

An analysis of *Edcon v Steenkamp* with reference to its effect on the “De Beers” principle

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OPSOMMING

’n Ontleding van *Edcon v Steenkamp* met verwysing na die effek daarvan op die “De Beers”-beginsel

In hierdie artikel word daar hoofsaaklik gehandel met die uitspraak in *Edcon v Steenkamp* (“*Edcon*”) waarin die applikant sy aansoek as “’n grondwetlike uitdaging” ten opsigte van artikel 189A van die Wet op Arbeidsverhoudinge 66 van 1995 (“WAV”) beskryf het. Artikel 189A van die WAV plaas bykomende vereistes op groter werkgewers by aflegging van groter getalle werknemers, wat deelname aan ’n gesamentlike konsensus-soekende proses insluit. Die algemene doel van artikel 189A is om die effektiwiteit van versoening in grootskaalse afleggings te bevorder deur te poog om konflik in die proses te vermy.

Die twee kwessies van belang in *Edcon* is eerstens die verwysingsvereiste van grootskaalse afleggings na die Kommissie vir Versoening, Bemiddeling en Arbitrasie (“KVBA”) vir versoening alvorens ’n werkgewer kennisgewings van ontslag mag uitreik en tweedens die uitleg van die sogenaamde “De Beers”-beginsel. Dit is ingevolge hierdie beginsel dat werknemers in *Edcon* beweer het dat hulle ontslag ongeldig was in ooreenstemming met die uitspraak in *De Beers Group Services (Pty) Ltd v NUM* soos bevestig in *Revan Civil Engineering Contractors v National Union of Mineworkers*.

Ten slotte word daar na aanleiding van hierdie arbeidsappèlhofuitsprake aanbevelings gemaak van hoe bestaande wetgewing uitgelê behoort te word ten einde uitvoering te gee aan die konstitusionele reg op billike arbeidspraktyke, asook die doelstellings van die WAV, naamlik om ekonomiese ontwikkeling, maatskaplike geregtigheid, arbeidsvrede en die demokratisering van die werkkplek te bevorder.

1 INTRODUCTION

In this article, the author deals predominantly with the judgment handed down in *Edcon v Steenkamp*.¹ Here the applicant described its application as “a constitutional challenge”² to section 189A of the Labour Relations Act,³ a primary object of the Act being to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996.⁴ It is also considered in what manner the *Edcon* judgment differs from the judgment in *De Beers Group Services (Pty) Ltd v NUM*.⁵

1 (JS648/13, JS51/14, JS350/14) [2015] ZALAC 2.

2 *Edcon* para 23.

3 66 of 1995 (hereafter “LRA”).

4 S 1 of the LRA.

5 [2011] 4 BLLR 318 LAC (hereafter “*De Beers (LAC)*”); *Edcon* para 24.

The employees in *Edcon* were dismissed for operational requirements in terms of section 189A of the LRA. The employer failed to comply with the prescribed time-frames in terms of section 189A(8) of the LRA in giving notice of termination as contemplated in section 189A(2). The parties contested the correctness of the Labour Appeal Court’s finding in *De Beers (LAC)*, where it was held that non-compliance with a statutory requirement is sanctioned with invalidity and renders a dismissal non-effective.

The scope of this article will be limited to an analysis of the requirement of referral of large-scale retrenchment disputes to the CCMA for conciliation as a prerequisite, before an employer may issue notices of dismissal. The issues of non-compliance with the prescribed time periods in section 189A(8), read with section 189A(2) and the effect thereof, will be further addressed. The author agrees with the finding in *Edcon* in as far as it was held that non-compliance with statutory prescribed time periods does not result in a dismissal being invalid and with the fact that the concept of invalidity is foreign to remedies for dismissal.

The dispute between the parties in *Edcon* related not only to whether there has been compliance with section 189A but also, and more importantly, to the correctness and constitutional sustainability of previous pronouncements upon, and the interpretation of section 189A by the Labour Appeal Court.⁶ The importance of this case and the unusual relief sought, prompted the Judge President, atypically, in terms of section 175 of the LRA, to direct that the matter be heard by the Labour Appeal Court, sitting as the court *a quo*.⁷

2 FACTS OF *EDCON*

The facts of *Edcon* were concerned with a restructuring based on operational requirements of the employer’s business, which occurred throughout the company. The restructuring process commenced during April 2013. It resulted in the retrenchment of about 3000 employees out of the total workforce of 40 000 employees nationwide which placed this retrenchment within the scope of section 189A of the LRA.⁸ The respondents in this matter were several employees of Edcon, the National Union of Metalworkers of South Africa (NUMSA), the Minister of Labour and the Minister of Justice and Constitutional Development.

The employees in *Edcon* relied on a single cause of action, that is, that their dismissals were “invalid” as it was held by the Labour Appeal Court in *De Beers (LAC)* and confirmed in *Revan Civil Engineering Contractors and Others v National Union of Mineworkers*.⁹ In these cases, it was held that where an employer issues notices of termination prematurely, that is, before the period referred to in section 189A(8)(b) of the LRA has lapsed, the ensuing dismissals are invalid and of no force and effect.¹⁰

⁶ *Edcon* para 4.

⁷ *Ibid*.

⁸ The retrenchments involved more than 50 employees – it is for this reason that s 189A of the LRA applied to the retrenchments. This section applies to, *inter alia*, employers employing more than 50 employees, if the employer contemplates dismissing by reason of the employer’s operational requirements at least 50 employees, if the employer employs more than 500 employees

⁹ 2012 (33) *ILJ* 1846 (LAC); *Edcon* para 24.

¹⁰ *De Beers (LAC)* para 36; *Edcon* para 24.

The applicant in *Edcon* sought an order for, *inter alia*, the following:¹¹

- (a) Declaring the interpretation of section 189A(2)(a) of the LRA as interpreted in the judgements of the *De Beers (LAC)* and *Revan Civil Engineering* cases, insofar as these judgments hold that non-compliance with the provisions of section 189A(2)(a) read with section 189A(8) results in the invalidity of a dismissal, is wrong and constitutes an erroneous interpretation or application of legislation that has been enacted to give effect to a constitutional right or in compliance with the legislature's constitutional responsibilities.¹²
- (b) Reinterpreting the provisions of section 189A(2), read with 189A(8), in a manner which is consistent with the objects of the LRA and thus declaring that where an employer does not comply with any of the provisions of these sections, the dismissals are not invalid and:
 - (i) that the court considering the dismissal is at large to consider the fairness thereof and the appropriate remedy; and that
 - (ii) an employee is free to elect to choose compensation as a remedy instead of reinstatement or re-employment.

The court in *Edcon* was persuaded that the interpretation of section 189A(8) of the LRA in *De Beers (LAC)* was wrong, and the relief sought, as set out in the paragraph above, was thus dispositive and for this reason it was found that there was no need to deal with the relief sought in the alternative in *Edcon*.

All of the employees concerned in *Edcon* were issued with section 189(3) notices.¹³ The main issue in dispute relates to the interpretation of section 189A(8) of the LRA and the consequences of non-compliance with the time periods stipulated by this section.¹⁴ The facilitation-route was not followed, and for that reason the dismissals were governed by section 189A(8).¹⁵ No referral was made to the CCMA for conciliation before the employer gave notice to terminate the contracts of employment.¹⁶ The time lapse between the issuing of the section 189(3) notices and the notices of termination in terms of section 189A(8) of the LRA varied from six days to in excess of 60 days.¹⁷

It was held that none of the employees brought an application in terms of section 189A(13) of the LRA alleging non-compliance with a fair procedure. None of the employees challenged the substantive or procedural fairness of their dismissals.¹⁸ This is due to the fact that the law as it stood at the time, provided for a more favourable remedy. Had the employees considered that this situation would be turned around, in all likelihood they would have challenged the substantive

11 The order sought in the alternative is not discussed for purposes of this analysis as the first order was granted in *De Beers (LAC)* and the court did not deal with the relief sought in the alternative.

12 *Edcon* para 25.

13 On the applicant's version, all of the applicants in *Kumalo* (save for one who died beforehand) accepted voluntary severance packages and hence resigned and thus were not issued with s 189(3) notices in contemplation of dismissal.

14 *Edcon* para 16.

15 *Edcon* para 22.

16 *Edcon* para 28.

17 *Edcon* para 28.

18 *Edcon* para 28.

and procedural fairness in the alternative. Instead, all employees in *Edcon* relied *exclusively* upon the De Beers’s principle to assert a cause of action that their dismissals were invalid and sought to be reinstated with full back-pay.¹⁹

3 DECISION IN *EDCON* AND COMMENTS ON FAIRNESS REQUIREMENTS FOR LARGE-SCALE RETRENCHMENTS

Dismissals due to operational requirements, also described as ‘no fault dismissals,’ as opposed to other forms of dismissals, often have more significant social and economic ill effects because they affect larger numbers of employees.²⁰ It is for, *inter alia*, this reason that many countries as well as the International Labour Organization (hereafter the “ILO”) by way of conventions require that retrenchment should not be resorted to until the employer has complied with certain procedural requirements intended to minimise the impact on the employees and their dependants.²¹ It is for the same reason that sections 189 and 189A are designed to ensure that retrenchments are not resorted to if they can be conceivably avoided.²²

The courts have always been wary of declaring retrenchments unfair solely because the employer could, objectively, have afforded to retain all or some of the retrenched employees. Retrenchments, however, must still be necessary – which will depend on whether a particular dismissal could have been avoided while the employer’s objective could still be attained.²³

While, from a mechanical reading of sections 189 and 189A, it might appear that the requirements placed on a retrenching employer are primarily procedural, the converse seems to be clear from our case law. The court is entitled to enquire as to whether a reasonable basis exists on which the decision, as well as the proposed manner to dismiss, is arrived at.²⁴ It could therefore be said that a decision to retrench must be “rationally justifiable”.²⁵

4 CONSULTATION

Sections 189 and 189A place an obligation on the employer to consult with the bargaining agents concerned and to engage in a meaningful joint consensus-seeking process. This aligns with the objects of the LRA, that is, to promote orderly collective bargaining, employee participation in decision-making in the workplace, and the effective resolution of labour disputes.²⁶

Section 189(3) requires the employer to issue a written notice, inviting the other consulting party to consult with it and to disclose relevant information

19 The cost of such orders, were they to be granted, would be substantial: *Edcon* para 28.

20 Grogan *Workplace law* (2014) 317.

21 *Ibid.* A primary object of the LRA is to give effect to obligations incurred by the Republic of South Africa as a member state of the International Labour Organisation. See s 1 of the LRA.

22 Grogan 317.

23 *Ibid.*

24 *BMD Knitting Mills (Pty) Ltd v SACTWU* 2001 (21) *ILJ* 2264 (LAC) para 19 (hereafter “*BMD Knitting Mills*”).

25 *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* 1999 (20) *ILJ* 89 (LAC) (hereafter “*Johnson & Johnson*”).

26 S 1(d) of the LRA.

about the *reasons* for the proposed retrenchments and the alternatives considered and rejected. The number of employees likely to be affected, the proposed selection criteria, the timing of the dismissals, the severance pay proposed and assistance to mitigate the adverse impact in the case of dismissals being unavoidable, are all subject matters to be included in the section 189(3) notice.²⁷ It appears to be clear from the above that the legislature prescribes specific topics that should be consulted on. Had this not been his intention, it would have simply referred to consultation on “relevant topics” instead.

Consultation must be exhaustive²⁸ and thorough, not merely sporadic, superficial or a sham.²⁹ The reason is that pre-retrenchment consultation is not *merely* a procedural requirement – it may be that the consultation is found to be so deplorably deficient as to render the ensuing dismissals *substantively* unfair.³⁰

The test for whether there has been genuine consultation prior to retrenchment, is whether the employees concerned were given a fair opportunity to suggest alternatives by which job losses might have been avoided or the adverse effects of the retrenchments ameliorated. This places the employees in a position to challenge the *merits* of the retrenchment proposal. Not all of the employees in *Edcon* were granted this opportunity.³¹

If it is possible to avoid some or all of the dismissals, it must follow that retrenchment is unnecessary as it lacks a sound economic reason.³²

The employer is not obliged to accept any suggestions made, but the suggestions must be seriously considered and management must have retained a mind sufficiently open to be persuaded by practical and rational alternatives.³³ Apart from promoting informed decision-making, consultation also serves the principles of natural justice³⁴ and helps discourage industrial unrest.³⁵ This is an important attribute to be considered, especially in view of both the South African violent industrial action climate and the purpose of the LRA to advance economic development, social justice, labour peace and the democratisation of the workplace.

27 S 189(3)(a)–(j) of the LRA. *Edcon* para 6.

28 *CWIU v Johnson & Johnson (Pty) Ltd* [1997] 9 BLLR 1186 (LC); since the employer in this case failed to exhaust consultation in the divisions concerned, employees in those divisions were held to be unfairly dismissed. See also *BEMAWU obo Mohapi v Clear Channel Independent (Pty) Ltd* 2010 (31) ILJ 2863 (LC) where it was held that employers are required to consult on each and every issue specified in the LRA.

29 *Hadebe v Romatex Industrials Ltd* 1986 (7) ILJ 726 (IC). Grogan 323.

30 *Broll Property Group (Pty) Ltd v Du Pont* 2006 (27) ILJ 269 (LAC). Grogan 323.

31 *Edcon* para 28. It could hardly be said that employees who were dismissed in the absence of conciliation and a mere six days after they were issued with s 189(3) notices were granted a fair opportunity or sufficient time to state their case.

32 Grogan 329.

33 *SATAWU v Roadway Logistics (Pty) Ltd* 2007 (28) ILJ 937 (LC).

34 *Administrator, Natal v Sibiyi* 1992 4 SA 532 (A) para 11.

35 *SACTWU v Jatex SA (Pty) Ltd* 1992 (13) ILJ 1252 (IC) 1256I; *FAWU v Ameens Food Products & Butchery* 1988 (9) ILJ 659 (IC) 668D; *CWUI of SA v Lennon Ltd* 1994 (15) ILJ 1037 (LAC); and *NUMSA v Atlantis Diesel Engines (Pty) Ltd* 1993 (14) ILJ 642 (LAC), confirmed on appeal 1994 (15) ILJ 1247 (A).

5 SECTION 189A

Section 189A places additional obligations on larger employers when they contemplate dismissing larger numbers of employees due to operational requirements.³⁶ The general purpose of the addition of this section to the LRA³⁷ was to enhance the effectiveness of consultation in large-scale retrenchments by seeking to reduce friction in the process.³⁸ Provision is made for consultation at an early stage and the section lays down the requirements for a fair procedure.³⁹ In *Edcon*, section 189A was examined as a whole contextually with reference to its purpose and the circumstances of its enactment.⁴⁰ This article, however, is specifically limited to a discussion of sections 189A(2) and 189A(8) as mentioned above.

Section 189A(2) reads as follows:

“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),⁴¹ 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.”⁴²

Section 189A(2) creates an exception to the general prohibition on industrial action in relation to “rights” disputes. This is done by the specific inclusion of the words “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”. The legislature, by the inclusion of this section, has recognised the fact that large-scale retrenchments may involve hybrid issues not always classifiable as disputes of rights or disputes of interest.⁴³ This innovation, being the main purpose of the 2002 amendments, is indispensable to its interpretation.⁴⁴ This section is directed at regulating the process of industrial action and referrals to adjudication where facilitation or conciliation has failed to produce consensus in relation to all the subjects of consultation.⁴⁵

The second section of importance is section 189A(8) which reads as follows:

“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

³⁶ This section is in addition to s 189 which regulates retrenchments in general.

³⁷ S 189A was inserted into the LRA by s 45 of the Labour Relations Amendment Act 12 of 2002.

³⁸ *Edcon* para 3.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ S 65(1)(c) reads as follows: “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 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.”

⁴² This section has since been amended by the Labour Relations Amendment Act 6 of 2014: “(c) 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.”

⁴³ *Edcon* para 11.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

- (b) once the periods mentioned in section 64(1)(a)⁴⁶ 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).”

This section also allows the employees or their registered trade union, on receipt of notices of termination, to resort either to strike action or litigation. It is, however, clear from the above section that where a facilitator is not appointed, the ordinary conciliation provisions should continue to apply.

There are two elements to the interpretation of section 189A(8) deserving attention. The first is concerned with the determination of whether the dispute has to be referred to a bargaining council or the CCMA for conciliation before the employer may issue dismissal notices.⁴⁷ The second element to the interpretation is the so-called *De Beers* principle.⁴⁸

6 THE REQUIREMENT TO REFER THE DISPUTE FOR CONCILIATION

In *Edcon* it was held that section 189A(8) is badly drafted and that it merely states that a party may not refer a dispute to a bargaining council or the CCMA unless 30 days have lapsed since the issuance of the section 189(3) notice. It should be noted at this stage that there was not even compliance with this first requirement, a fact which the applicant in *Edcon* had conceded to. The author further disagrees with the statement that section 189A(8) is badly drafted. Section 189A(8) refers to a second 30 day period mentioned in section 64(1)(a), which unambiguously stipulates “30 days from the date of referral for conciliation”. It could therefore be said with certainty, that the *second* 30 day period only starts running once the matter is referred to conciliation. If this was not the intention of the legislature, it would have simply referred to 30 days instead of specifically making reference to section 64(1)(a). And it is therefore unclear on which basis it is said that no express provision is made for a 30 day conciliation period.⁴⁹

It is thus unambiguous that, what was envisaged, in the absence of an agreement resulting from the consultation process, is that the dispute had to be referred to a bargaining council or the CCMA for conciliation.⁵⁰ It was also held

⁴⁶ S 64(1)(a) reads: “Every employee has the right to strike and every employer has recourse to lock-out if the issue in dispute has been referred to a council or to the Commission as required by this Act, and – (i) a certificate stating that the dispute remains unresolved has been issued; or (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission.”

⁴⁷ *Edcon* para 29.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ In *De Beers (LAC)*, the Labour Appeal Court approved the finding of the Labour Court in *Leoni Wiring Systems (East London) (Pty) Ltd v NUMSA* 2007 (28) ILJ 642 (LC) that in terms of s 189A(8), a dispute must be referred to a council or the CCMA after a period of 30 days has lapsed since the s 189(3) notice was issued.

in *Edcon* that the Labour Appeal Court in *De Beers (LAC)* was clearly of the opinion that such a referral was indeed a requirement.⁵¹ Section 189A(8) must therefore be construed to prohibit the employer from giving notice to terminate unless and until a dispute concerning the proposed retrenchments has been referred to a bargaining council or the CCMA and the 30 day period mentioned in section 64(1)(a) of the LRA had elapsed.⁵² Moreover, our labour legislation consistently requires parties in dispute to first attempt conciliation before resorting to industrial action or litigation.⁵³

The fact that there is a specific exemption from the requirement of referral to conciliation included in section 189A(7)⁵⁴ – directly preceding section 189A(8) – could further be construed to mean that if such an exemption also applied to subsection (8), the legislature would have also clearly indicated such intention in subsection (8). Therefore, in the absence of such a clear intention being conveyed, one should be led to conclude that no such intention existed. The court held that, if there is no obligation to refer a dispute under section 189A(8) to conciliation, it would be very unusual, as this would mean that the normal requirement of consensus-seeking with the assistance of an independent conciliator would not apply. Moreover, there is no apparent reason justifying such a departure from the norm.

In the “agreed statement of issues” the applicant stated that it sought a reinterpretation of section 189A(8) to the effect that:

“Contrary to what was found in *De Beers*, where the facilitator route is not followed, in the absence of full consensus being reached over a retrenchment, a ‘dispute’ does not exist for the purposes of section 189A(8)(a), and a referral to the CCMA (by the employer in the absence of the employee party doing so) is not then a prerequisite for a retrenchment.”

The author does not agree with this statement as there is no need for the relief sought in the form of reinterpretation. To ignore the ordinary meaning of the wording of section 189A(8) and to argue that a “dispute” does not exist in the absence of consensus, is rather superficial. This seems to be nothing other than a desperate attempt to avoid the inconvenient legal consequence of non-compliance with an obligation and a plot to deprive employees, who were unfairly treated of their entitlement, to an appropriate remedy.

It was held that the case could be determined on the shared assumption of the parties that a referral for conciliation may have been required but was not made, and it was for this reason that there was no need for precise wording or reading in. The shared assumption by the parties in *Edcon* is another indication of the fact that the requirement contained in section 189A(8) read with section 64(1)(a) is unambiguous. The principal question for determination that remains is what the consequence of non-referral, followed by notice of termination, would be.

51 *Edcon* para 30.

52 In *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd* 2006 (27) ILJ 1909 (LC) para 31; *Edcon* para 30.

53 *Edcon* para 30. In *Edcon* it was held that the reading in of a requirement of referral to conciliation is warranted and justifiable. It is contended that there was no need for reading in of any wording simply because the requirement for referral appears clearly from the current wording of the section, and also from the interpretation of such wording in previous judgments.

54 Where facilitation has been chosen as a substitute in terms of this section.

7 THE *DE BEERS* PRINCIPLE

The second, more controversial, principle enunciated in the *De Beers (LAC)* judgment, is that a dismissal would be invalid if the employer does not comply with the requirements of section 189A(8). This, also known as the “De Beers” principle, had its origin in *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd* (hereafter “*De Beers (LC)*”).⁵⁵ In *De Beers (LC)* the union referred a dispute, in terms of section 189A(8)(a) read with section 64(1)(a) of the LRA, regarding the proposed retrenchments to the CCMA. In its referral, the union contended that the *notices of termination* were premature in that it did not comply with section 189A(8)(a) due to the fact that the (*second*) 30 day period prescribed in section 64(1)(a) had not elapsed and that no certificate of resolution were issued by the CCMA before the expiry of the prescribed 30 day period.

The union in *De Beers (LC)* applied to the Labour Court, *inter alia*, for an order declaring that the *notices of termination* was of no force and effect and an interdict restraining the employer from giving notice of termination until the prescribed time periods in section 64(1)(a) of the LRA had elapsed.

The Labour Court in *De Beers (LC)* held, on the facts before it, that the *notices of termination* were invalid and of no force or effect:

“Section 189A(2) provides explicitly and in imperative language that the employer ‘must’ give notice of termination in accordance with the provisions of section 189A. It would, in my view, flout the intention of the language and the policy underlying section 189A to recognise the *validity of notices* given in contravention of section 189A(8).”⁵⁶

It should be noted that in *De Beers (LC)* the Labour Court granted a declaratory order that the *notices of termination* (and not the dismissals as such) were of no force and effect. The Labour Court refused to grant an interdict in this matter due to the fact that the employer had become entitled to issue the notices of termination after the lapse of the 30 day period prescribed by section 64(1)(a) of the LRA.

Section 189A(8)(a) deals with the requirement of notice. If notice is invalid, dismissal may be unfair and normal steps in determining substantive and procedural fairness need to be followed. The employer in *Edcon* contended that if employees are dismissed without the dispute being referred to conciliation or if they are otherwise prematurely dismissed before the lapse of the relevant time periods, such procedural flaws, in the context of section 189A, do not have the consequence that such dismissals are invalid and of no force and effect.⁵⁷ It should be noted, firstly, that non-compliance with prescribed time periods cannot be generally assumed to be procedural flaws – it will depend on the facts of each case. Although the author agrees with the opinion that non-compliance with the time periods in section 189A(8) will not result in invalidity, it is important to look at substance rather than form. If the word ‘invalid’ in *De Beers (LAC)* were to have been replaced with the word ‘unfair’, would there have been a substantial difference in the effect that the judgment would have had.

⁵⁵ 2006 (27) ILJ 1909 (LC) para 31; *Edcon* para 30.

⁵⁶ *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd* 2006 (27) ILJ 1909 (LC) para 40; *Edcon* para 33.

⁵⁷ *Edcon* para 31.

8 A COMPARISON OF *DE BEERS* (LABOUR AND LABOUR APPEAL COURT) WITH *EDCON*

The facts in *De Beers (LAC)*⁵⁸ (which *Edcon* submits was wrongly decided) were as follows: The employer issued section 189(3) notices to four employees on 21 January 2009, inviting them to consultation with regard to proposed retrenchments. On 31 March 2009, the employer issued the employees with termination notices, stipulating that their notice periods would run from 22 March 2009 and that the date of termination of the employment contracts would be 23 April 2009. The union referred a dispute to the CCMA for conciliation on 14 April 2009. The employees were dismissed on 23 April 2009. Almost a month after the dismissals on 19 May 2009, a conciliation meeting was held at the CCMA and a certificate of non-resolution was issued. From the above facts, it is clear that the dismissals took place prior to the expiry of the 30 day period prescribed by section 64(1)(a)(ii) and before the certificate of non-resolution was issued in terms of section 64(1)(a)(i). On 4 June 2009, the union sought an order from the Labour Court declaring that the notices of termination were of no force or effect and, alternatively, an order directing the employer to reinstate the employees pending compliance with a fair procedure and the requirements of section 189A, or further an award of compensation for procedural unfairness.

The Labour Court held that the *notices* of termination were indeed tainted by prematurity and were invalid and of no force and effect.⁵⁹ The employees were accordingly granted an order of reinstatement. The Labour Court was of the view that a dispute arose once consensus was not reached on the topics of consultation which had to be referred to conciliation and that there was no compliance with the time periods in section 189A(8)(b), which the Labour Court held was peremptory.⁶⁰

The Labour Appeal Court in *De Beers (LAC)* dismissed the appeal and upheld the order of reinstatement granted by the Labour Court in *De Beers (LC)*. It is these findings by the Labour Appeal Court in *De Beers (LAC)* which the Labour Appeal Court in *Edcon* has been urged to revisit and hold to be erroneous.

As mentioned above, it is important to note that in *De Beers (LC)*⁶¹ – which is the case in which the “De Beers” principle may be said to have originated – the Labour Court did not make any finding that the dismissals were invalid. The relief granted in this case was consciously limited to a declaratory order that the *notices* of termination (and *not* the dismissals) were of no force or effect. An invalid notice results from the fact that the prescribed requirements in relation to giving notice were not met. An invalid notice will affect the *fairness* (but not the *validity*) of the dismissal.

The author argues that an invalid dismissal cannot exist alongside South African labour legislation.

It was the Labour Appeal Court in *De Beers (LAC)* that assumed without any elaboration or reasoning that because the notices of termination did not comply with the statutory requirements, an indubitable consequence was that the dismissals were invalid and of no force or effect. In *Edcon* this proposition was held to be debatable and possibly wrong.

58 [2011] 4 BLLR 318 LAC; *Edcon* para 24.

59 *De Beers (LAC)* para 7.

60 *Ibid.*

61 *De Beers (LC)* para 31. See also *Edcon* para 30.

Argument by council in *Edcon* was made to the effect that a breach of the statutory duty to give proper notice did not result in invalidity of the dismissal. This is true about the breach of any statutory duty. In fact, non-compliance might very well result in an unfair dismissal. The concept of invalidity is foreign to dismissals regulated by labour law.⁶² This situation will prevail, even in the case of non-compliance with a substantive statutory duty relating to the reason for the dismissal.

To say that a dismissal is invalid is to deny the existence thereof. Davis JA in *De Beers (LAC)* responded to the latter submission with reference to the judgment in *De Beers (LC)*⁶³ and held as follows:

“In short, if the employer fails to comply with the mandatory requirement of consultation in terms of section 189(2) and moves to terminate the employment in breach of these provisions, then the dismissal must be considered to be invalid and accordingly of no force and effect.”⁶⁴

In *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd*⁶⁵ the Labour Court held that the employer cannot file a notice of retrenchment earlier than the date on which both the first 30 day period, after the section 189(3) notice was issued, and the second 30 day period, as set out in section 64(1)(a), have elapsed. This was confirmed in *De Beers(LAC)*.⁶⁶ Moreover, although parties cannot be forced to reach consensus, the legislature promotes consensus-seeking by prescribing time periods during which no dismissals may be effected, creating the opportunity to reach consensus before considering industrial action. The reasoning is in line with the generally applied principle that industrial action should not be resorted to if there are less destructive and more peaceful ways of reaching consensus.

With the destructive power of strikes in mind, one should act with caution not to “encourage” strike action where less adverse ways of dispute resolution, explicitly provided for in legislation, have not yet been resorted to. It is a well-known fact that the legislature prescribes conciliation as a prerequisite for a protected strike. The only way in which it might be said that conciliation before strike action is waived, is on the assumption that conciliation – as a prerequisite – was dealt with under section 189A. This was *not* the case in *Edcon*.

Section 189A provides that where a facilitator is not appointed, notice of termination can only be issued 30 days after issuing the initial section 189(3) notice and only after the additional 30 days provided for by section 189A(8)(b)(i) have elapsed. Both parties should accordingly be in a position to refer a dispute to the CCMA at any time after 30 days has passed since issuance of the 189(3) notice. Once the dispute has been referred to conciliation by either of the two parties, the additional 30 days, set out in section 64(1)(a) must lapse before notices of termination may be given by an employer.

62 The LRA does not make provision for “invalid” dismissals. It does, however, provide for disputes about unfair dismissals, where the onus is on the employee to prove the existence of the alleged dismissal. Further, it provides for remedies for unfair dismissal which include reinstatement, re-employment and compensation. See ss 191–193 of the LRA.

63 *De Beers (LC)* para 31; *Edcon* para 30.

64 *De Beers (LAC)* para 36; see also *Edcon* para 35.

65 *Ibid.*

66 *De Beers (LAC)* para 32.

9 CONCLUSION

In *Edcon*, certain employees were dismissed a mere six days after the date on which the section 189(3) notices were given. This means that the best case scenario for the employer is that the employees were dismissed 54 days earlier than allowed in terms of section 189A.⁶⁷ It could therefore be said that not only did the employer fail to comply with the prescribed procedure in terms of section 189A, it also deprived the employees of their opportunity to engage in consultation in an attempt to avoid or minimise dismissals as well as their opportunity to refer the matter to conciliation.⁶⁸

The absence of meaningful joint consensus-seeking by way of consultation, along with the fact that these employees were deprived of their statutory right to refer the matter to conciliation, raise not only the issue of substantive fairness, but also the constitutional right to fair labour practices.⁶⁹ The fact that the consultation period may be extended in terms of the LRA adds insult to injury.⁷⁰ The author submits that this gives rise to a further argument⁷¹ that, in the absence of referral for conciliation by either party, it would be reasonable to assume that consultation has not yet been exhausted and is extended by implication.

If one takes into account the number of jobs at stake as well as the measures taken by the legislature to put in place further obligations in the case of large-scale dismissals specifically, it is proffered that the employer’s argument that there was no dispute could only be viewed as superficial.

The author argues that non-compliance with statutory procedures cannot blindly be assumed to result in mere procedural unfairness. Section 189A acknowledges the fact that large-scale dismissal disputes might in some cases amount to hybrid disputes⁷² where substance and procedure are not easily distinguishable. It is for this reason that the courts should, after taking into account the facts of a specific case, look at *substance* and not *form*.

The peremptory requirements of both referral to conciliation as well as compliance with the prescribed time periods should not be belittled with disrespect. To do this would be to disregard the clear intention of the legislature and, in the employer’s own words, an erroneous interpretation or application of legislation that has been enacted to give effect to a constitutional right, or in compliance with the legislature’s constitutional responsibilities.⁷³

Section 189A(2) read with 189A(8) should be interpreted in a manner which is consistent with the objects of the LRA by looking at *substance* rather than *form*.

67 This would have been the best case scenario for the employer if it is assumed that the matter would have been referred to the CCMA for conciliation on the first day after the initial 30 days had lapsed.

68 The employees would only have been allowed to refer the matter for conciliation once the initial 30 days had lapsed. As a result of the fact that they were dismissed only six days after the s 189(3) notice, they never even had the option of referral.

69 Van Niekerk and Smit (eds) *Law@work* (2015) 41–43.

70 S 189A(2)(c) provides that “the consulting parties may agree to vary the time periods for facilitation or consultation” and in terms of s 189A(2)(d) “a consulting party may not unreasonably refuse to extend the period for consultation if such an extension is required to ensure meaningful consultation”.

71 In the case of employees dismissed after the initial 30 days, but before referral to conciliation.

72 See fn 42 above.

73 *Edcon* para 25.

Regard should therefore be had to the facts of each case before it can be said that a dismissal is merely procedurally unfair, especially in the case of dismissals for operational requirements, and even more so if these are large-scale retrenchments. This is due to the fact that non-compliance with a prescribed time period, which may on the face of it appear as a mere procedural flaw, may very well result in gross substantive unfairness. To disregard the possibility of such injustice, would be to disregard the constitutional right not to be subjected to unfair labour practices. It is for this reason that the precedent created in *Edcon* should be applied with great care so as not to disregard the clear intention and very purpose of section 189A, namely to enhance the effectiveness of consultation and conciliation in respect of all prescribed subjects,⁷⁴ by allowing employers to regard compliance with these peremptory time periods as obsolete.

⁷⁴ *Edcon* paras 3 11.