EMPLOYMENT

IN THIS ISSUE

EDCON V KARIN STEENKAMP AND OTHERS: THE INTERPRETATION OF SECTION 189A

On 3 March 2015, the Labour Appeal Court (LAC) ruled that the Court's prior interpretation of the validity of termination notices that are issued in violation of s189A(8) of the Labour Relations Act, No 66 of 1995 (LRA) was incorrect.

Section 189A of the LRA stipulates the procedure for large scale retrenchments. The two procedures that may be followed after a s189(3) letter has been issued are the following:

- With a facilitator

Employers may choose to appoint a facilitator, in which case the employer would need to:

- embark on a consultation process of at least 60 days with the employees; and
- may only issue a notice of termination at the end of the 60 day period.

Dissatisfied employees may embark on a protected strike or refer a dispute to the Labour Court based on substantive unfairness.

- Without a facilitator

Employers may choose to undergo the consultation process without a facilitator, in which case:

- the parties would consult until they reach agreement; or
- the parties may refer a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) once a period of 30 days has lapsed from the date on which the s189(3) notice was given;
- once the CCMA issues a certificate of outcome stating that the matter remains unresolved or a 30 day period has lapsed from the date of referral, the employer may issue the notice of termination.

Again, dissatisfied employees may embark on a protected strike or refer a dispute to the Labour Court based on substantive unfairness.

Labour Court Remedies

The employees may bring an application to the Labour Court (LC), prior to dismissal, alleging procedural unfairness in terms of s189A(13) of the LRA, in which case the LC may order the employer to follow procedure or restrain the employer from dismissing the affected employees until a fair procedure has been followed.

Alternatively, the employees may bring an application after their dismissal, alleging substantive unfairness in terms of s189A(18) and s189(19) of the LRA.

In *De Beers Group Services (Pty) Ltd v NUM [2011] 4 BLLR 318 (LAC)* (De Beers), the employer chose not to use a facilitator and issued s189(3) notices on 21 January 2009 inviting the employees to consult. On 13 March 2009, the employer issued notices of termination that take effect as from 22 March 2009, about 60 days after the s189(3) notices were given to the employees.

On 14 April 2009 the employees' union, the National Union of Mine Workers, referred the dispute to the CCMA 9 days before the individuals were to be retrenched. The individuals were subsequently retrenched on 23 April 2009. On 19 May 2009 the conciliation took place after which CCMA issued a certificate of non-resolution.

The employees' union referred an unfair dismissal dispute to the Labour Court seeking an order declaring the notices of termination invalid and subsequent reinstatement with back-pay because the employer had failed to adhere to the timelines in terms of s189A(8). The Labour Court and the Labour Appeal Court held that s189A(2) was explicit in its language that an employer must give notice of termination in accordance with the provisions of s189A, meaning after the referral and expiry of the 30 days in terms of s64(1) of the LRA. Thus notices of termination issued in contravention of s189A(2) and s189A(8) are invalid and of no force. The effect of the judgement was that employees could be reinstated with back-pay if employers issued notices of termination in contravention of s189A.

In the recent LAC judgement of *Edcon v Karin Steenkamp and Others (JS350/2014) [2015] ZALACJHB (3 March 2015)* (Edcon), the LAC held that the interpretation of s189A(8) in the De Beers case was incorrect.

In this matter, the employer also chose not to use a facilitator. Neither the employer nor the employees referred the matter for conciliation at the CCMA before the notice of termination

Continue

was issued to the employees. Furthermore, none of the employees brought an application to the Labour Court in terms of s189A(13) alleging non-compliance with fair procedure, but rather, sought to rely solely on the principle established in the De Beers case in bringing an application to declare the dismissals invalid and sought reinstatement with full back-pay.

The LAC looked to English law which states that any dismissal of employees, whether fair or unfair, is intended to terminate the employment relationship finally and the only recourse to dissatisfied employees should be restricted to damages.

In reaching its conclusion, the LAC relied on the following:

- The LAC referred further to the implicit acceptance of the Appellate Division in *Schierhout v Minister of Justice 1926 AD 99* that unlawful and invalid terminations can still bring employment contracts to an end. Employees therefore had reinstatement and/or compensation as recourse. This principle has remained a part of our labour law.
- The LAC stated further that employees would be able bring an application to the Labour Court in terms of s189A(13) of the LRA prior to the dismissal, alleging non-compliance with the procedure, in which case the court could order the employer to follow fair procedure or restrain the employer from dismissing the affected employees until a fair procedure is followed. Where the employees have already been dismissed, their recourse would be limited to an application to the Labour Court challenging the substantive fairness of the dismissals in terms of s189A(18) and s189A(19) of the LRA. Alternatively, the employees have the right to embark on a protected strike in retaliation.
- The LAC accordingly held that it could not have been the intention of the legislature to invalidate or nullify dismissals and reinstate employees, and that the De Beers judgement would have the anomalous effect of removing conventional dismissals from the scope of Chapter 8 of the LRA in that dismissals would no longer be assessed on fairness but be declared invalid merely because they were premature in procedure. The Court therefore held that the De Beers case was incorrect in its interpretation of s 189A(8) of the LRA.

Hugo Pienaar and Sihle Tshetlo

CONTACT US

For more information about our Employment practice and services, please contact:

Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@dlacdh.com

Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@dlacdh.com

Johan Botes
Director
T +27 (0)11 562 1124
E johan.botes@dlacdh.com

Mohsina Chenia
Director
T +27 (0)11 562 1299
E mohsina.chenia@dlacdh.com

Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@dlacdh.com

Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@dlacdh.com

Gavin Stansfield
Director
T +27 (0)21 481 6314
E gavin.stansfield@dlacdh.com

Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@dlacdh.com

Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@dlacdh.com

Kirsten Caddy
Senior Associate
T +27 (0)11 562 1412
E kirsten.caddy@dlacdh.com

Nicholas Preston
Senior Associate
T +27 (0)11 562 1788
E nicholas.preston@dlacdh.com

Lauren Salt
Senior Associate
T +27 (0)11 562 1378
E lauren.salt@dlacdh.com

Ndumiso Zwane
Senior Associate
T +27 (0)11 562 1231
E ndumiso.zwane@dlacdh.com

Anli Bezuidenhout
Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@dlacdh.com

Katlego Letlonkane
Associate
T +27 (0)21 481 6319
E katlego.letlonkane@dlacdh.com

Inez Moosa
Associate
T +27 (0)11 562 1420
E inez.moosa@dlacdh.com

Thandeka Nhleko
Associate
T +27 (0)11 562 1280
E thandeka.nhleko@dlacdh.com

Sihle Tshetlo
Associate
T +27 (0)11 562 1196
E sihle.tshetlo@dlacdh.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG
1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN
11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

cliffedekkerhofmeyr.com

Cliffe Dekker Hofmeyr is a member of DLA Piper Group, an alliance of legal practices.

DLA CLIFFE DEKKER HOFMEYR