

Retrenchment Law Turned On Its Head?

*Regenesys Management (Pty) Ltd
t/a Regenesys v Ilunga and Others*

Selection Criteria

- Retrenchment process: 189 and 189A
- Employer's position: the selection criteria accepted by the LC (skills, knowledge and behaviour) were assessment criteria for vacant positions. Rejected by the LAC & CC.
- *South African Breweries (Pty) Ltd v Louw* [2018] 1 BLLR 26 (LAC).
- In a restructuring scenario, where no selection criteria is agreed in respect of employees who are unsuccessful in a competitive process for new posts, **the selection criteria must still be fair and objective.**



Section 189A(13)

- Process confirmed to challenge unfair process in large scale retrenchments
- “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.”



Procedural Fairness

Section 189A(13):

- Process confirmed to challenge unfair process in large scale retrenchments
 - Excludes 191(5)(b)(ii)
- S189A(13)(d) - Stand-alone remedy
 - Past v Present interpretation
 - 189A (a), (b), (c): primary remedy - reinstatement
 - Get a fair process back on track
 - Appropriate - compensation
- Consolidation
 - 189A applications and action matters challenging substantive fairness
 - Potential disputes of fact
 - Compensation claims / orders more likely



COSTS ORDERS

Principle: [21] the norm in labour matters is that no costs are awarded.

Constitutional Court reinstates the LC'S costs order:

[53] In the circumstances Regenesys' appeal falls to be dismissed. This is an appropriate case in which a costs order should be made against Regenesys. The success of the employees, the manner in which Regenesys handled the restructuring and the retrenchment and the manner in which it failed to have a proper consultation with the employees all justify an order of costs against it. Accordingly, the appeal is to be dismissed with costs.



- Consultation & Timelines
- Selection Criteria
- Facilitation Request
- Rationale - misrepresentation
- Individual Cases

TAKE AWAYS

- Must adhere to a fair process always
- Utilise CCMA facilitation when possible
- Timeous prosecution of litigation
- Awareness of the section 189A(13) process



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