only remedy open to an ordinary servant who has been wrongfully dismissed is an action for damages", and that the courts "will not decree specific performance" of this class of contract.[86]

[74] Since *Schierhout*, the rigidity of both propositions has been substantially tempered. First, our courts accept that whether violating a statutory prohibition has the consequence of nullity depends on a broad understanding of the statute's purpose and meaning.[87] That consequence depends on the subject-matter of the prohibition, its purpose in the context of the legislation, the remedies provided for disregard of it, the mischief it was designed to remedy and any untoward consequences that invalidity may wreak.[88]

[75] It is the second proposition in *Schierhout* on which the Labour Appeal Court relied in coming to its conclusion. This was the Appellate Division's "implicit acceptance" that a wrongful or statutorily invalid termination can bring the employment contract to an end. This, the Court said, had "persisted in our labour law".[89] This led the Labour Appeal Court to observe that dismissal under the LRA includes forms of employment termination far broader than only lawful cancellation. It was this consideration that persuaded the Court that dismissal under section 189A falls within the broad ambit of a section 186 dismissal, even if on short notice in breach of the provision.

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[86] Id at 107.

[87] See the authorities Froneman J sets out in *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*) at para 168 fn 142 and Zondo J's judgment at [184].

[88] See *Cool Ideas* id at paras 43-7 where Majiedt AJ held that the registration requirement for builders is imperative, and that non-compliance disentitles a claim for remuneration for a building contract and *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A); (1978) 3 All SA 406 (A) at 885E-F.

[89] Labour Appeal Court judgment above n 3 at para 40.

[76] The Labour Appeal Court was also alert to the fact that the second proposition in *Schierhout* had been superseded by judicial development.[90] In *Stag Packings*, a Full Court held that there is no rule of law that a party's wrongful cancellation of a contract of personal service puts an end to the contract even though the other party does not accept the repudiation.[91] There is in other words no rule that the employment contract can be terminated unilaterally, and thereby brought to an end.[92] From this it follows that there is no absolute prohibition against granting a remedy of specific performance to wrongfully dismissed employees, even if not statute-protected.[93] Whether specific performance is in fact granted depends on practical considerations[94] and lies in the court's discretion.[95]

[77] Despite this, the Labour Appeal Court found support for its approach in the broad notion, which it said *Schierhout* entailed, that an invalid termination could nevertheless put a unilateral end to a contract of employment. In the balance the Court struck in approaching the meaning of the provisions, it erred. In doing so, it ascribed too much weight to the original statement in *Schierhout*, and too little to significant later developments that have superseded it. These have reaffirmed that unilateral conduct by the employer does not of itself terminate the contract of employment.

[78] Section 189A resonates with this strong stream of contractual employment doctrine. And the stream contributes force to the conclusion that *De Beers* and *Revan* were correct, and the Labour Appeal Court in the present case incorrect.

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[90] Id at para 43.

[91] *Stag Packings* above n 22 at 156F-157A.

[92] Id at 157A.

[93] Id at 158A-B.

[94] Id at 157C.

[95] Id at 158A-D.

Is retrospective reinstatement automatic?

[79] The Labour Appeal Court gave prominence in its reasoning to the idea that the inefficacy of short notice, and the nullity of resultant dismissals, would lead "automatically" to the remedy of reinstatement, with, it implied, full back pay for those reinstated.[96] This led the Court to reject the conclusion that non-compliant dismissals were null and void. The Court seemed to adopt a more nuanced approach to remedy – finding that other provisions of the LRA dealing with unfair dismissal provided it. Hence, according to the Labour Appeal Court, non-compliant dismissals in violation of section 189A were just ordinary unfair dismissals, subject to the ordinary remedies provided elsewhere in the LRA.

[80] The conclusion that short notice dismissals under section 189A are subject to the ordinary remedies in section 193, the Labour Appeal Court found, would "lead to more proportionate and less capricious consequences"[97] for non-compliance. In this Court, Edcon supported the Labour Appeal Court's analysis and approach.

[81] These considerations are consequentialist in tone and effect. But are they correct? NUMSA in its argument disavowed them. It rejected the notion that short-notice dismissal in violation of section 189A would automatically entitle employees to reinstatement. On the contrary, NUMSA contended that reinstatement was not automatic. Whether the court hearing the employee applicants' claim granted them reinstatement, and on what conditions, was a question for its discretion.

[82] In oral argument, the employee applicants endorsed this approach. This led to the paradox that the employees embraced a weaker remedy for short-notice dismissals under section 189A than the employer insisted would be the consequence of their argument.

[96] Labour Appeal Court judgment above n 3 at paras 28 and 50.

[97] Id at para 50.

[83] The employee applicants and NUMSA are in my view correct. The fact that the dismissals are null and void does not entitle employees subjected to them, without more, to the remedy of full retrospective reinstatement.[98] That has never been the approach of South African courts. For instance, employees dismissed on short notice in violation of the BCEA have not always been granted full retrospective reinstatement.[99] This is in keeping with the long-standing notion that remedy depends on the discretion of the Court that hears the employee applicants' claim. There is no reason to think that the enactment of section 189A entailed a radical abandonment of this approach to remedy.

[84] It is worth stressing that the question of the remedy to be afforded to the employee applicants in the proceedings now pending elsewhere is not before us. Despite this, the judgment of Zondo J undertakes an exposition of the remedies expressly provided in section 189A but fails to acknowledge the foundational remedy that lies in the breach of the statute, generally, itself. We are concerned with it only so far as it bears on interpretation. And once one removes the consequentialist sting from the arguments that induced the Labour Appeal Court to hold that a short-notice dismissal under section 189A is not a nullity, the statutory consequence may freely flow: the dismissal is indeed a nullity. Section 189A(14) empowers the Labour Court to grant relief provided for in section 158(1)(a). This includes a declaratory order. This may also include an order declaring non-compliant dismissals invalid.[100]

[98] See *Schierhout* at 111 and *Stag Packings* at 158 above n 22.

[99] See for example the remedies granted in *Anderson* and *Tsetsana* above n 82. In *Anderson* the Industrial Court declared the dismissal null and void and ordered reinstatement, and in *Tsetsana* the Court found that the notice period operating concurrently with the applicant's leave was null and void, and ordered the employer to pay additional notice pay.

[100] Zondo J judgment at [158].

Conclusion

[85] If notice of termination in retrenchments subject to section 189A does not comply with the provisions of section 189A(8)(b)(i), where no facilitator has been appointed, as here, there is no valid termination. In that event, the contract of employment is not terminated. And if the contract of employment is not terminated, there is no dismissal in terms of section 186(1)(a) of the LRA.

[86] The employee applicants and NUMSA are thus right. When Edcon dismissed the individual employees without waiting for the time periods in section 189A(8) to expire, it acted without effect in law. The dismissals were a nullity. They had no force and effect. The question of what remedy flows in practice from this conclusion must await another day and another court.

ZONDO J (Mogoeng CJ, Moseneke DCJ, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J and Wallis AJ concurring):

Introduction

[87] The issue for determination in this matter is whether dismissals effected by an employer pursuant to notices given in breach of section 189A(8)[101] of the Labour Relations Act[102] (LRA) are invalid. I have had the pleasure of reading the judgment prepared by my Colleague, Cameron J (first judgment).[103] It holds, by implication, that this Court has jurisdiction. I agree. This matter involves the interpretation of the LRA which is legislation enacted to give effect to the Constitution and the interpretation of such legislation is a constitutional matter.[104]

[101] See [95] below.

[102] 66 of 1995.

[103] The reason for referring to it as the first judgment is that it was produced first.

[104] *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 14.

Indeed, this Court would also have jurisdiction on the basis that this matter raises an arguable point of law of general public importance which ought to be considered by this Court.[105] For the reasons given in the first judgment, I also agree that we should grant leave to appeal. The first judgment goes on to hold that the dismissals of the applicants by the respondent are invalid, the appeal should be upheld and the decision of the Labour Appeal Court set aside. I am unable to agree with this conclusion and outcome. In my view, the dismissals cannot be held to have been invalid and the appeal should be dismissed. I, therefore, write to set out my reasons for this conclusion and outcome.

Background

[88] The first judgment sets out the factual background to this matter. For that reason I do not propose to do the same save to the limited extent required for a proper understanding of my approach. What follows in the next few paragraphs is the limited background necessary for that purpose.

[89] Before the events that gave rise to the present dispute, the respondent employed about 40 000 employees throughout the country. Between April 2013 and mid-2014 it dismissed about 3000 employees for operational requirements.[106] It is common cause that section 189A was applicable to the dismissal.[107] The individual applicants, by which term I mean the applicants other than the National Union of Metalworkers of

[105] Section 167(3)(b)(ii) of the Constitution reads:

> "(3) The Constitutional Court—
>
> . . .
>
> (b) may decide—
>
> . . .
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court".

[106] Section 213 of the LRA defines "operational requirements" as "requirements based on the economic, technological, structural or similar needs of an employer".

[107] In this judgment any reference to sections is a reference to the LRA unless the context indicates otherwise.

South Africa (the Union), are some of the employees who were dismissed during that period.

[90] The individual applicants were given notices as contemplated in section 189(3). Those are notices that an employer is obliged to issue when it contemplates the dismissal of any employees for operational requirements. By way of such notices an employer invites to the consultation process the parties with whom it is required to consult in terms of section 189(1).[108] Section 189A(2)(a) provides that in respect of any dismissal covered by section 189A "an employer must give notice of termination of employment in accordance with the provisions of this section" Section 189A(2) also provides that the period of the consultation period contemplated in section 189 may be varied by the parties. It also provides that no consulting party may unreasonably refuse to extend the period of consultation if the extension is required "to ensure meaningful consultation". Section 189A(3) and (4) envisages the appointment of a facilitator to help the parties with the issues that are the subject of the consultation process.

[91] In terms of subsection (7) the employer is precluded from giving notice to terminate the contracts of employment unless "60 days have elapsed from the date on which notice was given in terms of section 189(3)". That is in a situation where a

[108] Section 189(1) provides:

> "(1) When an employer contemplates dismissing one or more *employees* for reasons based on the employer's *operational requirements*, the employer must consult—
>
> (a) any person whom the employer is required to consult in terms of a *collective agreement*;
>
> (b) if there is no *collective agreement* that requires consultation—
>
> (i) a *workplace forum* if the *employees* likely to be affected by the proposed *dismissals* are employed in a *workplace* in respect of which there is a *workplace forum*; and
>
> (ii) any registered *trade union* whose members are likely to be affected by the proposed *dismissals*;
>
> (c) if there is no *workplace forum* in the *workplace* in which the *employees* likely to be affected by the proposed *dismissals* are employed, any registered *trade union* whose members are likely to be affected by the proposed *dismissals*; or
>
> (d) if there is no such *trade union*, the *employees* likely to be affected by the proposed *dismissals* or their representatives nominated for that purpose."

facilitator has been appointed. In terms of subsection (8) a party to the consultation process is precluded from referring a dispute to a bargaining council or the Commission for Conciliation, Mediation and Arbitration (CCMA) before the lapse of 30 days from the date on which notice was given in terms of section 189(3) and the periods envisaged in section 64(1)(a). This is where no facilitator has been appointed.

[92] Where a facilitator is appointed, there is a period of 60 days during which employees may not be given notices of the termination of their contracts of employment (dismissal notices). That is 60 days from the day of the giving of the section 189(3) notice. However, in a situation where a facilitator is not appointed, the period during which the employees may not be given dismissal notices is 30 days from the date of the giving of the section 189(3) notice plus the period in section 64(1)(a).

[93] In this case no facilitator was appointed to assist the consulting parties in terms of section 189A(3) and (4) with the issue relating to the contemplated dismissal of employees for operational requirements. This meant that subsection (8) was applicable. Therefore, the respondent was precluded from giving employees dismissal notices during the period of 30 days from the date of the giving of section 189(3) notice and until the periods mentioned in section 64(1)(a) had elapsed. The respondent gave the individual applicants dismissal notices during this period when it was precluded from doing so. This is common cause. The time periods between the issuing of the section 189(3) notices and the notices of termination varied from 6 days to in excess of 60 days.

[94] In response to the dismissal notices and the resultant dismissals, the applicants did not make use of the dispute resolution mechanisms of the LRA. They did not make an application to the Labour Court for an order under section 189A(13)[109] nor did they give a notice of the commencement of a strike nor refer a dispute about whether there was a fair reason for the dismissal to the Labour Court for adjudication.

[109] See [127] below where this provision is quoted.

I shall say more about these avenues later. They simply approached the Labour Court and asked for orders declaring the dismissals invalid and of no force and effect and for reinstatement orders. However, the matter was heard by the Labour Appeal Court sitting as a court of first instance. That Court rejected the applicants' contention that the dismissals were invalid and upheld the respondent's contention.[110] That judgment of the Labour Appeal Court overruled an earlier judgment of the same Court, differently constituted, in *De Beers*[111] which had upheld a similar contention and which was followed in *Revan*.[112]

The appeal

[95] This case is about a breach of the provisions of section 189A(8). Section 189A(8) reads:

> "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)."

[110] Judgment by Murphy AJA with Tlaletsi DJP and Musi JA concurring, reported as *Edcon v Steenkamp* and *Others* [2015] ZALAC 2; 2015 (4) SA 247 (LAC); (2015) 36 ILJ 1469 (LAC).

[111] *De Beers Group Services (Pty) Ltd v National Union of Mineworkers* [2010] ZALAC 26; [2011] 4 BLLR 319 (LAC); (2011) 32 ILJ 1293 (LAC). This was a judgment of Davis JA in which Waglay DJP and Hendricks AJA concurred.

[112] *Revan Civil Engineering Contractors and Others v National Union of Mineworkers and Others* (2012) 33 ILJ 1846 (LAC). This was a judgment of Landman AJA in which Davis JA and Hlophe AJA concurred.

[96] The dispute between the parties is whether the dismissals effected pursuant to the dismissal notices given in breach of section 189A(8) were invalid and of no force or effect. The applicants contend that that is so. The respondent contends that that is not so and seeks a conclusion that its breach of section 189A(8) did not render the dismissals invalid. The respondent concedes that its conduct constitutes a breach of subsection (8) but contends that, while that may render the resultant dismissals unfair, it does not render them invalid and the applicants cannot be granted the declaratory order and order of reinstatement they seek.

[97] In support of their contention the applicants mainly rely upon the use of the word "must" in section 189A(2)(a). The provision reads:

> "(2) In respect of any dismissal covered by this section—
>
> (a) an employer *must* give notice of termination of employment in accordance with the provisions of this section." (Emphasis added.)

The applicants also rely on *Schierhout*[113] to argue that anything done contrary to law is a nullity.

[98] The first judgment holds that subsections (7) and (8) of section 189A create what it refers to as a "dismissal-free zone" during which an employer to whom section 189A applies may not give employees dismissal notices nor terminate their contracts of employment. I would call it a "dismissal-free-period". With this proposition I have no quarrel. However, the judgment then goes on to say that, if an employer issues notices of dismissals or dismisses employees during this period, the result is that the notices and the resultant dismissals are null and void and of no force and effect. It also says, as I understand it, that its interpretation of subsection (8) provides greater protection to employees against dismissal during the "dismissal-free-period" because the employer would see dismissing employees during the period as too risky. That interpretation is that the dismissal of employees in breach of the

[113] *Schierhout v Minister of Justice* 1925 AD 99.

provisions of subsection (8) results in invalidity. With this further proposition I am unable to agree. The first judgment does not explain why the orders provided for in subsection (13) would not be a sufficient deterrent to the employer. Nor does it explain why the employer would not consider a strike such as is envisaged in section 189A(8) and (9) as an equal, if not a greater, threat for the continued viability of its business.

[99] In this judgment I say 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. I further say that the mere use of the word "must" in section 189A(2) is not adequate to justify that conclusion. It all depends upon a number of considerations including 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. This requires a proper examination of the relevant provisions of the statute. In my view a proper examination of the provisions of the LRA, including its scheme, the purpose of section 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.

Interpretive approach

[100] This matter requires us to interpret various provisions of the LRA. That being the case, it is necessary that we have regard to the correct approach to the interpretation of this legislation. The starting point is section 39(2) of the Constitution. In so far as it is relevant, it reads:

"When interpreting any legislation . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

We must also take into account the provisions of section 3 of the LRA. Section 3 reads:

"Any person applying *this Act* must interpret its provisions—

(a) to give effect to its primary objects;

(b) in compliance with the Constitution; and

(c) in compliance with the public international law obligations of the *Republic*."

[101] The primary objects of the LRA appear in section 1 which sets out its purpose. The purpose is—

"to advance economic development, social justice, labour peace and the democratisation of the *workplace* by fulfilling the primary objects of *this Act.*"

Thereafter the primary objects of the LRA are spelt out. They are:

"(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;

(b) to give effect to obligations incurred by the *Republic* as a member state of the International Labour Organisation;

(c) to provide a framework within which *employees* and their *trade unions*, employers and *employers' organisations* can—

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(d) to promote—

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) *employee* participation in decision-making in the *workplace*; and

(iv) the effective resolution of labour *disputes*."

It is trite by now that, in interpreting provisions of the LRA, the correct approach is purposive interpretation.

[102] In my view the applicants' contention falls to be rejected and their appeal dismissed. This view I take rests on three bases. These are that—

(a) the LRA does not contemplate invalid dismissals or an order declaring a dismissal invalid and of no force and effect;

(b) the declaratory order sought is a wrong remedy for an LRA breach; and

(c) for a breach of a section 189A(8) obligation, the applicants are limited to the remedies provided for in section 189A and those remedies are adequate.

I proceed to deal with these in turn.

A. Relief sought not contemplated by the LRA

[103] My point of departure is that, if a litigant's cause of action is contractual in nature, the remedy will have to be found within contract law. If a litigant's cause of action is based on the law of delict, the remedy will have to be in the law of delict. The applicants' cause of action is a breach of the procedural requirements laid down in section 189A(8) of the LRA that a relevant employer is required to comply with before it can dismiss employees to which the section applies. On the same principle the relief to which the applicants may be entitled by virtue of that breach, if they make out a proper case, should be sought within the four corners of the LRA. The applicants contend that Edcon's non-compliance with the section 189A(8) procedure before the workers were dismissed rendered their dismissals invalid. They do not contend that the non-compliance rendered their dismissals unfair.

[104] Non-compliance with the section 189A(8) procedure may result in the dismissals being unfair, not invalid. Before a court may declare that a dismissal is

invalid, it must first conclude that the dismissal is unlawful. The LRA is legislation that was enacted to give effect to section 23 of the Constitution. What we find in section 23 that is closely related to section 189A is the provision in section 23(1) that "everyone has a right to fair labour practices".

[105] The LRA created special rights and obligations that did not exist at common law. One right is every employee's right not to be unfairly dismissed which is provided for in section 185. The LRA also created principles applicable to such rights, special processes and fora for the enforcement of those rights. 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.[114]

[106] Section 189A falls within Chapter VIII of the LRA. That is the chapter that deals with unfair dismissals. Its heading is: UNFAIR DISMISSAL AND UNFAIR LABOUR PRACTICE. Under the heading appears an indication of which sections fall under the chapter. The sections are reflected as "ss 185-197B". The chapter starts off with section 185. Section 185 reads:

> "Every *employee* has the right not to be—
>
> (a) unfairly dismissed; and
>
> (b) subjected to unfair labour practice."

[114] In *South African Maritime Safety Authority v McKenzie* [2010] ZASCA 2; 2010 (3) SA 601 (SCA); (2010) 31 ILJ 529 (SCA); the Supreme Court of Appeal, through Wallis AJA held that one could not simply transpose rights from the LRA into the contract of employment.

Conspicuous by its absence here is a paragraph (c) to the effect that every employee has a right not to be dismissed unlawfully. If this right had been provided for in section 185 or anywhere else in the LRA, it would have enabled an employee who showed that she had been dismissed unlawfully to ask for an order declaring her dismissal invalid. Since a finding that a dismissal is unlawful would be foundational to a declaratory order that the dismissal is invalid, the absence of a provision in the LRA for a right not to be dismissed unlawfully is an indication that the LRA does not contemplate an invalid dismissal as a consequence of a dismissal effected in breach of a provision of the LRA.

[107] This indication is reinforced when one has regard to the definition of "dismissal" in section 186(1).[115] It starts with what would ordinarily be understood as a dismissal, namely, a termination of employment with or without notice. That encompasses the ordinary situation of the employer giving notice under the contract of

[115] Section 186(1) entitled "Meaning of dismissal and unfair labour practice" reads:

> "*Dismissal* means that—
>
> (a) an employer has terminated employment with or without notice;
>
> (b) an employee employed in terms of a fixed term contract of employment reasonably expected the employer—
>
> (i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or
>
> (ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee.
>
> (c) an employer refused to allow an *employee* to resume work after she—
>
> (i) took maternity leave in terms of any law, *collective agreement* or her contract of employment; or
>
> (ii) . . .
>
> (d) an employer who dismissed a number of *employee*s for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or
>
> (e) an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee; or
>
> (f) an employee terminated employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer."

employment and a summary dismissal. But then in five further paragraphs it extends the concept of dismissal far beyond its ordinary meaning. Once again the absence of any reference to an unlawful dismissal is telling. It suggests that, if a dismissed employee wishes to raise the unlawfulness of their dismissal, they must categorise it as unfair if they are to obtain relief under the LRA.

[108] Another indication that the LRA does not contemplate an invalid dismissal is this. In section 187 the LRA created a new category of dismissals. It called them "automatically unfair dismissals". This is a special category of dismissals. What makes this category of dismissals special is that the dismissals in this category are all based on reasons that we, as society, regard as especially egregious. They include cases where an employee is dismissed for his or her race, gender, sex, ethnic origin, religion, marital status, political opinion, membership of a trade union, participation in a protected strike, exercise of rights provided for in the LRA and other such arbitrary reasons. Another factor that makes this category of dismissals special is that for those cases where an employee's dismissal has been found to be automatically unfair, the LRA provides the Labour Court with power to order the employer to pay double the maximum compensation that the Labour Court would have had the power to order if the dismissal had not been found to be automatically unfair but was found to simply lack a fair reason or was found to have been effected without compliance with a fair procedure.

[109] Most, if not all, of the reasons for dismissal that render a dismissal automatically unfair as contemplated in section 187 are reasons that would ordinarily render a dismissal unlawful and invalid. If the Legislature had intended that under the LRA there would be a category of invalid dismissals, it would have been the automatically unfair dismissals. The Legislature must have deliberately decided that the LRA would not provide for invalid dismissals but rather for automatically unfair dismissals instead. Put differently, the Legislature deliberately provided in the LRA for unfair dismissals and automatically unfair dismissals to be outlawed and to attract a remedy but did not make any provision for unlawful or invalid dismissals. To

understand this choice by the Legislature, it is necessary to look back at the legal position before the passing of the current LRA.

[110] The predecessor to the current LRA was the Labour Relations Act[116] (1956 LRA). Section 66[117] of the 1956 LRA prohibited employers from victimising workers for actual or suspected union membership and made such conduct a criminal offence. Dismissal for union membership and for taking part in a strike that was not

[116] 28 of 1956.

[117] Section 66 of the 1956 LRA read:

> "(1) Any employer who, whether or not any agreement, award or determination is binding upon him in terms of this Act, dismisses any employee employed by him or reduces the rate of his remuneration or alters the terms or conditions of his employment to terms or conditions less favourable to him or alters his position relatively to other employees employed by him to his disadvantage, by reason of the fact, or because he suspects or believes whether or not the suspicion or belief is justified or correct, that—
>
> (a) that employee has given information which by or under this Act he is required to give, or which relates to the terms or conditions of his employment or those of other employees of his employer, to the Minister or to an officer, or to an industrial council or executive or other committee of an industrial council, or to a designated agent or other official of an industrial council or to a conciliation board, or to a mediator, assessor, arbitrator or umpire appointed under this Act, or to the industrial court or to a member of the industrial court or has complied with any lawful requirement of an inspector or designated agent, or has given evidence before a court of law; or
>
> (b) that employee has refused or omitted to do any act which an employer may not require or permit an employee to do in terms of sub-section (2) or (3) of section *fifty-two*; or
>
> (c) that employee belongs or has belonged to any trade union or any other similar association of employees or takes or has taken part outside working hours, or, with the consent of the employer, within working hours, in the formation of or in the lawful activities of any such trade union or association, shall be guilty of an offence.
>
> (2) If an industrial council or a conciliation board has failed to settle a dispute such as is referred to in sub-section (1) of section *forty-three* (other than a dispute between any employer and employee referred to in sub-section (1) of section *forty-six* and has not decided to refer such dispute to arbitration, the Minister may, if he deems it expedient to do so, and if in his opinion the employees or the trade union by whom or which the dispute was referred to the industrial council or on the application of whom or which the conciliation board was established had reasonable grounds for believing that the action taken by the employer which resulted in the dispute arose from a matter such as is referred to in paragraph *(a)*, *(b)* or *(c)* of sub-section (1) or in paragraph *(a)* or *(b)* of sub-section (1) of section *twenty-five* of the Wage Act, 1957 (Act 5 of 1957), direct that the provisions of section *forty-six* relating to arbitration shall apply in respect of such dispute as though it were a dispute referred to in sub-section (2) of the last-mentioned section and thereupon all the provisions of the last-mentioned section shall so apply."

prohibited by that Act constituted conduct prohibited by that provision. Under the 1956 LRA those dismissals were recognised as unlawful and invalid.

[111] In *Rooiberg Minerals*[118] the Court held that, where an employer had victimised an employee in breach of section 66 of the Industrial Conciliation *Act*[119] (1937 Act), the dismissal was invalid.[120] Section 66 of the 1937 Act was, to all intents and purposes, similar to section 66 of the 1956 LRA. In *Makhanya*[121] the dismissal was effected in contravention of section 25 of the Wage Act.[122] That provision was materially the same as section 66 of the 1956 LRA.[123] In that case the Court held, following *Rooiberg Minerals*, that a dismissal effected in contravention of section 25 of the Wage Act was null and void.[124] In *Stag Packings*[125] the employer conceded that, if the reason for the dismissal of the workers brought the dismissal within the ambit of section 66 of the 1956 LRA, the dismissal constituted victimisation and would, therefore, be invalid. The reason I refer to cases based on contraventions of section 66 of the 1937 Act and section 25 of the Wage Act is to show that dismissals that were effected in contravention of provisions materially similar to those of section 66 of the 1956 LRA were held by the courts to be invalid.

[112] The characteristic of all these cases and the statutory provisions with which they were concerned is that the conduct in question by the employer constituted a criminal offence and the criminal court had the power to reinstate an employee after conviction. The position is different under the LRA. Whilst previous labour legislation in this country had contained many provisions reinforced by criminal sanction, there was a deliberate choice in the LRA to move away from this model and

[118] *Rooiberg Minerals Development Co Ltd v Du Toit* 1953 (2) SA 505 (T).

[119] 36 of 1937.

[120] *Rooiberg Minerals* above n 118 at 509D–510A.

[121] *Makhanya v Bailey NO* 1980 (4) SA 713 (T); (1980) 3 ILJ 219 (T).

[122] 5 of 1957.

[123] See summary in *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Another* 1982 (4) SA 151 (T); (1982) 4 All SA 566 (T) at 153A-C.

[124] *Makhanya* above n 121 at 225D-226B.

[125] *Stag Packings* above n 123.

not to use the criminal law to enforce obligations in the current LRA. The context in which the dismissals were held to be invalid in those cases is different from the statutory context in which we are asked to hold that the applicants' dismissals were invalid. The LRA does not contemplate invalid dismissals.

[113] Unlike the current LRA, the 1956 LRA contemplated invalid dismissals and orders declaring dismissals invalid and of no force and effect. Section 17(11)(a)[126] of that Act conferred upon the Industrial Court jurisdiction to decide any matter that a civil court could decide arising out of the administration of various pieces of labour legislation. Section 17(11)(a) is the provision under which the workers in *Ndawonde*[127] brought their application for an order *inter alia* declaring that their dismissal for union membership or lawful union activities was invalid and of no force and effect. In *Ndawonde* the court held that the applicants were entitled to seek an order declaring their dismissals invalid. It rejected the employer's contention that under the 1956 LRA they were limited to challenging their dismissals under the unfair labour practice provisions.

[114] The Court's reason for rejecting that contention was that, unlike the current LRA, the 1956 LRA had section 17(11)(a) which gave power to the Industrial Court to adjudicate any case under that statute arising from the application of various pieces of labour legislation that any civil court could adjudicate. That power enabled the Industrial Court to make an order declaring a dismissal invalid – a power that a civil court would ordinarily have. The current LRA does not have a provision to that effect concerning the Labour Court. In section 157(2) of the LRA the concurrent jurisdiction the Labour Court has with the High Court is confined to cases in which

[126] Section 17(11)(a) of the 1956 LRA reads:

> "(11) The functions of the industrial court shall be–
>
> (a) to perform all the functions, excluding the adjudication of alleged offences, which a court of law may perform in regard to a dispute or matter arising out of the application of the provisions of the laws administered by the Department of [Labour]."

[127] *Ndawonde and Others v KwaZulu Cash & Carry (Pty) Ltd* (1988) 9 ILJ 103 (IC).

there is an alleged or threatened violation of the fundamental rights entrenched in the Bill of Rights arising from:

> "(a) employment and from labour relations;
> (b) any *dispute* over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer, and
> (c) the application of any law for the administration of which the *Minister* is responsible."[128]

[115] It seems to me that section 157(2) is a replacement of section 17(11)(a) of the 1956 LRA because section 17(11)(a) also referred to matters arising from the application of various pieces of legislation falling under the Minister of Labour. It appears that there was a deliberate decision by the Legislature not to frame section 157(2) in such a way as would have given the Labour Court jurisdiction to deal with all the matters that could be dealt with by the Industrial Court under section 17(11)(a) of the 1956 LRA. Matters such as *Ndawonde* would be some of those matters. Those are matters in which an order could be sought declaring a dismissal invalid. The similarity of the idea represented from the words "arising from" to the end of paragraph (c) to the idea represented in section 17(11)(a) of the 1956 LRA could not have been a coincidence.

[116] I think that the rationale for the policy decision to exclude unlawful or invalid dismissals under the LRA was that through the LRA the Legislature sought to create a dispensation that would be fair to both employers and employees, having regard to all the circumstances, including the power imbalance between them. In this regard a declaration of invalidity is based on a "winner takes all" approach. The fairness which forms the foundation of the LRA has sufficient flexibility built into it to enable a court or arbitrator to do justice between employer and employee. For example, where a dismissal is unlawful by virtue of the employer having failed to follow a

[128] The reference to the Minister is a reference to the Minister of Labour.

prescribed procedure before dismissing an employee and the dismissal is declared invalid, in law the employee is regarded as never having been dismissed and will be entitled to all arrear wages from the date of the purported dismissal to the date of the order. Under the LRA a dismissal will be recognised as having taken place irrespective of whether the dismissal is held to have been automatically unfair or unfair because there was no fair reason for it or because there was no compliance with a fair procedure in effecting it.

[117] Furthermore, the fairness required by the LRA dictates that the relief that is granted by the Labour Court or an arbitrator for an unfair dismissal must take account of all the relevant circumstances of the case and the interests of both the employer and employee. As a result of this approach, there is flexibility in the relief that may be granted in a particular case. The remedy may be reinstatement with or without retrospectivity. It may be an award of compensation. The compensation is capped at 12 months' remuneration or 24 months' remuneration, depending on whether it is for an automatically unfair dismissal or a substantively or procedurally unfair dismissal. If the dismissal is substantively fair but procedurally unfair, reinstatement is not competent but an award of compensation is competent.

[118] All of these enable the Court or an arbitrator to grant relief for unfair dismissal that is just and equitable to both the employer and the employee in a particular case. The common law which gives us the concept of the invalidity of a dismissal is rigid. It says that if a dismissal is unlawful and invalid, the employee is treated as never having been dismissed irrespective of whether the only problem with the dismissal was some minor procedural non-compliance. It says that in such a case the employer must pay the employee the whole backpay even if, substantively, the employer had a good and fair reason to dismiss the employee.

[119] Whereas the LRA requires a number of factors to be taken into account in deciding what the appropriate remedy is for an unfair dismissal including an automatically unfair dismissal, the common law's remedy of an invalid dismissal

takes into account one fact and one fact only. That is that the dismissal was in breach of statutory provisions. Under the LRA if the remedy that is considered fair is compensation, the Court grants compensation. The compensation is limited to 12 months' or 24 months' remuneration, as the case may be, in terms of section 194 of the LRA. Under the LRA if the Court thinks reinstatement would be an appropriate remedy, it will grant reinstatement. When considering the flexibility required by the LRA in the grant of a remedy for unfair dismissal, one thinks of the flexibility in regard to a remedy that section 172(1)(b) of our Constitution contemplates. Section 172(1)(b) confers on the courts the power to make "any order that is just and equitable" when dealing with constitutional matters within their powers. I make these points to show that the exclusion of the remedy of an invalid dismissal under the LRA was deliberate. It did not fit into the dispensation of the LRA which required flexibility so as to achieve fairness and equity between employer and employee in each case.

[120] Section 188(1) of the LRA refers to unfair dismissals that fall outside the category of automatically unfair dismissals. Section 188(1) provides:

> "(1) A *dismissal* that is not automatically unfair, is unfair if the employer fails to prove—
>
> (a) that the reason for *dismissal* is a fair reason—
>
> (i) related to the *employee's* conduct or capacity; or
>
> (ii) based on the employer's *operational requirements*; and
>
> (b) that the *dismissal* was effected in accordance with a fair procedure."

Section 188(2) is also important. It reads:

> "Any person considering whether or not the reason for *dismissal* is a fair reason or whether or not the *dismissal* was effected in accordance with a fair procedure must take into account any relevant *code of good practice* issued in terms of *this Act*."

[121] The Code of Good Practice contemplated in section 188(2) appears as Schedule 8 to the LRA. When one goes to the Code of Good Practice, one finds that it

covers only dismissals for misconduct and dismissals for incapacity. It has no provisions relating to dismissals for operational requirements. There is a reason for this. It is that, whereas there are no detailed provisions in the LRA itself about dismissals for misconduct and for incapacity, there are detailed provisions in the LRA relating to dismissals for operational requirements. Those detailed provisions are contained in sections 189 and 189A.

[122] The Code of Good Practice provides for guideline procedures that are expected to be followed to ensure procedural fairness in the case of dismissals for misconduct and dismissals for incapacity. The Code of Good Practice seeks to give effect to section 188(1)(a)(ii) of the LRA in relation to dismissals for misconduct and dismissals for incapacity. That is the provision that requires a dismissal to be effected in accordance with a fair procedure.

[123] The provisions of sections 189 and 189A were enacted to give effect to sections 185 and 188 in regard to dismissals for operational requirements. That means the two sections were enacted to give effect to an employee's right not to be unfairly dismissed provided for in section 185 read with section 188(1). They were not enacted to give effect to every employee's right not to be unlawfully dismissed for which the LRA does not make any provision. In particular, in so far as sections 189 and 189A provide for procedures and processes that must be complied with before any dismissal for operational requirements can be effected, they seek to give effect to the requirement in section 188(1)(a)(ii) that a dismissal must be effected in accordance with a fair procedure. Therefore, both sections 189 and 189A have nothing to do with unlawful or invalid dismissals.

[124] The first judgment is wrong that section 189A cannot be smoothed into the fabric of the unfair dismissal provisions of the LRA. That section fits comfortably into those provisions. If non-compliance with section 189A results in dismissals being procedurally unfair, the ordinary unfair dismissal provisions of the LRA as well as the special remedies that section 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 section 189A may be invoked.

[125] If the procedural requirements of section 189 or 189A are not complied with in circumstances where there is no acceptable reason for non-compliance, the result will be that the dismissal was not effected in accordance with a fair procedure as contemplated in section 188(1)(a)(ii). It is, therefore, procedurally unfair – not unlawful, invalid and of no force or effect. In substance the applicants' complaint is that the dismissals are procedurally unfair. However, the applicants have dressed their complaint up as something else so that they can avoid the mechanisms and remedies under the LRA and seek a remedy that falls outside of the LRA in relation to dismissals. They do so in an attempt to get maximum benefit that is available only when the breach relied upon is not that of the provisions of the LRA. What the applicants are doing is not exactly forum-shopping but it is analogous to forum-shopping. Where the law permits forum-shopping, a litigant cannot be denied relief just because it is engaging in forum-shopping. However, in this case there is no room for granting the remedy sought by the applicants.

[126] As already stated, the applicants' complaint is the respondent's breach of its procedural obligations in section 189A(8) by failing to observe the time limits imposed by that provision. The procedural obligations placed upon an employer in section 189A, including those in section 189A(8), relate to the procedural fairness contemplated in section 188(1)(b). Then, when subsection (13) refers to non-compliance with a fair procedure, it refers to procedural fairness made up of the procedural obligations and rights provided for in section 189A. That being the case, subsection (13) is of great significance. Not so much for what it provides but rather for what it does not provide.

[127] Subsection (13) reads:

> "(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."

If section 189A had contemplated that, for a breach of a procedural obligation in section 189A(8), the Labour Court could grant a declaratory order that the resultant dismissal is invalid and of no force and effect, it would have been the easiest thing to include another paragraph in subsection (13), a paragraph (e), reading as follows: "(e) declaring the dismissal invalid". The drafters did not include an order to that effect among the orders in subsection (13) because invalid dismissals were not contemplated for the dispensation created by the LRA.

[128] The orders that the Labour Court is given power to make under subsection (13) are so extensive as to make it unnecessary for the LRA to contemplate invalid dismissals and an order declaring a dismissal invalid and of no force and effect. Those orders include an order for reinstatement which could be with retrospective effect to the date of dismissal and, thus, entitling an employee to full backpay and other benefits and to be treated as if he had never been dismissed. Any power to enable the Labour Court to make an order declaring an employee's dismissal invalid and of no force or effect is redundant in the presence of a power to make a fully retrospective order of reinstatement in subsection (13)(c).

[129] One of the strange features of the applicants' case is that, although their complaint is based upon a breach of an LRA obligation, the remedy that they seek, namely, a declaratory order that the dismissal is invalid and of no force and effect is a common law remedy and not an LRA remedy. Instead of seeking an LRA remedy for

an LRA infringement, they seek a common law remedy for an LRA infringement. There is a disjuncture about that. As if that is not enough, when they seek to identify from where the Labour Court must derive its jurisdiction to adjudicate a dispute arising out of a breach of an LRA obligation, they do not go to the LRA. This is done despite the fact that the LRA does deal with the jurisdiction of the Labour Court.[129] They go outside the LRA to the Basic Conditions of Employment Act[130] (BCEA) and rely upon section 77[131] of that Act to say that the Labour Court has jurisdiction to deal with a dispute concerning a breach of an LRA obligation. They could not find a single provision in the LRA which gives the Labour Court the jurisdiction to entertain a dispute whether a dismissal in breach of an LRA provision is invalid. That is telling.

[130] The scheme of the LRA is that, if it creates a right, it also creates processes or procedures for the enforcement of that right, a dispute resolution procedure for disputes about the infringement of that right, specifies the fora in which that right must be enforced and specifies the remedies available for a breach of that right. A well-known example is every employee's right not to be unfairly dismissed which is provided for in section 185. In section 186 there is a definition of what dismissal

[129] Section 157 of the LRA.

[130] 75 of 1997.

[131] Section 77 of the BCEA reads:

> "(1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in term of this Act.
>
> (1A) The Labour Court has exclusive jurisdiction to grant civil relief arising from a breach of sections 33A, 43, 44, 46, 48, 90 and 92.
>
> (2) The Labour Court may review the performance or purported performance of any function provided for in this Act or on any act or omission of any person in terms of this Act on any grounds that are permissible in law.
>
> (3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.
>
> (4) Subsection (1) does not prevent any person relying upon a provision of this Act to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil or an arbitration held in terms of an agreement.
>
> (5) If proceedings concerning any matter contemplated in terms of subsection (1) are instituted in a court that does not have jurisdiction in respect of that matter, that court may at any stage during the proceedings refer that matter to the Labour Court."

means. In section 187 there is a special category of dismissals, namely, automatically unfair dismissals. In section 188 other categories of dismissals are created, namely, dismissals that lack a fair reason and procedurally unfair dismissals.

[131] In section 189 the LRA sets out the process or procedure that an employer must follow when contemplating the dismissal of any employee for operational requirements. In section 189A the LRA creates rights and obligations for a certain category of employers and their employees in regard to dismissals for operational requirements which did not form part of the LRA before 2002.[132] It also creates the processes or procedures to be complied with. Section 189A also specifies the process for the adjudication of disputes. In this regard it makes provision for the referral to the Labour Court for adjudication of a dispute about whether there is a fair reason for dismissal. It makes provision for the route of a strike and lock-out for the resolution of a dispute. It is particularly significant that section 189A(9) expressly contemplates the very eventuality that arises in this case. That is the eventuality of an employer giving notice of dismissals prematurely. It provides the remedy of an immediate strike for a breach of the section's provisions. In section 189A(13) the LRA specifies special remedies for non-compliance with a fair procedure. All of that – including subsection (8) – is about the right not to be unfairly dismissed which the LRA creates in section 185. In section 191 the LRA sets out the dispute procedure that must be used to resolve disputes concerning alleged infringements of the right not to be unfairly dismissed. No provision is made anywhere for a dispute procedure that must be used for a dispute about the validity or lawfulness or otherwise of a dismissal.

[132] One can take other rights provided for in the LRA and do the same exercise. These include organisational rights, collective bargaining rights, the right to strike and others. There is even a special dispute resolution chapter in the LRA but it says nothing about a right not to be dismissed unlawfully or about disputes concerning invalid dismissals. There is no reference to a right not to be unlawfully dismissed.

[132] The reference to 2002 is based on the fact that section 189A was inserted into the LRA in 2002 by section 45 of the Labour Relations Amendment Act 12 of 2002.

There are no processes or procedures for the enforcement of such a right. There are no fora provided for in the LRA for the enforcement of such a right. Nowhere in the entire LRA is there mention of the words "dismissal" and "unlawful" or "invalid" in the same sentence. Yet there are many sentences in the LRA in which the words "dismissal" and "unfair" appear. The LRA makes no provision for dispute procedures to be followed in the case of a dispute arising out of the infringement of such a right. The only sensible explanation for these omissions in the LRA is that the LRA does not contemplate a right not to be unlawfully dismissed nor does it contemplate invalid dismissals or orders declaring dismissals invalid and of no force and effect.

[133] The absence in the LRA of any provision for a right not to be dismissed unlawfully and of any dispute procedures or processes for the enforcement of that right explain why the applicants have been forced to go to another statute i.e. the BCEA to enforce a right that is not provided for in the BCEA which they say is provided for in the LRA. The explanation is simply that the LRA does not contemplate the right and the invalid dismissals on which they base their case. If the LRA contemplated such a right in regard to dismissals, it would have made provision for it and for a dispute procedure to be followed in disputes concerning its infringement.

[134] One factor in determining whether a breach of the procedural requirements of section 189A(8) results in the invalidity of the dismissal notices or of the resultant dismissals is whether the LRA provides any consequences for the breach. The first point is that the LRA does not say that the invalidity of the dismissal notices or of the resultant dismissals is part of the consequences of a breach of section 189A(8).

[135] The LRA spells out the consequences of an employer's breach of the procedural requirements of section 189A(8) both in section 189A(9), which is the strike route, and in subsection (13). That the subsection (13) orders are consequences of non-compliance with the procedural requirements is made clear when subsection (13) refers to "non-compliance with a fair procedure". That phrase is a

reference to the procedure set out in section 189A. If the provisions that cover the "fair procedure" referred to in subsection (13) include the procedural requirements of subsection (8), then logically that would lead to the conclusion that the subsection (13) orders represent the consequences of non-compliance with subsection (8). Furthermore, in many cases the invalidity of an act performed contrary to a statutory provision is inferred from the fact that the statute makes that act a criminal offence. The LRA does not have a comparable provision.

[136] I conclude that invalid dismissals and a declaratory order that a dismissal is invalid and of no force and effect fall outside the contemplation of the LRA. Such an order cannot be granted in a case based on the breach of an obligation under the LRA concerning a dismissal. Accordingly, on this ground alone, the appeal falls to be dismissed.

B. LRA remedy for an LRA breach

[137] 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.

[138] The approach is in line with this Court's decision in *Chirwa*.[133] Ms Chirwa had been employed by the Transnet Pension Fund (Fund), an organ of state established by legislation. She was dismissed for poor performance. She referred a dispute of unfair dismissal to the CCMA for conciliation in terms of section 191 of the LRA. After the conciliation process had failed to produce a resolution of the dispute, she was entitled

[133] *Chirwa v Transnet Limited and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC).

to request that the dispute be resolved through arbitration in terms of section 191(5) of the LRA. However, she did not make this request. Instead, she brought an application in the High Court to have the decision to terminate her contract of employment reviewed and set aside under the Promotion of Administrative Justice Act (PAJA).[134] She contended that the decision to terminate her contract of employment constituted administrative action under PAJA.

[139] In the High Court Ms Chirwa's case was based on a contention that the Fund had been obliged to comply with the provisions of the Code of Good Practice contained in Schedule 8 of the LRA. In this regard she was relying on an alleged breach by the Fund of provisions of the Code relating to procedural fairness applicable to dismissals for poor performance. She contended that the decision to terminate her contract of employment constituted administrative action under PAJA and fell to be reviewed and set aside because of the Fund's alleged non-compliance with the LRA procedural requirements. From this it is clear that the *Chirwa* case shares an important feature with the present case. In *Chirwa* the employee's cause of action was non-compliance with a procedural requirement provided for in the LRA and the Code but the relief she sought fell outside the LRA. She sought relief in PAJA. In the present case the applicants' cause of action is also non-compliance with a procedural requirement of the LRA but the relief that they seek falls outside the LRA. It is to be found in the common law.

[140] I have said above that 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[135] said:

> "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

[134] 3 of 2000.

[135] Moseneke DCJ, Madala J, Navsa AJ, Nkabinde J, Sachs J and Van der Westhuizen J concurred in the judgment of Ngcobo J.

> 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."[136]

[141] Ms Chirwa's application in the High Court was based upon a contention that the Fund had dismissed her in breach of the provisions of items 8 and 9 of Schedule 8 to the LRA and the Code of Good Practice issued in terms of section 188(2) of the LRA. This Court pointed out that Ms Chirwa's claim was based on section 188 of the LRA read with items 8 and 9 of the Code.[137]

[142] In another majority judgment in the same case Skweyiya J said:

> "Thus, unlike in *Fredericks*, the applicant here expressly relies upon those provisions of the LRA which deal with unfair dismissals. Indeed, this is the claim she asserted when she approached the CCMA. It is apparent that when she approached the High Court, she made it clear that her claim was based on a violation of the provisions of the LRA, including items 8 and 9 of Sc[hedule] 8 to that Act. However, she elected to vindicate her rights not under the provisions of the LRA, but instead under the provisions of PAJA."[138]

[136] *Chirwa* above n 133 at paras 18 and 124.

[137] Id at para 125.

[138] Id at para 61.

Skweyiya J concluded that Ms Chirwa was not "at liberty to relegate the finely-tuned dispute resolution structures created by the LRA".[139]

[143] Ngcobo J also said:

> "The question therefore is whether a dispute about a failure to comply with the mandatory provisions of item 8 and 9 of Schedule 8 to the LRA is a dispute which falls to be resolved under the dispute resolution provisions of the LRA. In the light of the principles to which I have referred, the answer is clear; a dispute concerning the alleged non-compliance with the provisions of the LRA is a matter which under the LRA, must be determined by the Labour Court. This result cannot be avoided by alleging, as the applicant does, that the conduct of Transnet violates the provisions of the LRA in question and violates a constitutional right to just administrative action in section 33 of the Constitution and is therefore reviewable under PAJA."[140]

[144] Applying this passage to the present case, the dispute concerns the breach by Edcon of the procedural requirements of section 189A(8). Accordingly, the dispute "falls to be resolved under the dispute resolution provisions of the LRA". The applicants cannot avoid this result by alleging that the dismissal is invalid and of no force and effect. What this passage means in part is also that, if a litigant's case is based on a breach of an LRA obligation, the dispute resolution mechanism used must be that of the LRA and the remedy must also be a remedy provided for in the LRA. Accordingly, on this ground, too, the appeal falls to be dismissed.

C. Applicants limited to section 189A remedies and those remedies are adequate

[145] Under this heading I seek to show that, since the applicants rely upon a breach of an obligation in section 189A, their remedies are limited to those provided for in that section and that those are adequate remedies. In *Madrassa*[141] it was held that, as a general rule of construction, if it is clear from the language of a statute that, in creating

[139] Id at para 65.

[140] Id at para 125.

[141] *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718.

an obligation, the Legislature has confined the party complaining of its non-performance or suffering from its breach to a particular remedy, such party is limited to that remedy and has no further remedies. One exception to this general rule is the grant of an interdict. This general rule has been followed in a number of cases.[142]

[146] After referring to *Madrassa,* the Court in *Kubheka* went on to say:

> "As a matter of construction of the statute, the express provision of a *forum* for the enforcement of the liability shows that the Legislature intended that *forum* to have jurisdiction to enforce the remedy, and where the statute is silent on the question whether any other *forum* would have a similar jurisdiction, the finding of an intention on the part of the Legislature that such a concurrent, unexpressed jurisdiction should exist, can of necessity only be based on an implied provision to that effect, which is to be derived from the provisions of the statute as a whole."[143]

In the present case the obligation which the applicants seek to enforce is a new obligation introduced into the LRA in 2002. It did not exist at common law nor did it exist in the LRA before 2002. It was inserted by section 45 of the Labour Relations Amendment Act.[144] Prior to this amendment, section 189 governed all dismissals for operational requirements. The obligation is found in section 189A(8). It is a procedural obligation. Subsection (9) provides for a strike option for employees in a case where notices of dismissals are given or the actual dismissals are effected before the expiry of the period referred to in subsection (8)(b)(i). Section 189A was not part of the LRA prior to 2002.

[147] At this stage it is necessary to deal with section 189A(2). However, as it has been quoted already, it is not necessary to quote it again. The purpose of

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[142] *Coetzee v Fick and Another* 1926 TPD 213 at 216; *Balagooroo Senaithalway Educational Trust v Soobramoney* 1965 (3) SA 627 (N) at 628H; *Callinicos v Burman* 1963 (1) SA 489 (A) at 497H-498C; *Da Silva and Another v Coutinho* 1971 (3) SA 123 (A) at 134H-135A and 140E-F. The latter two cases were cited with approval in this Court in *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at fn 161.

[143] *Kubheka and Another v Imextra (Pty) Ltd* 1975 (4) SA 484 (W) at 489A-B.

[144] 12 of 2002.

section 189A(2)(a) is to make sure that there is no doubt that any notice of the termination of a contract of employment given in a situation governed by section 189A cannot be said to be a notice in terms of any other law. This is in line with the idea that section 189A creates special rights and obligations for which it provides special remedies. Subsection (2)(b) makes this even clearer.

[148] Subsection (2)(b) permits employees to resort to a strike in regard to the fairness of the reason for dismissal. In terms of our law governing industrial action the normal position is that employees may not resort to a strike in respect of an issue in dispute that they may refer to arbitration or to the Labour Court nor may an employer institute a lock out in respect of such an issue in dispute.[145] A complaint about the fairness of a dismissal covered by section 189A is a complaint that can be referred to the Labour Court. It is, therefore, an issue that would ordinarily not be strikeable. In the case of dismissals to which section 189A applies, the LRA has gone out of its way and created an exception to that normal rule. Section 189A makes an exception to this rule in order to enable workers and employers to resort to strikes and lockouts, respectively, to try and resolve disputes concerning dismissals governed by section 189A. In this situation an extraordinary remedy is provided for an extraordinary situation.

[149] Subsection (7) deals with what may or may not happen where a facilitator has been appointed. It also lays down certain procedures. Subsection (7), *inter alia*, provides:

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

[145] Section 65(1)(c) provides:

> "(1) No person may take part in a *strike* or a *lock-out* or in any conduct in contemplation or furtherance of a *strike* or a *lock-out* if—
>
> . . .
>
> (b) the *issue in dispute* is one that a party has the right to refer to arbitration or to the Labour Court in terms of *this Act* or any other employment law".

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

[150] The provisions of subsection (7)(a) mean that, in a case where a facilitator was appointed, a period of at least 60 days from the date on which the section 189(3) notice was given must lapse before the employer may give employees dismissal notices. An employer may not give an employee notice of the termination of his or her contract of employment before the expiry of 60 days. If an employer were to do so, that would be a breach of section 189A(7). It would immediately give the employees the right to strike.[146]

[151] Subsection (8) has already been quoted above. It is therefore, not necessary to quote it again. In terms of subsection (8) a period of at least 30 days must elapse from the date of the giving of the section 189(3) notice before a party may refer a dispute to a council or the CCMA. A referral of a dispute before the expiry of that period would be a breach of the provision. Once the period of 30 days has elapsed, the employer must also wait for the periods referred to in section 64(1)(a) to elapse before it may give the employees dismissal notices. If the employer were to give employees dismissal notices prior to the expiry of those periods, that would be a breach of subsection (8)(a). That is dealt with under subsections (8)(a) and (8)(b)(i).

[152] Subsection (8)(b)(ii) deals with what the employees and a registered trade union may do in response to dismissal notices. In construing subsection (8)(b)(ii), the use of the word "may" before subparagraph (aa) and the use of the disjunctive word

[146] Section 189A(9).

"or" between (aa) and (bb) must be noted. It seems to me that employees and a registered trade union are given an election between two routes. The one route is a strike. The other is adjudication by the Labour Court of a dispute about whether there is a fair reason to dismiss. The employees and a registered trade union may not have both at the same time or one after the other. They have to choose one and their choice cannot be changed once it has been communicated to the employer.

[153] Subsection (9) is also important. It is also about the strike weapon for the workers. It reads:

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

This provision deals specifically with the situation where the employer gives employees notices of dismissal or dismisses employees before the expiry of the statutory time periods prescribed in subsection (7)(a) and subsection (8)(b)(i). It provides a clear remedy in addition to the remedy under section 189A(13). It provides that, as a response to the employer giving employees notices of dismissal or dismissing employees before the expiry of the periods in subsections (7)(a) and (8)(b)(i), the employee may give notice of a strike and resort to a strike immediately after the expiry of the strike notice. That is a further strong indication that the Legislature was aware of this possibility and provided for it by way of remedies in section 189A under the LRA.

[154] The right to strike in this provision can be invoked only where the employees decide not to refer the question whether the employer had a fair reason to dismiss to the Labour Court. Subsection (10)(a) makes it clear that the avenue of a strike under subsection (9) is not in addition to the avenue of referring a dispute concerning whether there is a fair reason for the dismissal to the Labour Court for adjudication. It is in the place of such a referral. Subsection (10)(a) also makes it clear that, if the union or the workers elect to refer a dispute concerning whether there is a fair reason

for a dismissal to the Labour Court, that is not in addition to the avenue of a strike. It is in its place.

[155] Subsection (9) is important to trade unions and workers because it gives them an opportunity to carefully assess which avenue or weapon has a better chance of producing the outcome they want when the employer acted prematurely in either issuing notices of dismissal or dismissing without issuing notices. The provision gives them an election. Once they have made their election, they are bound by it and may not later explore the other avenue. If they elect the strike route, they cannot later seek to refer a dispute about whether there is a fair reason for dismissal to the Labour Court for adjudication. If they elect to refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court, they cannot later resort to a strike. Importantly, the time constraints that previously applied to them fall away and they are entitled immediately to invoke the option of a strike.

[156] Under normal circumstances workers do not have an election whether to use a strike to deal with a dismissal to which they are opposed. In terms of section 65(1)(c) they may not resort to a strike in respect of such a matter because it is an issue in dispute that they have a right to refer to the Labour Court for adjudication.[147] They are obliged, if they want to challenge the dismissal in any way under the LRA, to refer the dispute to the Labour Court for adjudication. The fact that section 189A gives workers and trade unions the election that it gives them means that the protection it gives to employees is greater than the protection given to employees to whom section 189A does not apply. It is also important to point out that in terms of subsection (11)(a)(ii) the employer is precluded from instituting a lock-out in a case where the workers do not elect the strike route.

[157] Subsections (8)(b)(ii)(aa) and (bb) provide the only remedies available to workers or their trade union if they dispute the fairness of the reason for their dismissal. They do not have any other remedies. However, they are still better off

[147] See section 64(1) of the LRA.

than their colleagues to whom section 189A does not apply. That is in so far as they may be challenging the fairness of the reason for their dismissal. What if they challenge only the procedural fairness of the dismissal?

[158] It is to be noted that in such a case subsection (8)(b)(ii)(bb) does not contemplate the referral of a dispute concerning the procedural fairness of a dismissal to the Labour Court for adjudication. In terms of that provision only a dispute concerning whether there is a fair reason for dismissal may be referred to the Labour Court for adjudication. In fact subsection (18) precludes the Labour Court from adjudicating any dispute about the procedural fairness of a dismissal for operational requirements referred to it in terms of section 191(5)(b)(ii). It reads:

> "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)."

Subsection (18) may seem very drastic and harsh on employees who may be having a dispute with their employer concerning the procedural fairness of their dismissal. However, it will be seen that, when read with subsection (13), it is not harsh at all. Subsection (13) provides extensive protections to employees where the employer has failed to comply with a fair procedure.[148]

[159] I cannot think of any relief that an employee could ask for which is not provided for in this section. Subsection (17)(a) provides that an application such as the one contemplated in subsection (13) must be made not later than 30 days after the employer has given notice to terminate the employees' contracts of employment or if notice is not given, the date on which the employees were dismissed. So, a challenge based on procedural unfairness may be brought after the dismissals have taken place. However, subsection (17)(b) gives the Labour Court power to condone, on good cause shown, any failure to comply with that time limit.

[148] See [127] above where subsection (13) is quoted.

[160] If an employer has not issued notices of dismissal but has failed or is failing to comply with a fair procedure in the pre-dismissal process, a consulting party may make use of the remedy in subsection (13)(a). In such a case the consulting party would apply to the Labour Court for an order compelling the employer to comply with a fair procedure. If an employer gives employees notices of dismissal without complying with a fair procedure, or, if an employer dismisses employees without complying with a fair procedure, the consulting party may apply to the Labour Court for an order interdicting the dismissal of employees in terms of subsection (13)(b) until there is compliance with a fair procedure. This would include giving premature notices of dismissal.

[161] If an employer has already dismissed employees without complying with a fair procedure, the consulting party may apply to the Labour Court in terms of subsection (13)(c) for an order reinstating the employees until the employer has complied with a fair procedure. The significance of the remedy of reinstatement in subsection (13)(c) is that it is made available even for a dismissal that is unfair only because of non-compliance with a fair procedure. That is significant because it is a departure from the normal provision that reinstatement may not be granted in a case where the only basis for the finding that the dismissal is unfair is the employer's failure to comply with a fair procedure.[149] In such a case the norm is that the Labour Court or an arbitrator may award the employee only compensation.

[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

[149] See section 193(2)(d) of the LRA.

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 section 189 where dismissal is only procedurally unfair and not substantively unfair as well. In these cases the Labour Court is required not to order reinstatement at all. So, in making the remedy of reinstatement available for a procedurally unfair dismissal and also making it one of the preferred remedies in subsection (13), the Legislature has gone out of its way to give special protection for the rights of employees and to protect the integrity of the procedural requirements of dismissals governed by section 189A.

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

[165] Subsection (14) provides:

> "Subject to this section, the Labour Court may make any appropriate order referred to in section 158(1)(a)."

The orders referred to in section 158(1)(a) include a declaratory order. However, I do not think that subsection (14) empowers the Labour Court to make a declaratory order of invalidity in respect of a dismissal when the LRA makes no provision for a right not to be dismissed unlawfully or for an invalid dismissal. This means that whatever declaratory order may be made in terms of subsection (14) may be made only if it is contemplated in section 189A. This is so because of the opening phrase: "subject to this section" which appears at the beginning of subsection (14).

[166] I referred earlier to the fact that section 189A(8) gives employees and a registered trade union a right to strike as one of the "weapons" they may use when they have received notices of the termination of contracts of employment of the employees. That avenue is provided by subsection (7)(b)(i) and subsection (8)(b)(ii)(aa). Both those provisions say that a registered trade union or employees who have received dismissal notices may "give notice of a strike in terms of section 64(1)(b) or (d)" or "refer a dispute whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11)".

[167] A question that arises out of these provisions is whether the strike contemplated in these provisions can only be about a dispute whether there is a fair reason for the dismissal or can also be about a dispute concerning non-compliance with a fair procedure or whether it can be about both. It can also be asked whether the strike can relate to such dispute as may have existed between the parties prior to the dismissal or prior to the giving of the notices of dismissal by the employer and whether it can relate to all three disputes or to any one of them.

[168] The reason for considering what the position is in this regard is that it is necessary to assess whether the strike route is available to employees and a trade union if the dispute is confined to non-compliance with a fair procedure. It seems from subsection (10)(a)(i) and (ii) as well as subsection (2)(b) that the strike contemplated in subsections (7) and (8) relates simply to dismissals. What we know is that:

(a) before a strike notice can be given, the employees would have received notice of the termination of contracts of employment because that must precede the giving of a strike notice;

(b) in terms of subsection (10)(a)(i) the strike route is not available to a consulting party "if [the consulting party] has referred a dispute

concerning whether there is a fair reason for that dismissal to the Labour Court";

(c) in terms of subsection (10)(a)(ii) the option of referring to the Labour Court for adjudication a dispute whether there is a fair reason for the dismissal is not available to a consulting party "if [the consulting party] has given notice of a strike in terms of this section in respect of that dismissal";

(d) whereas, in respect of a dispute whether there is a fair reason for the dismissal, there is a clear provision that there will be no strike if that dispute has been referred to the Labour Court for adjudication, there is no corresponding provision in respect of a dispute about whether there has been compliance with a fair procedure in regard to a dismissal;[150]

(e) there is also no provision to the effect that, if a consulting party has applied to the Labour Court for any of the orders listed in subsection (13), the consulting party may not give notice of a strike; and

(f) there is no provision to the effect that, if a consulting party gives notice of a strike in respect of a dispute whether there has been compliance with a fair procedure in respect of a dismissal, the consulting party may not apply to the Labour Court for any order listed in subsection (13).

[169] If a strike may be resorted to in respect of a dispute whether there was compliance with a fair procedure in respect of a dismissal, not only would that mean that the LRA makes it possible for employees to strike in respect of a dispute about the procedural fairness of a dismissal but also it would mean that employees are not precluded from using both a strike and the Labour Court to deal with an employer who fails to comply with a fair procedure in dismissing them or in issuing notices of termination. This would be quite extraordinary not only because it goes against the

[150] Of course, subsection (18) precludes the Labour Court from adjudicating a dispute about whether there has been compliance with a fair procedure in regard to a dismissal. For that reason, there was no need for such a corresponding provision in respect of a dispute whether there has been compliance with a fair procedure in respect of a dismissal.

norm but also because in respect of a dispute about a more serious matter – namely whether there is a fair reason for the dismissal – the LRA does not permit the use of both avenues. Even if a strike may not be resorted to in respect of a dispute on whether there was compliance with a fair procedure in regard to a dismissal, the remedies in subsection (13) are still sufficiently extensive and adequate. They make it unnecessary for the LRA to contemplate orders declaring dismissals invalid.

[170] It may well be that a strike in respect of a dispute on whether there has been compliance with a fair procedure in respect of a dismissal is not permissible under section 189A because, maybe, the LRA must be construed to mean that the exception to the norm is only in respect of a dispute whether there is a fair reason to dismiss. Having said this, I note that subsection (2)(b), which provides for the exception to the norm with regard to the right to strike, simply provides that, "despite section 65(1)(c), an employee may participate in a strike and an employer may lock-out in accordance with the provisions of this section". This does not help us in clarifying whether the strike route is available in respect of both types of dispute or only in respect of the dispute whether there is a fair reason for the dismissal.

[171] Where section 189A permits a strike, whether in respect of a dispute concerning the existence of a fair reason for the dismissal only or both types of dismissal disputes, the position is that section 189A gives employees a strong weapon to deal with the employer. It is a strong weapon because in a particular case, a strike, particularly one that lasts long, has the potential to financially ruin an employer's business. This is more so when a strike is resorted to against an employer who may be facing financial difficulties as is to be expected of an employer who seeks to dismiss a significant number of its workforce for operational requirements.

[172] A protected strike may be a potent collective bargaining weapon against an employer. This can be seen, in part, from the fact that the LRA permits various actions to be taken against an employer in contemplation or furtherance of a protected strike. The actions that the employees and their union may take against the employer

in contemplation or in furtherance of a protected strike include breaches of contracts and the commission of delicts. In respect of both a breach of contract and the commission of a delict the employer is precluded from taking any legal action against the union or employees. This is based on section 67(1) and (2) of the LRA. This section reads:

> "(1) In this Chapter, 'protected *strike*' means a *strike* that complies with the provisions of this Chapter and 'protected *lock-out*' means a *lock-out* that complies with the provisions of this Chapter.
>
> (2) A person does not commit a delict or a breach of contract by taking part in—
>
> (a) a protected *strike* or a protected *lock-out*; or
>
> (b) *any conduct in contemplation or in the furtherance of a protected strike or a protected lock-out*." (Emphasis in original and added.)

Even under the 1956 LRA there was a provision to this effect although it was differently formulated. It was section 79 of that Act.[151]

[173] The meaning of section 67(2)(b) is that, for example, in the case of a protected strike, a trade union and employees may resort to any conduct in contemplation or furtherance of a protected strike and the employer may not interdict them or sue them for damages for such conduct even if the conduct causes the employer financial loss.

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[151] Section 79 of the 1956 LRA read:

> "Indemnification against certain losses suffered in furtherance of strike or lockout—
>
> (1) No civil legal proceedings, shall be brought in any court of law against any employee, employer, registered trade union or employers' organization, or against any member, office-bearer or official of any such union or organization in respect of <u>any breach of contract</u>, <u>breach of statutory duty</u> or <u>delict (other than defamation) committed by that employee, employer</u>, union or organization, or by that member, office bearer or official on behalf of that union or organization, <u>in furtherance of a strike or lock-out</u>: Provided that this indemnity shall not apply to any act committed in furtherance of any strike or lock-out in which, or in the continuance of which, any employee, employer or other person is by section 65 forbidden to take part, or to any act the commission of which is a criminal offence.
>
> (2) Subject to the indemnity in subsection (1) any member, office-bearer or official of a trade union, employers' organization or federation who interferes with the contractual relationship between an employer and an employee resulting in the breach of such contract shall be liable in delict." (Underlining supplied.)

The only limitation to this extensive right is that such conduct may not constitute a criminal offence.[152]

[174] Conduct referred to in section 67(2)(b) would include the calling of a boycott of the products of the employer. It would also include the union and workers peacefully dissuading potential temporary workers not to take up employment with the employer for the duration of the strike. Picketing is also provided for in section 69.[153] The point about all this is that the strike under section 189A is a

[152] Section 67(8) of the LRA.

[153] Section 69 of the LRA reads:

> "(1) A registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating—
>
> (a) in support of any protected strike; or
>
> (b) in opposition to any lock-out.
>
> (2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1), may be held—
>
> (a) in any place to which the public has access but outside the premises of an employer; or
>
> (b) with the permission of the employer, inside the employer's premises.
>
> (3) The permission referred to in subsection (2)(b) may not be unreasonably withheld.
>
> (4) If requested to do so by the registered trade union or the employer, the Commission must attempt to secure an agreement between the parties to the dispute on rules that should apply to any picket in relation to that strike or lock-out.
>
> (5) If there is no agreement, the Commission must establish picketing rules, and in doing so must take account of—
>
> (a) the particular circumstances of the workplace or other premises where it is intended that the right to picket is to be exercised; and
>
> (b) any relevant code of good practice.
>
> (6) The rules established by the Commission may provide for picketing employees—
>
> (a) in a place contemplated in section 69(2)(a) which is owned or controlled by a person other than the employer, if that person has had an opportunity to make representations to the Commission before the rules are established; or
>
> (b) on their employer's premises if the Commission is satisfied that the employer's permission has been unreasonably withheld.
>
> (7) The provisions of section 67, read with the changes required by the context, apply to the call for, organisation of, or participation in a picket that complies with the provisions of this section.
>
> (8) Any party to a dispute about any of the following issues, including a person contemplated in subsection (6)(a), may refer the dispute in writing to the Commission—
>
> (a) an allegation that the effective use of the right to picket is being undermined;

far-reaching "remedy" itself and that there is, therefore, no need to include the invalidity of dismissals as a consequence of non-compliance with the procedural obligations in subsection (8) on the basis that, otherwise, there would be no serious consequences for non-compliance. Another point about all this is also to show that the remedies provided by the LRA to employees who are dismissed or who receive notices of dismissals in terms of section 189A(7) and (8) are adequate.

[175] May it be said that the remedies provided for in subsection (13) are inadequate and fall short of proper remedies for the employees? No. Not only is the choice of remedies wide but also the protection is itself very extensive. They are remedies that do justice between employer and employee. If these remedies are adequate, the question that arises would be: why would the LRA require the invalidity of dismissals

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(b) an alleged material contravention of subsection (1) or (2);

(c) an alleged material breach of an agreement concluded in terms of subsection (4); or

(d) an alleged material breach of a rule established in terms of subsection (5).

(9) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(10) The Commission must attempt to resolve the dispute through conciliation.

(11) If the dispute remains unresolved, any party to the dispute may refer it to the Labour Court for adjudication.

(12) If a party has referred a dispute in terms of subsection (8) or (11), the Labour Court may grant relief, including urgent interim relief, which is just and equitable in the circumstances and which may include—

(a) an order directing any party, including a person contemplated in subsection (6)(a), to comply with a picketing agreement or rule; or

(b) an order varying the terms of a picketing agreement or rule.

(13) The Labour Court may not grant an order in terms of subsection (12) unless—

(a) 48 hours' notice of an application seeking relief referred to in subsection (12)(a) or (b) has been given to the respondent; or

(b) 72 hours' notice of an application seeking relief referred to in subsection (12)(c) or (d) has been given to the respondent.

(14) The Labour Court may permit a shorter period of notice than required by subsection (13) if the—

(a) applicant has given written notice to the respondent of its intention to apply for the order;

(b) respondent has been given a reasonable opportunity to be heard before a decision concerning the application is taken; and

(c) applicant has shown good cause why a period shorter than that contemplated by subsection (13) should be permitted."

as another consequence? The remedies in subsection (13) are sufficient and they represent serious consequences for non-compliance with the procedural requirements of, among others, subsection (8).

[176] The order provided for in subsection (13)(c) can in effect give employees the same relief as an order declaring a dismissal invalid. An order that a dismissal is invalid and of no force and effect means that in law there was never any dismissal. That means that the employee has always remained in the employ of the employer. An employee whose dismissal has been declared invalid does not need an order of reinstatement because he or she is in his or her employer's employ.

[177] In the case of an employee whose dismissal is automatically or substantively unfair, the law recognises the dismissal but regards it as unfair. Unless the employee has been granted an order of reinstatement with retrospective effect to the date of dismissal, he is not regarded as having been in the employer's employ between the date of the dismissal and the date of the grant of the order of reinstatement. However, once an order of reinstatement is made retrospective to the date of dismissal, whether it is in the case of an automatically unfair dismissal or a substantively unfair one, the employee will in effect be regarded as not having been dismissed. In that case the employee is in no worse a position than an employee whose dismissal has been found to have been invalid. An employee whose dismissal has been declared invalid only needs to report for duty or to tender his or her services but an employee whose dismissal is valid but unfair needs an order of reinstatement in addition to an order declaring the dismissal unfair in order to report for duty.

[178] Two employees, one whose dismissal has been declared invalid by a court and another whose dismissal has been declared unfair but who, in addition, secures an order of reinstatement with retrospective effect to the date of dismissal, are exactly in the same position. Both may report for duty and resume their jobs and get backpay for the post-dismissal period.

[179] In *Pottie v Kotze*[154] the Court held that non-compliance with the requirements of subsections (1) and (3) of section 13 *bis* of the Transvaal Motor Vehicle Ordinance[155] when a second-hand motor vehicle was disposed of did not render the transaction null and void. In that case the fact that the Ordinance in question had ample remedies for enforcing the prohibition or requirement in question was an important factor that the Court took into account in reaching the conclusion that the purpose of the Ordinance was not to visit a transaction entered into in breach of subsections (1) and (3) of section 13 with nullity. The Court said:

> "In the Ordinance under discussion there are ample remedies for enforcing the requirement that the vehicle should be examined and pronounced fit for the road; when once that pronouncement has been made, there is no mischief left, and nothing could then be gained, while serious inequities might be caused, by invalidation of the contract."[156]

[180] The LRA does not contemplate orders of invalidity in respect of dismissals. This is because through orders of reinstatement that operate with retrospective effect to the date of dismissal the same result may be achieved as is achieved through an order declaring a dismissal invalid. Furthermore, that is achieved while retaining the flexibility that comes with fairness and equity which are the foundation of the LRA dispensation and without the rigidity of the common law on which the invalidity of dismissals is based. Therefore, under the LRA the need for invalid dismissals does not arise.

The approach of the Labour Court and Labour Appeal Court

[181] In considering whether the dismissal notices in *De Beers I,*[157] *De Beers II*[158] and *Revan,*[159] were valid, the Labour Court (in respect of *De Beers I)* and the

[154] *Pottie v Kotze* 1954 (3) SA 719 (A).

[155] 17 of 1931 as amended.

[156] *Pottie v Kotze* above n 154 at 727A-B.

[157] *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd* [2006] ZALC 65; (2006) 27 ILJ 1909 (LC).

Labour Appeal Court (in respect of *De Beers II* and *Revan*), respectively, adopted the approach that, if an act was done contrary to a statutory obligation, it was invalid and of no force and effect and should be so declared. This was based mainly on the fact that the statutory provision contains the word "must". This was not the correct approach.

The correct approach

[182] The approach that the use of the word "shall" in a statutory provision means that anything done contrary to such a provision is a nullity is neither rigid nor conclusive. The same can be said of the use of the word "must". Many factors must be considered to determine whether a thing done contrary to such a provision is a nullity. There are cases where the performance of an act in breach of a statutory obligation does not necessarily result in the act being invalid and of no force and effect.[160] When the question arises whether something that was done contrary to a statutory provision is invalid and of no force and effect, the proper approach is to ascertain what the purpose of the legislation is in this regard. Sometimes, the purpose of the legislation will be to render it a nullity. At other times the purpose will not be to render such a thing a nullity. In each case the legislation will need to be construed properly to establish its purpose.

[183] Some of the factors that should be taken into account in the construction of the statute to establish its purpose are the following: the purpose of the legislation as a whole, the purpose of the relevant section of the Act, the mischief sought to be addressed, whether the statute makes provision for remedies for its breach or whether, if the act is not held to be null and void, it would mean that the provision may be breached with impunity.[161] Where the statute does make provision for some remedies for the breach of the relevant provision, the Court would also have to take into account

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[158] *De Beers Group Services (Pty) Ltd v National Union of Mineworkers* above n 111.

[159] *Revan Civil Engineering Contractors and Others v National Union of Mineworkers and Others* above n 112.

[160] See for example *Pottie v Kotze* above n 154.

[161] See cases referred to in [184] below.

whether the remedies provided are adequate. Where they are adequate, there seems to be no justification for the conclusion that the purpose of the legislation is to visit an act committed in breach of the provision with nullity. It would be a different case where the remedies provided by the statute are not adequate, particularly if they are substantially inadequate or where such remedies cannot be easily obtained.

[184] This approach is consistent with that taken in *Standard Bank*,[162] *Metro Western Cape (Pty) Ltd*,[163] *Palm Fifteen (Pty) Ltd*,[164] *Pottie v Kotze*[165] and *Swart v Smuts*.[166] In *Palm Fifteen* Miller JA said:

> ". . . the subject matter of the prohibition, its purpose in the context of the legislation . . ., the remedies provided in the event of any breach of the prohibition, the nature of the mischief which it was designed to remedy or avoid and any cognisable impropriety or inconvenience which may flow from invalidity, are all factors which must be considered when the question is whether it was truly intended that anything done contrary to the provision in question was necessarily to be visited with nullity."[167]

This passage was quoted with approval in *Absa Insurance Brokers (Pty) Ltd*.[168] In that case the Supreme Court of Appeal made the following important point after quoting the above passage from *Palm Fifteen (Pty) Ltd*:

> "In answering the question as to whether a contract entered into in contravention of the provisions of s 20*bis* is a nullity, *the purpose of the section is crucial*."[169] (Emphasis added.)

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[162] *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 274.

[163] *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A); [1986] 2 All SA 288 (A) at 188F-I.

[164] *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A); (1978) 3 All SA 406 (A) at 885E-G.

[165] *Pottie v Kotze* above n 154 at 726H-727A.

[166] *Swart v Smuts* 1971 (1) SA 819 (A); [1971] 2 All SA 153 at 829E-H.

[167] *Palm Fifteen (Pty) Ltd* above n 164.

[168] *Absa Insurance Brokers (Pty) Ltd v Luttig and Another NNO* [1997] ZASCA 61; 1997 (4) SA 229 (SCA); [1997] 3 All SA 267 (A) at 238J-239A and at 293B.

[169] Id at 239B.

[185] If one were to apply to the present case the factors mentioned by Miller JA, one would need to point out that—

(a) the purpose of the procedural obligation that has been breached is to give effect to the employer's obligation to ensure compliance with a fair procedure before there can be a dismissal for operational requirements and to give the parties enough time to try and reach an agreement on the various issues;

(b) the statute is silent on whether a breach of the procedural obligation in question results in the invalidity of the dismissal;

(c) there is no provision in the statute making a breach of the procedural obligation a criminal offence; and

(d) this is not a case where a breach of the procedural obligation will have no consequences if it is held that the purpose of section 189A(8) is not to visit the dismissal or notices with nullity; this is a case where the statute spells out serious consequences for the employer if the employer acts in breach of the procedural obligation including an order that would effectively reverse the decision of the employer until the employer has complied with the procedural obligation; that reversal may include reinstatement of employees; also included is that the employer may be "hit" with a strike.

[186] Having regard to the purpose of the LRA in general, the purpose of section 189A, the purpose of section 189A(8) and the provisions of section 189(a) and of 189A(13) in particular, and other factors, there is no sufficient basis for the proposition that the purpose of the LRA is that the consequence of a breach of section 189A(8) is the nullity of the act done contrary thereto.

[187] Two cases were referred to during the hearing in which dismissals that were effected in breach of statutory provisions relating to notice were declared invalid and

of no force and effect. One was *NTE Ltd*[170] and the other was *Natal Co-operative Timbers (Pty) Ltd*.[171] Both cases are distinguishable. The statutory context in which they were decided differs significantly from the statutory context in which we have to decide the present case. In both cases the legislation involved had a provision that made non-compliance with the relevant notice provisions a criminal offence. The LRA has no such provision. In both cases the legislation involved did not have any non-criminal consequences such as we have in section 189A(13) and (9) in the present case. *Schierhout*[172], upon which there was much reliance by the Union and the other applicants, is similarly distinguishable.

Is an order of reinstatement competent in the case of an invalid dismissal?

[188] One of the factors on which the first judgment relies to reach the conclusion that dismissal notices given, or, dismissals effected, in breach of the procedural requirements of section 189A(8) are invalid is the proposition that the grant of an order of reinstatement in the case of an invalid dismissal is not automatic but discretionary. Obviously, that implies that an order of reinstatement is competent in the case of a dismissal that has been declared invalid and of no force and effect. I am unable to agree with this proposition. In my view an order of reinstatement is not competent where the dismissal is invalid and of no force and effect. To speak of an order of reinstatement in that case is a contradiction in terms.

[189] An invalid dismissal is a nullity. In the eyes of the law an employee whose dismissal is invalid has never been dismissed. If, in the eyes of the law, that employee has never been dismissed, that means the employee remains in his or her position in the employ of the employer. In this Court's unanimous judgment in *Equity Aviation*, Nkabinde J articulated the meaning of the word "reinstate" in the context of an

[170] *NTE Ltd v SA Chemical Workers Union and Others* (1990) 11 ILJ 43 (N).

[171] *Transport and Allied Workers Union and Others v Natal Co-operative Timber Ltd* (1992) 13 ILJ 1154 (D).

[172] See above n 113.

employee who has been dismissed.[173] She said, quite correctly, it means to restore the employee to the position in which he or she was before he or she was dismissed.[174] With that meaning in mind, the question that arises in the context of an employee whose dismissal has been found to be invalid and of no force and effect is: how do you restore an employee to the position from which he or she has never been moved? That a dismissal is invalid and of no force and effect means that it is not recognised as having happened. It is different from a dismissal that is found to be unfair because that dismissal is recognised in law as having occurred.

[190] When a dismissal is held to be unfair, one can speak of a reinstatement but not in the case of an invalid dismissal. This, therefore, means that an order of reinstatement is not competent for an invalid dismissal. An employer against which an order has been made declaring the dismissal of its employees invalid and who does not want to continue or cannot continue the employment relationship with those employees will have to dismiss them again. Otherwise, they remain in its employ and, if they tender their services or are prevented by the employer from performing their duties, will be entitled to payment of their remuneration.

[191] The distinction between an invalid dismissal and an unfair dismissal highlights the distinction in our law between lawfulness and fairness in general and, in particular, the distinction between an unlawful and invalid dismissal and an unfair dismissal or, under the 1956 LRA a dismissal that constituted an unfair labour practice. At common law the termination of a contract of employment on notice is lawful but that termination may be unfair under the LRA if there is no fair reason for it or if there was no compliance with a fair procedure before it was effected. This distinction has been highlighted in both our case law and in academic writings.[175]

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[173] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2008] ZACC 16; 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) at para 36.

[174] Id.

[175] This distinction has been discussed in the following context. In *Marievale Consolidated Mines Ltd v National Union of Mineworkers and Others* 1986 (2) SA 472 (W); (1986) 7 ILJ 108 (W) the employer dismissed employees for striking and obtained an order from the Supreme Court (now High Court) declaring the dismissals lawful and valid and an order evicting the employees from accommodation provided by it. Within a

[192] It is an employee whose dismissal is unfair that requires an order of reinstatement. An employee whose dismissal is invalid does not need an order of reinstatement. If an employee whose dismissal has been declared invalid is prevented by the employer from entering the workplace to perform his or her duties, in an appropriate case a court may interdict the employer from preventing the employee from reporting for duty or from performing his or her duties. The court may also make an order that the employer must allow the employee into the workplace for purposes of performing his or her duties. However, it cannot order the reinstatement of the employee.

[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 section 189A but instead to simply seek orders declaring their dismissals invalid. It is arguably open to them to seek condonation and pursue remedies under the LRA. Obviously, Edcon would be entitled to oppose that.

[194] Originally, all the parties had sought costs if they were successful. However, during argument they all abandoned costs. In any event I am of the view that 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 that required to be considered by this Court.

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week of that order, the employees obtained an order from the Industrial Court ordering the employer to reinstate them on the basis that their dismissals were unfair. Reinstatement also meant the reinstatement of the employees in the accommodation provided by the employer. See *National Union of Mineworkers v Marievale Consolidated Mines Ltd* (1986) 7 ILJ 123 (IC). A subsequent attempt by the employer to have the Supreme Court review and set aside the reinstatement order of the Industrial Court failed. See *Marievale Consolidated Mines Ltd v The President of the Industrial Court and Others* 1986 (2) SA 485 (T); (1986) 7 ILJ 152 (T). For a discussion of these three cases and the distinction between lawfulness and fairness, see RMM Zondo: *Forum-Shopping: The Industrial Court versus the Supreme Court* (1987) 8 ILJ 571.

[195] In the result, the following order is made:

(a) Leave to appeal is granted.

(b) The appeal is dismissed.

(c) There is no order as to costs.

For the First, Second and Further Applicants:	A Redding SC and E S J Van Graan SC instructed by Keith Whitaker Attorney.
For Intervening Applicant:	J G Van der Riet SC and H Barnes instructed by Ruth Edmonds Attorneys
For the Respondent:	A Myburgh SC and F Boda instructed by Norton Rose Fulbright South Africa Inc