



CONSTITUTIONAL COURT OF SOUTH AFRICA

Steenkamp and Others v Edcon Limited

CCT 46/15 & 47/15

Date of hearing: 8 September 2015

Date of judgment: 22 January 2016

MEDIA SUMMARY

On Friday, 22 January 2016 the Constitutional Court handed down judgment in a matter concerning the interpretation of a provision of the Labour Relations Act which regulates large-scale dismissals for operational requirements.

During 2013 and 2014, the respondent, Edcon Limited (Edcon), retrenched over 3000 employees. Before the dismissals were effected, Edcon gave the employees notices of termination of their contracts of employment. These notices were given prior to the expiry of the periods prescribed by section 189A(8) of the Labour Relations Act (Act) and therefore were in breach of the Act.

The main issue in the Labour Appeal Court was whether Edcon's failure to comply with the prescribed procedures in section 189A(8) of the Act meant that the dismissals were invalid. The Court overruled its earlier decisions which had held that premature termination notices result in invalid dismissals. It held that although Edcon had not complied with the requirements of the Act, the dismissals were not invalid.

Before the Constitutional Court, the applicants, former Edcon employees and their representative trade union, the National Union of Metalworkers of South Africa (NUMSA), challenged the Labour Appeal Court decision and sought reinstatement with full back-payment. Principally they argued that the Act used the word "must" which indicates that an employer such as Edcon was obliged to comply with the prescribed procedures before dismissing the employees and failure to do so resulted in invalid dismissals. Edcon argued that the fact that there was no compliance with the prescribed procedures meant that the dismissals may be unfair, but not invalid.

The minority judgment written by Cameron J (Van der Westhuizen J concurring) held that leave to appeal must be granted. Flowing from its interpretation of section 189A of the Act, it agreed with the applicants' contention that the 30-60 day period allowed under the Act suspends the employer's power to dismiss and relegate the relief available under section 189A(7). The judgment disagreed with Edcon's argument that section 189A is a 'bolt-on' to section 189, and rather found that the section was specific to mass retrenchments. The time period mandated under the Act creates a 'dismissal-free' zone during which employees must be safe from dismissal until the statutory periods have elapsed. Refusing the Labour Appeal Court's characterisation of the section 189A(9) and (13) remedies as unavailable for short notice, the minority disagreed with the purposive interpretation of section 189A (supported by the majority). The judgment states that a strike remedy does not properly deal with the mischief that section 189A seeks to prevent. Rather, the failure to comply rendered the dismissals a nullity. Cameron J held that the dismissals, though indeed null and void, did not entitle the employees subjected to them to full retrospective reinstatement. The judgement concluded that the dismissals by Edcon outside of the time periods in section 189A(8) were without effect in law and thus a nullity.

The majority judgment penned by Zondo J (Mogoeng CJ, Moseneke DCJ, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J and Wallis AJ concurring), agreed that leave to appeal should be granted but disagreed that dismissals effected in breach of section 189A(8) resulted in invalid dismissals. He took the view that the Act did not contemplate invalid dismissals and that the procedures with which Edcon failed to comply constituted requirements for the procedural fairness aspect of dismissals, and as such, related to unfair dismissals. He pointed out that the concept of an invalid dismissal is foreign to the current Act, and that the applicants should have utilised the mechanisms provided under the Act to deal with the dismissal dispute instead of seeking to have the dismissals declared invalid. Zondo J thus held that the dismissals could be unfair but not invalid.

Zondo J went on to point out that for dismissals effected in breach of section 189A(8), the remedies are those set out in the Act, particularly in section 189A(8), (9) and (13). Those remedies do not contemplate any order declaring dismissals invalid. They include going on strike and applying to the Labour Court for a variety of orders including an order reinstating dismissed employees pending compliance by the employer with the procedural requirements. He further held that under the Act, there is no right not to be unlawfully dismissed but there is a right not to be unfairly dismissed. Further, Zondo J held that the applicable principle is that for a breach of the Act, the remedy must be sought in the Act and not at common law. The majority dismissed the appeal but made no order as to costs.