13 MAY 2019

EMPLOYMENT ALERT

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Slamming the door on the indecisive

The protracted dispute between *Karin Steenkamp and 1817 Others and Edcon Limited* was brought before the Constitutional Court for a second time, but with a different legal basis. This turbulent matter concerned a mass retrenchment whereby approximately 3,000 employees where dismissed between 2013 and 2015.

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Slamming the door on the indecisive

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The protracted dispute between *Karin Steenkamp and 1817 Others and Edcon Limited* was brought before the Constitutional Court for a second time, but with a different legal basis. This turbulent matter concerned a mass retrenchment whereby approximately 3,000 employees where dismissed between 2013 and 2015.

Disillusioned by the dismissals, the employees initially approached the Labour Court for an order declaring their dismissals to be '*invalid*' and given the failure by their employer to follow the prescribed procedural requirements when a facilitator is not utilised during the consultation process.

By alleging the '*invalidity*' of their dismissals, a term not recognised in the Labour Relations Act (LRA), their collective strategy was clearly different to the dedicated remedy afforded under s189A(13) of the LRA. When the matter was ultimately heard by the Constitutional Court, it was held that an invalid dismissal is not a principle that is recognised in our law.

Looking at ways to revive their claim, the employees hoped to revert to what should have been their strategy in the first place, namely following the dedicated protections of the LRA and bringing an application in terms of s189A(13), which in brief terms serves to compel the employer to comply with fair procedure.

As a consequence of the time spent on the initial course that the employees had followed, they were out of time in launching their 189A(13) application.

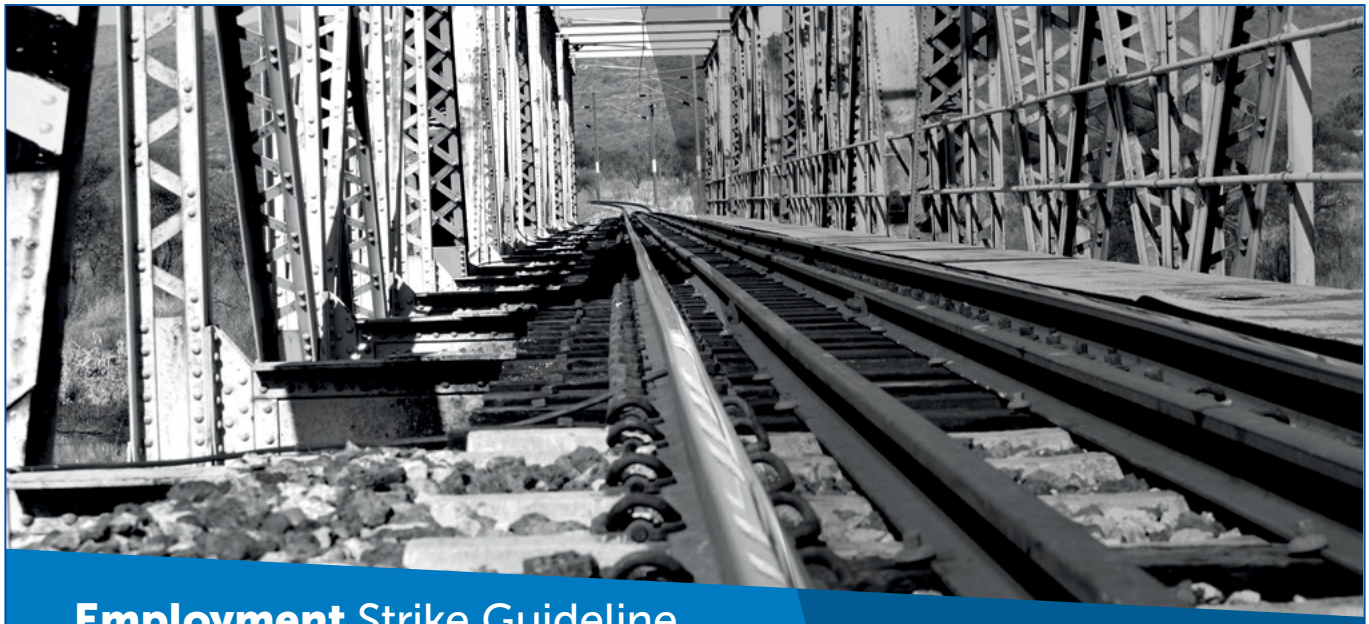
The question which the court then had to determine was whether a "failed legal strategy" was a reasonable explanation for late filing and the granting of condonation. By the time the matter reached the Constitutional Court, the lower courts had made contradictory findings in establishing whether a "failed legal strategy" was a reasonable excuse for a lengthy delay, with the Labour Court granting the condonation and the Labour Appeal court overturning this finding.

In finally deciding whether condonation for late filing should be granted, the unanimous Constitutional Court took into account the purpose and function of s189A(13) applications and the expeditious nature of LRA disputes. Consequently, given the broader context of the LRA, the Constitutional Court found that an unsuccessful legal strategy alone (even though *bona fide* and which had not at that stage been ruled upon) is not a sufficient explanation for a delay in filing an application in terms of s189A(13).

Had the employees simply followed the provisions of s189A(13) from the very outset, the outcome of this debacle may have been very different. The decision is of significant importance to employers and employees alike, especially where attempts are made to develop the law.

Legal strategies going forward should therefore be carefully planned and a cautionary sound should ring in cases where dedicated and specialised legislation exists and is available to parties.

Nicholas Preston and Ashlyn Quenet-Meintjies



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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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