CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 220/22

In the matter between:

REGENESYS MANAGEMENT (PTY) LIMITED t/a REGENESYS	Applicant

and

SIBONGILE CHARLOTTE ILUNGA	First Respondent
MARIA ANTONIA OLIVEIRA DOS SANTOS	Second Respondent
MAPASEKA PATIENCE NKODI	Third Respondent
NOMPUMELELO MAHLANGU	Fourth Respondent

and

In the matter between:

SIBONGILE CHARLOTTE ILUNGA	First Applicant in cross-appeal
MARIA ANTONIA OLIVEIRA DOS SANTOS	Second Applicant in cross-appeal
MAPASEKA PATIENCE NKODI	Third Applicant in cross-appeal
NOMPUMELELO MAHLANGU	Fourth Applicant in cross-appeal
SUSARA MARIA NORTJÉ	Fifth Applicant in cross-appeal
BETH MANN	Sixth Applicant in cross-appeal
STACEY-LEIGH CHALKLEN	Seventh Applicant in cross-appeal

and

REGENESYS MANAGEMENT (PTY) LIMITED t/a REGENESYS	Respondent in cross-appeal

Neutral citation:	*Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga and Others* [2024] ZACC 8
Coram:	Zondo CJ, Maya DCJ, Kollapen J, Mathopo J, Rogers J, Schippers AJ, Theron J, Tshiqi J and Van Zyl AJ
Judgments:	Zondo CJ (majority): [1] to [242] Rogers J (concurring): [243] to [263]
Heard on:	14 September 2023
Decided on:	21 May 2024
Summary:	Employees' posts declared redundant — inadequate consultation — employees required to apply for own positions unsuccessful — selection criteria — knowledge, skills and behaviour — compensation under section 189A(13)(d) can be standalone remedy — section 189A(18) does not exclude section 189A(13) jurisdiction of the Labour Court — reinstatement — compensation.

ORDER

On appeal from the Labour Appeal Court of South Africa (hearing an appeal from the Labour Court):

1. Leave to appeal and to cross-appeal is granted.
2. The appeal is dismissed with costs including the costs of two Counsel where two Counsel were employed.
3. The cross-appeal is upheld with costs including the costs consequent upon the employment of two Counsel where two Counsel were employed.

4. Save in respect of the sixth and ninth respondents in the Labour Appeal Court (Ms Wendy Mary Malleson and Ms Ariadne David):

   (a) the decision of the Labour Appeal Court that the Labour Court had no jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements is set aside.

   (b) the order of the Labour Appeal Court on costs in that Court is hereby set aside and replaced with the following:

   "The appellant is to pay the costs of the appeal including the costs of two Counsel where two Counsel were employed."

   (c) the order of the Labour Appeal Court setting aside the order of the Labour Court on costs is hereby set aside.

   (d) the order of the Labour Court is reinstated.

JUDGMENT

ZONDO CJ (Maya DCJ, Kollapen J, Mathopo J, Schippers AJ, Theron J, Tshiqi J and Van Zyl AJ concurring):

Introduction

[1] Before us are an application for leave to appeal, and, an application for leave to cross-appeal, against certain orders of the Labour Appeal Court. The applicant in the application for leave to appeal is Regenesys Management (Pty) Limited (Regenesys). Regenesys operates as a private tertiary institution that provides certain courses including degrees to students. The respondents in Regenesys' application are Ms Sibongile Charlotte Ilunga, first respondent, Dr Maria Antonia Oliveira Dos Santos, second respondent, Ms Mapaseka Patience Nkodi, third respondent and

Ms Nompumelelo Mahlangu, fourth respondent. The respondents are former employees of Regenesys.

[2] Although I shall deal with the application for leave to cross-appeal later in this judgment, it seems appropriate to specify at this stage who the applicants in the application for leave to cross-appeal are. This is because, when I set out the factual background to this matter shortly, that background will relate not only to the respondents in the application for leave to appeal but also to the applicants in the application for leave to cross-appeal.

[3] The applicants in the application for leave to cross-appeal are:

(a) Ms Sibongile Charlotte Ilunga, the first applicant;
(b) Dr Maria Antonia Oliveira Dos Santos, the second applicant;
(c) Ms Mapaseka Patience Nkodi, the third applicant;
(d) Ms Nompumelelo Mahlangu, the fourth applicant;
(e) Ms Susara Maria Nortjé, the fifth applicant;
(f) Ms Beth Mann, the sixth applicant; and,
(g) Ms Stacey-Leigh Chalklen, the seventh applicant.

The first, second, third and fourth applicants in the application for leave to cross-appeal are the first, second, third and fourth respondents in Regenesys' application for leave to appeal. The fifth, sixth and seventh applicants in the application for leave to cross-appeal are also former employees of Regenesys who were dismissed at more or less the same time as the respondents in Regenesys' application for leave to appeal. The respondent in the application for leave to cross-appeal is Regenesys.

[4] If we grant Regenesys leave to appeal, its appeal will be against the dismissal by the Labour Appeal Court of its appeal against the Labour Court's conclusion that the dismissals of certain employees were substantively unfair and the orders of reinstatement granted by the Labour Court in favour of certain of the employees and the order of a payment of a large amount of compensation to one of the employees whose

dismissal it had found to be substantively unfair. If the cross-appeal applicants are granted leave, their appeal will be against the decision of the Labour Appeal Court that, in the light of section 189A(18)[1] of the Labour Relations Act[2] (LRA), the Labour Court has no jurisdiction to adjudicate a dispute about the procedural fairness of a dismissal for operational requirements including one that is brought in the Labour Court by way of an application in terms of section 189A(13)[3] of the LRA. They will also appeal against the order of the Labour Appeal Court setting aside the amounts of compensation awarded by the Labour Court to the employees whose dismissals it had found to have been procedurally unfair. Wherever I refer to a section or subsection in this judgment without mentioning the LRA, this will be a reference to a section or subsection of the LRA.

[5] When I refer to the respondents in the application for leave to appeal only, I shall refer to them simply as the appeal respondents. I shall refer to the applicants in the application for leave to cross-appeal as the cross-appeal applicants. When I want to refer to both the appeal respondents and the cross-appeal applicants, I shall refer to them as such or as the "employees".

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[1] Section 189A(18) of the Labour Relations Act reads:

> "(18) The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii)."

[2] 66 of 1995.

[3] Section 189A(13) of the LRA reads:

> "(13) 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–
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> (a) compelling the employer to comply with a fair procedure;
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> (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
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> (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."

Factual background

[6] The judgment of the Labour Court is very comprehensive and sets out detailed evidence heard by that Court. For that reason, I do not consider it necessary to set out the background to this case in any great detail. I shall refer only to those facts that I consider necessary for a proper understanding of this judgment and which are relevant, given the issues before this Court.

[7] Regenesys called its staff to a meeting on 17 June 2015. At that meeting the staff were informed that for some time Regenesys had been concerned about its revenue and costs and had explored certain options to deal with its challenges about revenue and costs. The management informed the staff that the options that had been considered were a bank loan, embarking upon efforts to improve the efficiency of employees and the management had not been given salary increases.

[8] The staff were also informed that there was a need for retrenchment as a result of Regenesys' financial position. The management told the staff that its wage bill made up 43% of its expenses. The staff were informed that group meetings would be held the following day to discuss the possibility of retrenchment. It is not clear that the staff had much to say in response at this meeting. Maybe this should not be surprising because it seems that Regenesys was simply informing them of what was going to happen.

[9] On 18 June 2015 meetings took place between the management and the staff of certain departments that Regenesys had identified as the affected departments. In those meetings the management showed the staff a new structure of the organisation that it had prepared with which it "proposed" to replace the then existing structure. In other words, Regenesys had decided that it needed to restructure the organisation in order to deal with its financial problems. The employees were handed the proposed structure and invited to make proposals or recommendations on the structure.

[10] Only two staff members made proposals to the management. They were Ms Nortjé and Ms Ilunga. One of the proposals made was that a facilitator from the Commission for Conciliation, Mediation and Arbitration (CCMA) be secured to facilitate the consultation. It is not clear whether Regenesys responded to this proposal but no facilitation took place. The probabilities are that Regenesys either rejected it or simply ignored it and went ahead with its plan of what it wanted to do. If it had accepted it, but there was some other reason why in the end the facilitation did not take place, Regenesys would have highlighted that such a facilitation did take place, especially when it was accused of having dismissed the employees in a procedurally unfair manner. It did not do so.

[11] On 22 June 2015 Regenesys gave the employees the final structure. That structure reflected various vacant positions. Regenesys then invited the employees to apply for positions to which they wanted to be appointed in the new structure of the organisation. The employees were required to submit their applications by 13h00 on the same day, namely, 23 June 2015. They were provided with abridged application forms to complete and submit.

[12] The positions which the employees or at least some of the employees occupied were included in the new structure as positions in respect of which applications had to be made. The employees were told that the selection criterion for filling the positions in the new structure was competence which was said to include knowledge, skills, and behaviour. The employees applied for appointment to their respective positions and other similar positions. On 24 June 2015 the employees were informed that their applications were unsuccessful and that they were then being retrenched with effect from 31 July 2015. They were informed that July would serve as their notice month. However, Ms Wendy Mary Malleson, who was an applicant in the Labour Court but is not part of the proceedings in this Court, fell sick on 23 June 2015 and was only informed of her retrenchment on 29 June 2015. Ms Chalklen took a 2.5% salary cut in order to avoid retrenchment.

[13] On 5 August 2015 Ms Malleson was informed that her performance was not commensurate with her salary. Ms Brownlee and Dr Law of the management of Regenesys informed her that her job could be outsourced for R12 000 per month. This was R40 000 less than her monthly salary. Ms Brownlee and Dr Law handed her a separation agreement to sign. When she rejected the separation agreement, Regenesys gave her a written notice in terms of section 189(3)[4] and dismissed her in a meeting held on 17 August 2015. A notice in terms of section 189(3) tells the employee that the employer contemplates his or her dismissal for operational requirements and invites the employee to a consultation on the issues which are set out in the provision.

[14] Ms Mann was offered the position of Marketing Database Co-ordinator but she rejected that offer. In her evidence Ms Brownlee testified that the reason for Ms Mann's retrenchment – when it was contemplated – was recorded by Regenesys as being that Regenesys was implementing a new business model and organisational structure to improve operational efficiencies and effectiveness. Ms Brownlee said that the reason why the section 189(3) notices did not say that the retrenchment was due to Regenesys' financial problems was that it did not want to alarm the external markets about its financial position as that could have had dire consequences for it and could have scared

[4] Section 189(3) reads:

> "(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to–
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> (a) the reasons for the proposed dismissals;
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> (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
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> (c) the number of employees likely to be affected and the job categories in which they are employed;
>
> (d) the proposed method for selecting which employees to dismiss;
>
> (e) the time when, or the period during which, the dismissals are likely to take effect; the severance pay proposed;
>
> (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
>
> (h) the possibility of the future re-employment of the employees who are dismissed;
>
> (i) the number of employees employed by the employer; and
>
> (j) the number of employees that the employer has dismissed for reasons based on its operation requirements in the preceding 12 months."

off students. Regenesys stated that the employees, including the appeal respondents and the cross-appeal applicants, were selected for retrenchment because they did not meet the selection criteria of knowledge, skills and behaviour in respect of the positions that they had applied for. Strangely, some of the positions to which at least some of the appeal respondents and cross-appeal applicants were not appointed were the positions that they occupied for some time before they were retrenched.

[15] After the employees had received their letters of dismissal and even before 31 July 2015 – which was the date from which the dismissals would take effect – the employees referred to the CCMA for conciliation an unfair dismissal dispute in which they contended that their dismissals were both procedurally and substantively unfair. That dispute was conciliated by the CCMA on 13 August 2015 but the conciliation was unsuccessful. The CCMA issued a certificate that the dispute remained unresolved. The employees then referred that dispute to the Labour Court. From their affidavit in the section 189A(13) application it seems that the dispute that they referred to the Labour Court for adjudication in terms of section 191(5) concerned both the procedural and substantive fairness of their dismissals. As will be seen below, on or about 8 September 2015 they applied in the Labour Court for the adjudication of their dispute with Regenesys concerning the procedural fairness of their dismissals and asked for temporary reinstatement or compensation. The dismissals took effect on 31 July 2015.

Labour Court

[16] As stated earlier, the appeal respondents and the cross-appeal applicants were dismissed by Regenesys with effect from 31 July 2015 except one who was dismissed some time in August 2015. As already stated, on or about 8 September 2015 the appeal respondents and the cross-appeal applicants instituted an application in the Labour Court in terms of section 189A(13) for an order reinstating them in Regenesys' employment until Regenesys had complied with a fair procedure in terms of section 189A(13)(c) or alternatively for the award of compensation in terms of section 189A(13)(d).

[17] The employees brought their section 189A(13) application as an urgent application. The first prayer they sought in their notice of motion was condonation for instituting the application outside the prescribed period of 30 days. The second was "dispensing with the provisions of the rules relating to times and the manner of service in dealing with this matter as one of urgency in terms of Rule 8 of the Rules" of the Labour Court "should the Court upon case management so direct". The third prayer was: "Directing [Regenesys] to reinstate the [applicants] until such time as it has complied with a fair procedure in terms of section 189A alternatively awarding the applicants compensation in respect of procedurally unfair dismissals". They also asked that "those who oppose this application" be ordered to pay the costs thereof.

[18] In the founding affidavit filed in support of the section 189A(13) application – which was deposed to by Ms Nortjé – the employees made this request to the Labour Court:

> "The applicants request that a Judge be appointed in terms of item 11.1 of the above Honourable Court's Practice Manual to *undertake management of this case and to ensure an expedited hearing of the matter*." (Emphasis added.)

At some stage the Labour Court, through Gush J, consolidated both matters, namely the one referred to the Labour Court in terms of section 191(5)(b)(ii) and the application under section 189A(13). The Labour Court also condoned the employees' late filing of their section 189A(13) application. Gush J ordered that the two matters be adjudicated together.

[19] In due course the two consolidated matters came before Prinsloo J for trial. The Court found the dismissal of all the employees to have been procedurally unfair. It found the dismissal of some of the employees to have been substantively unfair as well and that of others to have been substantively fair. Those whose dismissals were found to have been both substantively and procedurally unfair were—

(a) Ms Ilunga;

(b) Dr Dos Santos;

(c) Ms Nkodi; and

(d) Ms Mahlangu.

Those whose dismissals were found to have been procedurally unfair only were—

(a) Ms Nortjé;

(b) Ms Mann;

(c) Ms Malleson;

(d) Ms Chalklen; and

(e) Ms Ariadne David (she, like Ms Malleson, was an applicant in the Labour Court but is not a party in this Court).

Two of these, namely, Ms Malleson and Ms David, appeal against the decision of the Labour Appeal Court setting aside the Labour Court's order against Regenesys for the the payment of compensation.

[20] The Labour Court ordered Regenesys to reinstate Ms Ilunga, Ms Nkodi and Ms Mahlangu with effect from the dates of their respective dismissals. Although Dr Dos Santos' dismissal was found to have been both substantively and procedurally unfair, the Labour Court did not order her reinstatement but ordered that she be paid R766 378.08 which was the equivalent of 12 months' remuneration calculated at her rate of remuneration as at the date of dismissal. This was because, by the time the Labour Court gave judgment in February 2020, Dr Dos Santos had already reached her retirement age. Those in whose favour reinstatement orders were made were ordered to repay the severance pay they had received on retrenchment. Regenesys was given the right to effect a set-off in respect of what it had to pay the employees who were to be reinstated and what the employee had to repay to the employer.

[21] The Labour Court awarded compensation to the cross-appeal applicants whose dismissals it found to have been procedurally unfair only. Here are the amounts of compensation that the Labour Court ordered in their favour:

(a)	Ms Nortjé:	R429 999.96 (12 months' remuneration)
(b)	Ms Mann:	R262 359.36 (12 months' remuneration)
(c)	Ms Malleson:	R410 970.00 (12 months' remuneration)
(d)	Ms Chalklen:	R312 000.00 (6 months' remuneration)
(e)	Ms David:	R384 936.72 (12 months' remuneration)
(f)	Dr Dos Santos	R766 378.08 (12 months' remuneration)

The Labour Court ordered Regenesys to pay the appeal respondents' and cross-appeal applicants' costs. It gave specific reasons as to why it was ordering Regenesys to pay costs when the norm in labour matters is that no costs are awarded.

[22] The Labour Court dealt with the case of each one of the employees before it and gave reasons why it found their dismissals to have been either substantively fair or substantively unfair. It also gave reasons for its conclusion that the dismissal of all the employees was procedurally unfair. It then made the orders it made as already indicated above. I do not consider it necessary to record the reasons given by the Labour Court for its conclusion that the dismissals of certain of the employees were substantively unfair. I also do not record its reasons for its conclusions that the dismissal of all the employees was procedurally unfair. This is because it is either common cause or not seriously disputed that Regenesys did not comply with a fair procedure in dismissing the employees. In any event, for both findings the Labour Court gave detailed reasons in respect of each individual. Other than its reliance on knowledge, skills and behaviour as the selection criteria that were used by Regenesys, the Labour Court's reasons for finding substantive unfairness are not challenged.

Labour Appeal Court

[23] Regenesys applied for and was granted leave to appeal to the Labour Appeal Court against certain orders of the Labour Court. Before the Labour Appeal Court Regenesys challenged the conclusions reached by the Labour Court that the dismissals of certain specified employees were substantively

unfair and that it had jurisdiction to determine whether the dismissals of the employees were procedurally unfair.

[24] In the Labour Appeal Court Regenesys contended that the skills, knowledge and behaviour that Regenesys had said during the consultation process and in the trial were the selection criteria that had been used were actually not selection criteria. In other words, Regenesys was saying that, to the extent that the Labour Court made its decision on the basis that skills, knowledge and behaviour were the selection criteria used, it was wrong. Skills, knowledge and behaviour were, Regenesys argued, the criteria used when the affected employees applied for positions in the new structure. Regenesys thus distinguished between selection criteria for retrenchment and assessment criteria for competition for new positions. Regenesys relied on the decision of the Labour Appeal Court in *Louw*[5] in support of this contention.

[25] The Labour Appeal Court rejected Regenesys' contention. It distinguished the case of *Louw*. The Labour Appeal Court, therefore, rejected Regenesys' contention that the Labour Court had erred in concluding that the dismissals of certain of the employees were substantively unfair. From the judgment of the Labour Appeal Court this seems to have been the only point argued by Regenesys to challenge the conclusion of the Labour Court on the substantive unfairness of the dismissals of some of the employees. Accordingly, Regenesys' appeal against the findings of the Labour Court that the dismissals of certain of the employees were substantively unfair was dismissed.

[26] With regard to whether or not the Labour Court had jurisdiction to determine the procedural fairness of the dismissals of the employees for operational requirements, the Labour Appeal Court concluded on the basis of section 189A(18) that the Labour Court had no jurisdiction to determine such an issue. It held that it was not competent for the Labour Court to make the orders it made that were based on its conclusion that the dismissals were procedurally unfair. In support of its conclusion in this regard the

[5] *South African Breweries (Pty) Ltd v Louw* [2017] ZALAC 63; [2018] 1 BLLR 26 (LAC); (2018) 39 ILJ 189 (LAC).

Labour Appeal Court relied on this Court's judgment in *CC Steenkamp II*.[6] I shall deal with this further later in this judgment.

[27] The Labour Appeal Court then made the following order:

> "1. The appeal succeeds.
>
> 2. The orders of the Labour Court are set aside and replaced as follows:
>
> '1. The dismissals of the second, third, fifth and seventh applicants [Ms Ilunga, Dr Dos Santos, Ms Nkodi and Ms Mahlangu respectively] are found to be substantively unfair;
>
> 2. The respondent is to retrospectively reinstate the second, fifth and seventh applicants, with effect from the date of dismissal, into the same or similar positions held by them at the time of their dismissal, with no loss of benefits;
>
> 3. The second, fifth and seventh applicants are to repay any amount received from the respondent as severance pay, or set off any such amount paid to them by the respondent in respect of severance pay against the back pay due to them;
>
> 4. The respondent is within fourteen (14) days of this order to pay to the third applicant [Dr Dos Santos] compensation in the sum of R766 378.08, being equivalent to 12 months' remuneration calculated at the rate of remuneration which applied on the date of dismissal;
>
> 5. There is no order as to costs.'
>
> 3. The appeal against the order of the Labour Court dismissing the appellant's application to adduce further evidence is dismissed.
>
> 4. There is no order as to costs."

[6] *Steenkamp v Edcon Limited* [2019] ZACC 17; 2019 (7) BCLR 826 (CC); [2019] 11 BLLR 1189 (CC); (2019) 40 ILJ 1731 (CC).

It is necessary to make a few observations in regard to this order but the proper place to make them is not now but later in this judgment.

In this Court

Jurisdiction

[28] As I have already stated earlier, Regenesys applies for leave to appeal against the judgment and order of the Labour Appeal Court in terms of which that Court upheld the conclusion of the Labour Court that the dismissals of some of the employees were substantively unfair and ordered their reinstatement and payment of a large sum of compensation to one of those employees. The cross-appeal applicants apply for leave to cross-appeal against the conclusion of the Labour Appeal Court that the Labour Court had no jurisdiction to determine the procedural fairness of the dismissals for operational requirements of the employees in whose favour the Labour Court had made a declaratory order on procedural fairness and ordered Regenesys to pay them compensation. The cross-appeal applicants also appeal against the Labour Appeal Court's reversal of the costs orders which the Labour Court made in their favour.

[29] This matter relates to the interpretation and application of the LRA which is legislation enacted to give effect to section 23 of the Bill of Rights. In terms of this Court's decision in *NEHAWU*[7] and a number of judgments which have since followed that decision, such a matter raises a constitutional issue. For this reason, this Court has jurisdiction to entertain this matter.

[30] Furthermore, if we grant the cross-appeal applicants leave to cross-appeal, the cross-appeal will raise not only a question of the interpretation of the LRA but also a question of law of general public importance that deserves to be considered by this

[7] *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town* [2002] ZACC 27; 2003 (2) BCLR 154 (CC); 2003 (3) SA 1 (CC).

Court. That question is whether, given the provisions of section 189A(18), the Labour Court has jurisdiction to determine disputes about the procedural unfairness of dismissals of employees for operational requirements in general or the procedural fairness of a dismissal of employees for operational requirements to which section 189A applies and where such employees bring an application before the Labour Court in terms of section 189A(13). The Labour Appeal Court held that the Labour Court did not have jurisdiction to adjudicate the procedural fairness of a dismissal for operational requirements. This decision meant that the Labour Court did not have jurisdiction to adjudicate such matters even when they have been brought to the Labour Court by way of an application in terms subsection (13). It based this conclusion on this Court's judgment in *CC Steenkamp II*.

[31] If the Labour Appeal Court's interpretation is correct, it would mean that the Labour Court's jurisdiction to determine a dispute about the procedural fairness of a dismissal for operational requirements is completely ousted irrespective of whether the dispute was referred to the Labour Court in terms of section 191(5)(b)(ii) or section 189A(13). This is so because in the present matter the Labour Appeal Court's decision that the Labour Court had no jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements is unqualified and was used in the present case to preclude the adjudication of a subsection (13) application. That interpretation may well be inconsistent with an employee's fundamental right to fair labour practices enshrined in section 23(1)[8] of the Constitution and section 34[9] of the Constitution which guarantees every person the right to have their justiciable disputes adjudicated by a court in a fair public hearing or, in an appropriate case, another

[8] Section 23(1) of the Constitution reads:

> "(1) Everyone has the right to fair labour practices."

[9] Section 34 reads:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

independent tribunal or forum. It may also be inconsistent with section 38[10] of the Constitution.

[32] I, therefore, conclude that this Court has jurisdiction in respect of this matter.

Leave to appeal

[33] The next question is whether it is in the interests of justice to grant leave to appeal and leave to cross-appeal. One of the arguments that Regenesys wishes to advance – on appeal if it is granted leave to appeal – is that skills, knowledge and behaviour which it had said at the trial were the selection criteria that it had used to select the employees who were dismissed are not actually selection criteria as contemplated in section 189(7). If this contention were to be upheld, this matter is likely to affect the labour relations community in general and not just the parties before us. Furthermore, the interpretation of section 189A(18) with regard to the jurisdiction of the Labour Court to adjudicate disputes about the procedural fairness of dismissals for operational requirements in general or those referred to the Labour Court in terms of section 191(5)(b)(ii) or with regard to applications in terms of section 189A(13) will affect many workers and employers. With regard to the prospects of success, I am of the opinion that, if leave to appeal and leave to cross-appeal, are granted, the appeal and cross-appeal have reasonable prospects of success. The issues in this matter are very important. It is in the interests of justice to grant both sides the leave each side seeks.

[10] Section 38 of the Constitution reads:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members."

[34] Furthermore, this matter makes it necessary for this Court to examine the correctness or accuracy of decisions of the Labour Court, Labour Appeal Court and this Court which contain statements or have held that the Labour Court has no jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements in general or those brought before the Labour Court in terms of section 189A(13). There appears to be confusion about whether the Labour Court's general jurisdiction with regard to such disputes has been ousted by section 189A(18). There are a number of cases in the Labour Appeal Court and this Court which contain statements which either suggest that the Labour Court no longer has jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements including those brought to the Labour Court in terms of subsection (13) or that suggest that it no longer has jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements referred to the Labour Court in terms of section 191(5)(b)(ii).[11] It is in the interests of justice that this Court brings about clarity in this regard.

[35] It is in the interests of justice to grant both the leave to appeal and the leave to cross-appeal.

Appeal

Substantive fairness

[36] The first issue that Regenesys raises on appeal is the Labour Court's conclusion that the dismissal of certain of the employees was substantively unfair which the Labour Appeal Court refused to overturn. Regenesys contends that what the Labour Court accepted as the selection criteria that were used to select the employees

[11] *Steenkamp v Edcon Ltd* [2016] ZACC 1; 2016 (3) SA 251 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); (2016) 37 ILJ 564 (CC) at paras 15-8; *Edcon Ltd v Steenkamp* [2017] ZALAC 81; [2018] 3 BLLR 230 (LAC); (2018) 39 ILJ 531 (LAC) at para 19; *CC Steenkamp II* above n 6 at paras 48 and 70; *Solidarity obo Members v Barloworld Equipment Southern Africa*, unreported judgment of the Labour Court, Case No J950 and 913/20 (2 October 2020) at paras 7-13; *Solidarity obo Members v Barloworld Equipment Southern Africa* [2022] ZACC 15; [2022] 9 BLLR 779 (CC); (2022) 43 ILJ 1757 (CC); 2023 (1) BCLR 51 (CC) at paras 65-8; *Regenesys Management (Pty) Ltd t/a Regenesys v Nortje* [2022] ZALAC 96; (2022) 43 ILJ 2745 (LAC) at paras 15 and 17.

who were dismissed were actually not the selection criteria. This was a reference to skills, knowledge and behaviour which Regenesys had told the employees during its interactions with them prior to their dismissals were the selection criteria that would be used to fill the vacant positions. It was understood by all concerned that any employee who was not appointed in one of the vacant positions would be dismissed for operational requirements. Indeed, Regenesys' case before the Labour Court was that skills, knowledge and behaviour were the selection criteria it had used to select the employees who were ultimately dismissed.

[37] The employees ran their trial on the basis that the selection criteria used to select those to be dismissed for operational requirements were skills, knowledge and behaviour. It was only in its appeal in the Labour Appeal Court that Regenesys contended, for the first time, that skills, knowledge and behaviour were not the selection criteria for retrenchment but the assessment criteria in the competitive process of applying for positions in the new structure. It relied, for this submission, on the judgment of the Labour Appeal Court in *Louw*. I am unable to find anything in *Louw* which supports the submission that skills, knowledge and behaviour, in general, do not or cannot constitute selection criteria or that in this case they were not used as selection criteria.

[38] Regenesys seems to contend that the presence of the competitive process relating to the filling of vacant positions between the declaration of the employees' positions as redundant and their ultimate dismissals after they had not been successful in their applications for those vacancies means that they became disentitled to be selected according to selection criteria that were fair and objective if the selection criteria had not been agreed between the parties. I say this because, if skills, knowledge and behaviour were not selection criteria, then the case must be decided on the basis that the selection of the employees for retrenchment was not based on any known selection criteria. Such a dismissal would be substantively unfair.

[39] The answer to Regenesys' contention is that the Court cannot rely on this contention to assess the conclusion reached by the Labour Court on whether the dismissal of some of the employees was substantively unfair because the trial was run by both parties on the footing that skills, knowledge and behaviour were the selection criteria that were used by Regenesys to select these employees for dismissal. It would be extremely prejudicial to the employees to now decide the appeal on the basis that the selection criteria were not skills, knowledge, and behaviour. In fact it will be prejudicial to Regenesys itself. It does not seem prudent on Regenesys' part to advance this argument because, if accepted, it would result in a situation where Regenesys would have no selection criteria to rely on for the selection of the employees for dismissal. It would not have anything to rely on in the record as having been the selection criteria that were used and that were disclosed to the employees prior to their retrenchment. That would compound the unfairness of the dismissal, including at a substantive level. In these circumstances, this contention cannot be entertained.

[40] Regenesys also contends that the Labour Court erred in rejecting its submission that it (i.e. the Labour Court) was not entitled to entertain the employees' contention that it (i.e. Regenesys) applied the selection criteria unfairly. This contention is based on the proposition that, although the pre-trial minute agreed to between the parties reflected that this was one of the issues to be decided by the Court, the employees did not subsequently amend their statement of claim to include this issue. Regenesys submits that, in the absence of such an amendment, the Labour Court erred in entertaining this point. According to Regenesys, on the pleadings the dismissed employees were confined to a case that the selection criteria were unfair, not that they were unfairly applied.

[41] There is a short answer to this contention. This is an appeal against a judgment and order of the Labour Appeal Court. Therefore, there must be an order or finding or failure to make a finding by the Labour Appeal Court which Regenesys submits was erroneous. In order for Regenesys' appeal against the judgment of the Labour Appeal Court to succeed, Regenesys must show that the Labour Appeal Court

erred in a certain respect. Regenesys cannot contend, and, this Court cannot conclude, that the Labour Appeal Court erred in regard to a certain point or finding unless it was required to consider that point or finding.

[42] If it was not part of Regenesys' case before the Labour Appeal Court that the Labour Appeal Court should consider or reassess a certain finding or point, the Labour Appeal Court will not have erred if it did not deal with that point. In fact, if the Labour Appeal Court considered a finding or point that was not in issue between the parties in the Labour Appeal Court, any party adversely affected by its conclusion on such point may legitimately complain. In fact it would even be a ground of appeal that the Labour Appeal Court made an adverse finding on a point which was not in issue between the parties.

[43] An exception to this would be a point of law because a court may raise a point of law *mero motu* if the point does not need any new evidence to be led and if it would not be unfair to one or both parties for the court to consider and take into account that point of law. A reading of the judgment of the Labour Appeal Court does not reveal that that Court ever dealt with this issue or with the Labour Court's decision or conclusion rejecting Regenesys' contention in this regard. Indeed, a reading of Regenesys' notice of appeal to the Labour Appeal Court reveals that Regenesys did not challenge the Labour Court's conclusion or finding that the employees' pleadings covered the point that Regenesys had applied the selection criteria unfairly. That explains why the judgment of the Labour Appeal Court did not deal with this issue.

[44] Can a party challenge in the second or further appeal court a finding or conclusion adverse to it that was made by the court of first instance which it did not challenge in the first appeal court? The answer is: When a party appeals to a second or further appeal court, it appeals against a judgment or order or conclusion of the first appeal court. It does not appeal against the judgment and order of the court of first instance. Therefore, a finding or conclusion or order of the court of first instance that a party did not appeal against or challenge in its appeal to the first appeal court cannot be

appealed against or challenged by such a party in an appeal to a second or further appeal court. In this case Regenesys applied to this Court for leave to appeal against the judgment and order of the Labour Appeal Court and not against the judgment and order of the Labour Court. It, therefore, cannot challenge in this Court a finding or conclusion or order of the Labour Court that it did not include in its appeal to the Labour Appeal Court. Therefore, its contention in this regard falls to be rejected.

[45] Regenesys also contends that the Labour Appeal Court erred in not setting aside the orders of reinstatement that were made by the Labour Court pursuant to its conclusion that the dismissals of certain of the appeal respondents and cross-appeal applicants were substantively unfair. It submits that the Labour Appeal Court should have set aside those orders. In support of this submission Regenesys referred to the fact that the appeal respondents and the cross-appeal applicants had not given or led any evidence including evidence about their personal circumstances. The Labour Court gave comprehensive reasons why it found that the dismissals of certain of the employees were substantively unfair. The Labour Appeal Court also concluded that there was no proper basis advanced by Regenesys that would justify interfering with the Labour Court's conclusion in this regard. I agree that there were proper grounds for the Labour Court to find that the dismissals were substantively unfair. I am here referring to the dismissal of the employees that the Labour Court found to have been substantively unfair.

[46] Regenesys also contended that, in granting orders of reinstatement in favour of certain specified employees, the Labour Court had failed to have regard to the provisions of section 193(2) and, for that reason, the orders of reinstatement that it made should be set aside and the employees concerned should be awarded compensation. This contention was advanced in the event that this Court was not persuaded to overturn the Labour Court's conclusions that the dismissals of certain employees were substantively unfair. In support of its contention Regenesys quoted certain passages

from the judgment of this Court in *SARS*[12] and the Labour Appeal Court's judgment in *Mediterranean Textile Mills (Pty) Ltd.*[13]

[47] This contention cannot be entertained. There is no indication in the judgment of the Labour Appeal Court that it was part of Regenesys' appeal before that Court that the Labour Court had erred in granting reinstatement to specified employees because it failed to have regard to section 193(2). Indeed, a reading of the notice of appeal to the Labour Appeal Court reveals that there was no appeal by Regenesys to the Labour Appeal Court against the alleged failure of the Labour Court to have regard to section 193(2). Regenesys may not appeal to this Court against a finding or conclusion made by the Labour Court which it (i.e. Regenesys) did not challenge in its appeal to the Labour Appeal Court.

[48] Furthermore, the orders that the reinstatement in each case be retrospective to the date of dismissal of each employee in whose favour the finding of substantive unfairness had been made was also justified because:

(a) there is no suggestion that the employees were responsible for any delay in the finalisation of the matters; instead Regenesys had caused some long delays;

(b) Regenesys had failed to engage in proper consultations which may have avoided the dismissals of the appeal respondents and the cross-appeal applicants and this litigation; and

(c) Regenesys had not been honest with the employees when it purported to consult with them in that it did not inform them about the role of its financial problems in the decision to restructure the organisation and to retrench.

[12] *South African Revenue Services v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; [2017] 1 BLLR 8 (CC); 2017 (1) SA 549 (CC); (2017) 38 ILJ 97 (CC) at para 38.

[13] *Mediterranean Textile Mills (Pty) Ltd v SA Clothing & Textile Workers Union* [2011] JOL 28117 (LAC); [2012] 2 BLLR 142 (LAC); (2012) 33 ILJ 160 (LAC) at para 30.

[49] Regenesys also challenged on appeal the Labour Appeal Court's failure or refusal to interfere with the Labour Court's award of compensation of 12 months' remuneration to the second respondent, Dr Dos Santos. It contended that the Labour Court or Labour Appeal Court had not had due regard to the following:

(a) Dr Dos Santos did not testify as to her personal circumstance.
(b) Dr Dos Santos did not seek clarity on the retrenchment process.
(c) Regenesys had a justifiable reason to embark upon a retrenchment exercise.
(d) Regenesys' financial position and Dr Dos Santos' conduct just prior to the retrenchment.

The contention was in effect that, if the Labour Court had had due regard to the above factors, Dr Dos Santos would not have been awarded the maximum compensation permitted in law, namely 12 months' remuneration.

[50] I shall deal with the question whether the Labour Court had jurisdiction to deal with the procedural fairness or otherwise of the dismissal of the employees and the power to order payment of compensation when I deal with the cross-appeal. However, for purposes of dealing with Regenesys' contention, I am able to say that, assuming that the Labour Court had the requisite jurisdiction, it was justified in rejecting Regenesys' contention in this regard once it accepted that the appeal respondents whose dismissals it had found to have been substantively unfair had to be reinstated retrospectively from the dates of their respective dismissals. Those appeal respondents were effectively awarded back pay of over four years.

[51] Regenesys also submitted that the Labour Court should have granted it leave to adduce the further evidence it applied for leave to adduce after it had closed its case which the Labour Court had dismissed. Regenesys contended that the Labour Appeal Court erred in upholding the decision of the Labour Court. The Labour Appeal Court gave persuasive reasons as to why the Labour Court did not err in dismissing Regenesys' application to adduce further evidence. I agree with those reasons. It is not necessary to repeat those reasons here. They can be found in the

Labour Appeal Court's judgment. Accordingly, Regenesys' contention in this regard falls to be rejected.

[52] The orders of reinstatement were justified because:

(a) the dismissals had been found to have been substantively unfair;

(b) reinstatement is the primary remedy for substantively unfair dismissal unless the employer proves one or more of the exceptions listed in section 193 of the LRA which Regenesys did not prove; and

(c) these were no-fault terminations in the sense that the employees were not dismissed because they had done anything wrong. The employees were dismissed at the end of July 2015 and the Labour Court handed down its judgment on 19 June 2019.

There would have been no justification for the Labour Court to award Dr Dos Santos compensation that was less than 12 months' remuneration when her dismissal had been found to have been substantively unfair where her colleagues whose dismissals had also been found to have been substantively unfair were granted retrospective reinstatement that effectively gave them four years' backpay.

[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.

The cross-appeal

Disputes about the procedural fairness of dismissals for operational requirements

[54] In the present case the Labour Appeal Court upheld Regenesys' appeal against the conclusion of the Labour Court that the Labour Court had jurisdiction to adjudicate a dispute about the procedural fairness of a dismissal for operational requirements. The cross-appeal applicants cross-appeal against the decision of the Labour Appeal Court that, given the provisions of section 189A(18) of the LRA, the Labour Court did not have jurisdiction to adjudicate a dispute about the procedural fairness of a dismissal for operational requirements.

[55] Once the Labour Appeal Court had concluded that the Labour Court did not have such jurisdiction, it set aside the declaration that had been made by the Labour Court that the dismissals of employees were procedurally unfair. It also set aside the compensation orders that the Labour Court had made in favour of those employees whose dismissals it had found to have been procedurally unfair only. The cross-appeal applicants also cross-appeal against those orders. The Labour Appeal Court's conclusion that the Labour Court did not have jurisdiction to adjudicate the dispute about the procedural fairness of a dismissal for operational requirements meant that the Labour Court should have refused to adjudicate the cross-applicants' application brought in terms of section 189A(13).

[56] The issue for determination in the cross-appeal is whether, given the provisions of section 189A(18), the Labour Court has jurisdiction to adjudicate a dispute about the procedural fairness of a dismissal for operational requirements including one brought to the Labour Court in terms of section 189A(13). Regenesys contends that the Labour Court has no such jurisdiction because that jurisdiction has been ousted by section 189A(18). The employees contend that the Labour Court does have jurisdiction in respect of disputes about the procedural fairness of dismissals for operational

requirements to which section 189A applies which are brought in the Labour Court by way of applications in terms of section 189A(13).

[57] The determination of the issue in this cross-appeal requires a consideration of section 189A(13), (18) and other provisions of the LRA. It is convenient to start with the issue of the circumstances under which the orders under subsection (13) may be granted. It is important to address right at the outset the question of the circumstances in which section 189A applies. That is to be found in section 189A(1). This provision reads:

> "(1) This section applies to employers employing more than 50 employees if–
>
> (a) the employer contemplates dismissing by reason of the employer's operational requirements, at least–
>
> (i) 10 employees, if the employer employs up to 200 employees;
>
> (ii) 20 employees, if the employer employs more than 200, but not more than 300, employees;
>
> (iii) 30 employees, if the employer employs more than 300, but not more than 400, employees.
>
> (iv) 40 employees, if the employer employs more than 400, but not more than 500, employees; or
>
> (v) 50 employees if the employer employs more than 500 employees; or
>
> (b) the number of employees that the employer contemplates dismissing together with the number of employees that have been dismissed by reason of the employer's operational requirements in the 12 months prior to the employer issuing a notice in terms of section 189(3), is equal to or exceeds the relevant number specified in paragraph (a)."

[58] It is clear from this provision that section 189A applies to dismissals for operational requirements by employers who employ more than 50 employees when they

contemplate dismissing certain numbers of employees in their workforce for operational requirements. As is the case with employers to which section 189A does not apply, employers to whom section 189A applies are obliged to consult with employees or their representatives if they contemplate such employees' dismissals for operational requirements. Section 189A(2) to (12) places various obligations on the employer and employees which are aimed at enhancing or enriching the consultation process so as to avoid or minimise mass retrenchments or disputes about mass retrenchments.

[59] Section 189A(13) then provides that, if an employer does not comply with a fair procedure, a consulting party may approach the Labour Court for certain orders listed therein. Subsection (13) reads:

> "(13) 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."[14]

Interpretative approach

[60] The determination of the issues that are raised by the cross-appeal require an interpretation of sections 189A(13), (14), (18) and 191(5)(b)(ii) of the LRA. It is, therefore, important to bear in mind the correct approach to the interpretation not only of legislation in general but also of the LRA in particular.

[14] Section 189A(13) of the LRA.

[61] Section 39(2) of the Constitution deals with the interpretation of legislation. It reads:

> "(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[15]

In *Hyundai*[16] this Court explained the purport and objects of the Bill of Rights thus:

> "[22] The purport and objects of the Constitution find expression in section 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."[17]

[62] Section 3 of the LRA provides that anyone interpreting or applying the LRA must do so with due regard to the purpose of the LRA, its primary objects, consistently with the Constitution and in furtherance of section 23 of the Constitution. Section 23(1) of the Constitution reads:

> "Labour Relations
> 23. (1) Everyone has the right to fair labour practices."

[63] The purpose of the LRA is to:

> "[A]dvance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are—

[15] Section 39(2) of the Constitution.

[16] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC).

[17] Id at para 22.

(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can—

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(d) to promote—

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and

(iv) the effective resolution of labour disputes."[18]

Among the above primary objects of the LRA, I emphasise the ones contained in paragraphs (a) and (d)(iv). It is now settled that the correct approach to the interpretation of the LRA is purposive interpretation.

Background to the right not to be dismissed unfairly under the LRA

[64] Prior to our constitutional democracy the courts of South Africa had developed an extensive unfair labour practice jurisprudence since the establishment of the Industrial Court of South Africa in the early 1980s. By the advent of democracy in 1994, that Court, together with the old Labour Appeal Court which was established in 1988 and, to some extent, the then Appellate Division of the Supreme Court of South Africa, which is now the Supreme Court of Appeal, had built upon and consolidated that jurisprudence.

[18] Section 1 of the LRA.

[65] That unfair labour practice jurisprudence was based effectively on a definition of the phrase "unfair labour practice" in the Labour Relations Act 1956[19] as amended (1956 LRA). In fact, that Act, as amended, effectively meant that the Industrial Court had jurisdiction to determine disputes of alleged unfair labour practices between employers and employees and to grant a remedy where it considered it appropriate to do so. That right included the workers' right not to be dismissed unfairly. In turn, that right included a component that an employee had to be afforded an opportunity to be heard (including the right to be consulted before any termination for operational requirements) before he or she could be dismissed. That is the component that relates to procedural fairness.

[66] One component of the right not to be dismissed unfairly is that there must be a valid or fair reason before an employee may be dismissed. When, therefore, the Constitution proclaimed in 1997 in section 23 that every worker was entitled to fair labour practices, an element of that right included the right not to be dismissed unfairly which in turn has two components, the one being every worker's right not to be dismissed without being afforded an opportunity to be heard and, the other being the worker's right not be dismissed without a fair reason. These two components of the right not to be dismissed unfairly related, respectively, to procedural fairness and substantive fairness of the right not to be dismissed unfairly.

[67] The LRA, a piece of legislation enacted to give effect to section 23 of the Constitution, provides in section 185 for a right not to be dismissed unfairly and a right not to be subjected to an unfair labour practice. Section 187 of the LRA describes when a dismissal is automatically unfair. Then section 188 deals with dismissals other than those that are automatically unfair. It reads:

> "188 Other unfair dismissals
>
> (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove—
>
> (a) that the reason for dismissal is a fair reason—

[19] 28 of 1956.

(i) related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure."

[68] Section 193(1) deals with the remedies that a court or an arbitrator may grant in a case where it has concluded that an employee's right not to be dismissed unfairly has been violated or infringed. The remedies include reinstatement, re-employment and payment of compensation. Section 193(2) enjoins the Labour Court, or, an arbitrator, to order the employer to reinstate the employee if it or he or she finds the dismissal to have been without a fair reason – in other words, if the court or an arbitrator finds the dismissal substantively unfair unless one of four exceptions provided for therein is present. One of the exceptions is where the dismissal is unfair only because the employer did not follow a fair procedure. In such a case reinstatement is not competent and the only remedy is payment of compensation by the employer.

[69] Prior to the amendment that was brought about by the insertion of section 189A into the LRA in 2002, the only adjudication of the procedural fairness of a dismissal that could competently be undertaken by the Labour Court was the one provided for in section 191(5). That was the case whether the only issue to be decided by the Court was the procedural fairness or otherwise of a dismissal or both the procedural and the substantive fairness of the dismissal. If its conclusion was that the dismissal was procedurally unfair, it would generally award the employee compensation.

[70] Whereas in those cases where the Labour Court had found a dismissal to be substantively unfair, it could be concerned about ordering reinstatement if a long time had lapsed between the date of dismissal and the date of adjudication, no such concern would arise in relation to ordering payment of compensation. If the Court, having found that a dismissal was substantively unfair, felt reluctant to order the employee's reinstatement because of the long period that had passed since the dismissal, it would

order payment of compensation. In other words, while there may be some concerns with the ordering of the reinstatement of an employee or group of employees after the lapse of a long time between the date of dismissal and the date of adjudication, there is never such a concern with regard to an order for the payment of compensation.

[71] Both before 1994 and for many years after the LRA had come into operation mass retrenchments were not subject to a legal regime that was different to the legal regime applicable to individual dismissals. The law was the same for all employers of different sizes and shapes. However, later, a special dispensation was enacted for large scale employers by way of section 189A. The relevance of this history will become apparent later.

Purpose, meaning and scope of section 189A(13)

[72] If an employer to which section 189A applies does not comply with a fair procedure, employees may approach the Labour Court for one or other relief specified in section 189A(13)(a), (b), (c) and (d). Section 189A(13) provides:

> "If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of 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."

[73] There is a common feature that the orders contemplated in paragraphs (a) to (c) share. They all end with the phrase "with a fair procedure" but the provisions relating to an order contemplated in paragraph (d) do not end with such a phrase. Another

feature that is shared by paragraphs (a) to (c) is the word that precedes that phrase in each of the first three paragraphs. It is the verb "comply" in different forms. In paragraph (a) it is "to comply", in paragraph (b) it is "complying" and in paragraph (c) it is "complied". Paragraph (d) does not have the verb "comply" in any form or shape.

[74] Why do paragraphs (a) to (c) share common features among themselves which they do not share with paragraph (d)? The reason is that section 189A(13) has two purposes. The one purpose, which may be called the primary purpose, relates to orders contemplated in paragraphs (a) to (c) but does not relate to an order contemplated in paragraph (d). The purpose of orders contemplated in paragraphs (a) to (c) is to ensure that the employer complies with a fair procedure before it dismisses employees for operational requirements finally. That is why the provisions of paragraphs (a) to (c) end with the phrase "with a fair procedure" and why the verb "comply" appears in different forms and shapes before that phrase in these paragraphs.

[75] The order contemplated in paragraph (a) is meant to be granted before or at the start of or during the consultation process when there has been no dismissal as yet and when there is no imminent dismissal. An order contemplated in paragraph (a) compels the employer to comply with a fair procedure. An order contemplated in paragraph (b) is one meant to be granted where the dismissal of an employee is imminent in circumstances where the employer has not complied with a fair procedure. That order would interdict or restrain the employer from dismissing the employee or employees before it complies with a fair procedure. The order contemplated in paragraph (c) applies when a dismissal has happened without compliance with a fair procedure when it is still appropriate to reverse the dismissal and put the consultation process back on track.

[76] An order contemplated in paragraph (c) may not be appropriate if a significant time has lapsed between the date of dismissal and the date of adjudication. This is because the reinstatement under paragraph (c) is not necessarily final. It is granted to enable the employer's compliance with a fair procedure. The outcome of the

employer's compliance with a fair procedure could be that the employees remain in the employer's employment or they could be dismissed after a fair procedure has been followed. It is a temporary order. In fact, the order contemplated in paragraph (b) is also a temporary order in that the employer is not permanently interdicted from dismissing the employees but is interdicted until it complies with a fair procedure.

[77] The order contemplated in paragraph (d) is not temporary. It is final. Paragraph (d) does not say that the payment of compensation by the employer must be made until the employer has complied with a fair procedure. The order in paragraph (d) is made on the acceptance that the employer has failed to comply with a fair procedure and the employer is not given another chance to comply with a fair procedure. The order contemplated in paragraph (d) is made to ensure two objectives, namely to hold the employer accountable for its failure to comply with a fair procedure by ensuring that there are consequences visited upon the employer for such unacceptable conduct and to compensate the employee for the infringement by the employer of his or her right not to be dismissed in a procedurally unfair manner.

[78] No two orders contemplated in paragraphs (a) to (d) may be granted together. If an order contemplated in paragraph (b) is granted, there is no need for an order under paragraph (a). An order under paragraph (c) cannot appropriately or competently be granted together with an order contemplated in paragraph (b) because an order under paragraph (b) can only be granted where a dismissal has not happened whereas an order contemplated in paragraph (c) can only be granted when a dismissal has occurred. Accordingly, it would be inappropriate to grant an order under paragraph (b) if a dismissal has happened just as it would be inappropriate and incompetent for the Labour Court to grant an order under paragraph (c) before the dismissal has happened. Given the provisions of paragraph (d), an order under that paragraph can only be granted when none of the orders contemplated in paragraphs (a) to (c) may be appropriately granted.

[79] Questions that arise are: When would it not be appropriate for the Labour Court to grant an order contemplated in paragraph (a) or (b) or (c)? When would it be appropriate for the Labour Court to grant an order contemplated in paragraph (d)? Each case has to be decided on its own merits. Changes in the operations of the employer may render it inappropriate for the Labour Court to grant an order under paragraph (a) or (b) or (c). If employees whose retrenchment is contemplated resign during the consultation process, an order contemplated in paragraph (a) would not be appropriate.

[80] The passage of a long time between the date of dismissal of employees and the date of adjudication may render it inappropriate for the Labour Court to grant an order under paragraph (a) or (b) or (c) of subsection (13). Where the time that has lapsed between the date of dismissal and the date of adjudication is so long that it cannot reasonably be expected that the employer should resume the consultation process, it would be inappropriate to grant an order under paragraph (a), (b) or (c). One cannot in abstract say how long a period would have to be before it can be said to be too long. However, a court needs to establish why it would not be appropriate to grant an order contemplated in paragraph (a), (b) or (c) of subsection (13). The employer bears the onus to place before the Court evidence that would show that the period in a particular case is so long that it would be inappropriate for the Court to grant an order under paragraph (a) or (b) or (c).

[81] There is nothing in the nature of the order contemplated in paragraph (d) nor in the text of the paragraph that would support the proposition that, if the consultation process can no longer be put back on track, an award of compensation as contemplated in paragraph (d) would not be appropriate. In fact, it is quite the opposite. An appropriate time for the Labour Court to make an order for the payment of compensation as contemplated in paragraph (d) is when it would not be appropriate for the Labour Court to make an order contemplated under paragraph (a) or (b) or (c). Another situation where it would be inappropriate for the Labour Court to grant an order

in terms of paragraph (a) or (b) or (c) of subsection (13) is when the consultation process cannot be continued with or cannot be put back on track.

[82] A court is required to grant an order when it is satisfied that it is appropriate to do so. The orders contemplated in subsection (13) are no exception. Subsection (13)(d) makes it clear in effect that the orders contemplated in paragraphs (a) to (c) may only be granted when it is not appropriate to grant an order under paragraph (d) and *vice versa*.

[83] While it is unlikely to be appropriate for the Labour Court to order the reinstatement of employees pending the employer's compliance with a fair procedure after two years have lapsed since the dismissal of the employees, it might be perfectly appropriate for it to order such reinstatement if, for example, only three months have lapsed. Indeed, while it would probably not be appropriate for the Labour Court to order reinstatement for the purpose of putting the consultation process back on track two years after the date of dismissal, it might still be appropriate for the Labour Court to make an order for the payment of compensation as contemplated in paragraph (d) after a period of two or three years has lapsed since the date of dismissal.

[84] The orders in paragraphs (a), (b) and (c) and the order in paragraph (d) do not serve the same purpose. Indeed, there is no reason why each one of the orders contemplated in paragraphs (a) to (d) cannot be claimed alone. If an employer is going through a consultation process and no dismissal is imminent but the employer is not complying with a fair procedure, there is no reason why a union or employees may not approach the Labour Court and simply ask for an order contemplated in paragraph (a) only. Equally, there is no reason why, if an employer is not complying with a fair procedure and the dismissal is imminent, a union or the employees may not approach the Labour Court and seek an order under paragraph (b) only. They would not need an order under paragraph (a) or (c) or (d) at that time.

[85] If an employer dismisses employees without following a fair procedure, there is no reason why a union or employees cannot approach the Labour Court and seek an order contemplated in paragraph (c) only. They would not need an order contemplated in paragraph (a) or (b). An order contemplated in paragraph (b) would be inapplicable. An order contemplated in paragraph (b) is already effectively included in the last part of paragraph (c). Therefore, there is no room for an order contemplated in paragraph (a) when there is a dismissal.

[86] So, just like an order contemplated in paragraph (a) has a time when it is appropriate and orders in paragraphs (b) and (c) would not be applicable, an order contemplated under paragraph (c) only applies when an order in paragraph (a) and an order in paragraph (b) would not be applicable. An order contemplated in paragraph (d) applies in a scenario where paragraphs (a), (b) and (c) would no longer be appropriate. Indeed, an order contemplated in paragraph (d) can only be granted if any order contemplated in paragraphs (a) to (c) is inappropriate. Employees would not need an order of compensation contemplated in paragraph (d) nor would they be entitled to one, if an order contemplated in paragraph (a), (b) or (c) was granted and achieved the statutory purpose of the employer complying with a fair procedure before it can dismiss employees.

[87] As will have been realised from what I have said earlier in this judgment, as a norm, when employees are dismissed for operational requirements by an employer to which section 189A applies, for a certain number of months, perhaps three months, four months or maybe more an order of reinstatement might be appropriate. In those circumstances, compensation would not be competent and, therefore, cannot be claimed. It can only be claimed and granted when an order of reinstatement would no longer be appropriate. However, the question arises as to whether compensation can never be claimable immediately after dismissal and whether it is only claimable after some months have lapsed since the dismissal of the employees.

[88] In my view, compensation will normally not be claimable soon after the dismissal because at that stage reinstatement would still be appropriate. However, there may be exceptional cases where compensation will be claimable soon after the dismissal. However, those cases will be those when reinstatement will not be appropriate even soon after the dismissal has been effected. One example is where the employer of more than fifty workers is a natural person and he or she dies a few days after the dismissal of the employees. In such a case reinstatement will not be appropriate the moment the employer dies. In fact reinstatement would not be competent. If the death happens before the employees launch their section 189A(13) application, the position would be that, when the employees prepare their section 189A(13) application, they would be aware that reinstatement would not be appropriate because their employer had died. Therefore, in their papers they could only claim compensation. They would claim compensation on its own and without first claiming reinstatement and compensation only as an alternative.

[89] Another situation where compensation may be claimable soon after the dismissal is a situation where the reason for dismissal is that the employer is selling his or her business but not as a going concern. In other words, where section 197 of the LRA does not apply – and a few days after the dismissal of the employees, the transaction gets completed. In such a case reinstatement might not be appropriate even after a few days of the dismissal. Compensation would be claimable a few days after dismissal if the sale of the business has been completed. Where section 197 applied, reinstatement would be appropriate. There may be other examples where compensation can be claimed soon after dismissal but it is not necessary to look for other examples. These two examples are enough to make the point that an order of compensation under subsection (13)(d) can be claimed and granted as a standalone remedy.

[90] What I have set out above shows that each one of the orders contemplated in paragraphs (a) to (d) in section 189A(13) can be claimed alone. In *CC Steenkamp II* this Court held, in a unanimous judgment by Basson AJ, that an order contemplated in section 189A(13)(d) cannot be claimed as a standalone order. A reading of

CC Steenkamp II does not reveal that the conclusion that an order under paragraph (d) cannot be claimed as a standalone order was based on any analysis of the orders contemplated in paragraphs (a) to (d). There was no analysis of the language used in section 189A(13). That conclusion seems to me to have been a result of the Court focusing on the primary purpose of section 189A(13) and not its secondary purpose.

[91] Throughout the discussion of section 189A(13) in this Court's judgment in *CC Steenkamp II*, Basson AJ emphasised the primary purpose of subsection (13) – which relates to the orders contemplated in paragraphs(a) to (c) and not paragraph (d) – and overlooked the secondary purpose of the subsection which is served by an order contemplated in paragraph (d). I said earlier that the primary purpose of subsection (13) is to ensure that the employer complies with a fair procedure before employees may be dismissed finally. That is why an order contemplated in paragraph (c) will reverse a dismissal which has been effected without compliance with a fair procedure.

[92] There is no difference in purpose between an order of compensation under section 189A(13)(d) and an order of compensation granted under section 191. They both serve the same purpose, namely, to afford the employee effective relief when his or her right to procedural fairness has been infringed and holding the employer accountable for the violation of the employee's right. In fact the remedy of compensation provided for in section 189(13)(d) is the same remedy of compensation that is provided for in section 191. I say this because, prior to the enactment of section 189A in 2002 employees retrenched by large scale employers without compliance with a fair procedure had a right to claim the remedy of compensation but, when section 189A(13) was enacted, that right under section 191 insofar as it related to such employees was moved to section 189A. Accordingly, the right to claim compensation provided for in section 189A(13) is the same right that such employees used to enjoy under section 191 prior to the enactment of section 191 of the LRA. The only difference is that under section 189A(13) they can only claim compensation when it is not appropriate to claim reinstatement.

[93] This interpretation of section 189(13)(a) ensures that, when it comes to seeking compensation for procedural unfairness, the employee who uses the section 189A(13) route is treated in the same way as the one who uses the section 191 route. This is subject to the qualification that an employee who seeks compensation under section 189A(13)(d) is required to only seek it when an order under section 189A(13)(a) to (c) is inappropriate and must comply with the 30-day time limit imposed by section 189A(17) or obtain condonation for non-compliance with that time limit if he or she fails to comply with it. A court considering an application for condonation would be entitled to take into account that the 30-day time limit has been imposed because an order in terms of section 189A(13)(a) to (c) is the lawmaker's preferred remedy so as to get the consultation process back on track.

[94] It is important to point out that section 189A(13) prescribes only one requirement that must be met in order for an employee to seek the relief contemplated in paragraph (d) of section 189A(13) i.e. compensation. That requirement is that compensation may be sought "if an order in terms of paragraph (a) to (c) is not appropriate." Therefore, any proposition that effectively says an employee may not seek compensation when it is no longer appropriate to seek an order under paragraphs (a) to (c) of section 189A(13) is in conflict with paragraph (d) of section 189A(13) and, therefore, contrary to the statute.

[95] The proposition that an employee may pursue his or her claim for compensation some months after dismissal is simply based on the fact that section 189A(13)(d) itself precludes the claiming of compensation while an order under paragraphs (a) to (c) is appropriate and it can take a few months at least for the point to be reached where an order under paragraphs (a) to (c) becomes inappropriate. I do not mean that employees who have a dispute with an employer about the procedural fairness of their dismissal for operational requirements to which section 189A applies may simply sit back and do nothing about launching a section 189A(13) application and lodge their application at a time convenient to themselves.

[96] Any proposition to the effect that an employee who launches his section 189A(13) application at a time when it is no longer feasible to put the consultation process back on track is precluded from claiming compensation is in conflict with the express provision of section 189A(13)(d). I say this because, precisely when it becomes not feasible to put the consultation process back on track is the time when it becomes inappropriate to grant any order under section 189A(13)(a), (b) or (c). Paragraph (d) of section 189A(13) expressly says that that is when compensation can be claimed. Subsection (13) should not be interpreted as if there is another provision in it which overrides the clear wording of section 189A(13)(d) because it simply has no such provision. The statute makes it quite clear that as long as one or more of the orders contemplated in section 189A(13)(a), (b) or (c) is still appropriate, an order for compensation is not appropriate and that the moment an order under section 189A(13)(a), (b) or (c) is no longer appropriate, that is the moment when it is appropriate to claim compensation. As I have said, however, this does not mean that, just because relief in terms of paragraphs (a), (b) or (c) has, due to the passing of time, become inappropriate, condonation for bringing an application in terms of section 189A(13) outside the 30-day time limit should be granted as a matter of course. Employees to whom section 189A applies are generally expected to protect their right to procedural fairness by an application brought within the prescribed 30-day time limit. If they lodge their application outside of the 30-day time period, they are obliged to apply for condonation and, among others, furnish an acceptable explanation for their delay.

[97] Orders contemplated in paragraphs (a) to (c) serve the primary purpose of subsection (13) whereas paragraph (d) serves the secondary purpose of the subsection. The secondary purpose is to ensure that an employer who dismisses employees for operational requirements without complying with a fair procedure and, therefore, in violation of the employees' right to procedural fairness does not do so with impunity and to ensure that employees whose rights to procedural fairness have been infringed

are granted an appropriate remedy for the infringement of their rights in line with the principle that where there is a right, there is a remedy.

Discussion of case law on the meaning, scope and function of section 189A(13)

[98] There are cases in all our courts which have jurisdiction to adjudicate labour disputes at different levels in which our courts have not interpreted subsection (13) as reflected above.[20] It is not necessary to mention all of them. Those cases have dealt with subsection (13) as if it has one purpose – namely, the primary purpose of subsection (13) as articulated above which is linked to paragraphs (a) to (c). They did not identify the secondary purpose of subsection (13) which is linked to paragraph (d). In my view this was an error and this error led those courts to conclude that, when the consultation process can no longer be put back on track, none of the orders contemplated in paragraphs (a) to (d) may be granted. Those cases are dealt with later in this judgment.

[99] As an order contemplated in paragraph (d) has nothing to do with the primary purpose of subsection (13), the proposition that an order for compensation under paragraph (d) of subsection (13) could not be granted when the consultation process could no longer be put back on track was, in my view, incorrect. An order under paragraph (d) could and can be made when the consultation process can no longer be put back on track. Therefore, when some cases say that an order under paragraphs (a) or (b) or (c) cannot be granted when the consultation process can no longer be put back on track, they are correct. However, when they say that even an order of compensation under paragraph (d) cannot be granted when the consultation process can no longer be put back on track, they are, with respect, not correct. Actually, section 189A(13)(d) is quite clear that it is when an order under paragraphs (a) to (c) is inappropriate that an order for compensation may be granted. An order under

[20] Some of those cases are: *Parkinson v Edcon Ltd* [2016] ZALCJHB 540; *Ramiyal v Clinix Selby Park Hospital (Pty) Ltd* [2016] ZALCJHB 485; *CC Steenkamp II* above n 6 and *CC Barloworld* above n 11.

paragraphs (a) to (c) is inappropriate when the consultation process can no longer be put back on track. An order for compensation is appropriate at that stage.

[100] When one considers how much time should elapse before it can be said that an order contemplated in paragraph (c) would not be appropriate, one should remember that provisions in labour legislation that grant a court the power to order a *status quo* order pending some processes are not new in our labour law. Under the 1956 LRA as amended, two sections gave the Industrial Court such powers. The one was section 17(11)(a) and the other section 43(4). For purposes of this matter it is only necessary to say something about section 43. Under that section the Industrial Court had powers to order the temporary reinstatement of an employee whose dismissal it found to *prima facie* constitute an unfair labour practice. That order of reinstatement was popularly known as a *status quo* order. Such an order of reinstatement endured for 90 days or until one of certain events stipulated in that provision occurred but the Court could extend the operation of that order beyond 90 days.

[101] The purpose of such a reinstatement was to place the employee in the position that he or she was in before the *prima facie* unfair labour practice was committed by the employer to enable the parties to try and settle the dispute. In the case of a dismissal for operational requirements – which is what we are dealing with in the present case – the basis of the conclusion that the dismissal *prima facie* constituted an unfair labour practice could be that the employer had not complied with a fair procedure in the sense that there was no consultation or because, although there was consultation, such consultation was not a proper consultation. The point I want to make is that under section 43 of the 1956 LRA the Industrial Court did not regard it as inappropriate to make a *status quo* order three months, four months or even six months after the date of dismissal. Such orders were frequently made and the employer could go through the consultation process afresh if it accepted that there had not been a proper consultation with regard to that employee or group of employees. That being the case I do not think that the mere fact that three or four months have elapsed before a section 189A(13) application is made or adjudicated under the current Act would make it necessarily

inappropriate for the Labour Court to grant an order of reinstatement under paragraph (c) of subsection (13).

SA Five Engineering

[102] In *SA Five Engineering*[21] the National Union of Metalworkers of South Africa (NUMSA) and its affected members launched an application in terms of subsection (13) within a few days of the dismissal which occurred in October 2002. The employees were dismissed for operational requirements by an employer to which section 189A applied. It would appear from the judgment of Murphy AJ, sitting in the Labour Court, that NUMSA and its members subsequently referred to the Labour Court a dispute about the substantive fairness of their dismissal. In their application in terms of subsection (13) NUMSA and its members sought relief in terms of subsection (13) including reinstatement pending compliance by the employer with a fair procedure or alternatively compensation. The basis for seeking such relief was that in dismissing the employees, the employer had failed to comply with a fair procedure. It appears that at some stage the Labour Court, through Waglay J, made an order the effect of which seems to have been to consolidate both the subsection (13) application and the dispute about the substantive fairness of the dismissal.

[103] In *SA Five Engineering* the employees launched their subsection (13) application timeously but there were delays before the matter could be adjudicated. The employees had asked for reinstatement in terms of paragraph (c) of subsection (13) but by the time that the adjudication took place reinstatement was considered no longer appropriate. Compensation had been asked for in the alternative.

[104] With regard to section 189A(13) Murphy AJ held that the Labour Court "was competent to proceed with the adjudication of the dispute about procedural fairness in terms of section 189A(13)". The Labour Court made this decision in that case in 2004

[21] *National Union of Metalworkers of South Africa (NUMSA) v SA Five Engineering* [2004] ZALC 81; (2004) 25 ILJ 2358 (LC); [2005] 1 BLLR 53 (LC).

despite the fact that the dismissal had occurred in October 2002. In other words, in *SA Five Engineering* the Labour Court did not take the view that the remedy of compensation contemplated in paragraph (d) could not be granted when the consultation process could no longer be put back on track as that Court subsequently held in *Parkinson* and *Clinix*.

[105] Murphy AJ said in *SA Five Engineering* about section 189A(13):

> "As explained earlier, the applicants initially moved the court in terms of this section for an order of reinstatement and to compel compliance with fair procedure. As also explained, the order of Waglay J of 6 March 2003 can be interpreted as having referred that dispute to oral evidence under rule 7(8)(b). However, *with the effluxion of a considerable period of time since the dismissals, the applicants are less interested in the adjudication of the procedural dispute and would prefer resolution of the dispute about substantive unfairness. Certainly, in practical terms, the time for a pre-emptive interdict has long passed. But section 189A(13)(d) also bestows on the applicants the right to seek compensation for procedural irregularities where interdictory relief or specific performance is not appropriate. Moreover, section 189A(14) preserves the court's general power to award compensation under section 158(1)(a) in such cases. Hence, even though the horse long bolted the stable, there is no reason why the applicants should be barred from proceeding with their claim for relief in respect of any procedural irregularities that may have tainted their dismissals. For that reason, I was prepared to grant a postponement for the adjudication of the procedural dispute under section 189A(13).*"[22] (Emphasis added.)

[106] I agree with what Murphy AJ said in this passage about section 189A(13). What he said reflects that he understood the different purposes served by paragraphs (a) to (c), on the one hand, and paragraph (d), on the other, and by any order contemplated in either (a), or (b), or (c), on the one hand, and, by an order contemplated in paragraph (d)

[22] Id at para 10.

of subsection (13). It is a pity that this important passage in this judgment of the Labour Court does not appear to have been noticed or brought to the attention of the Labour Court in *Parkinson*, *Clinix* and to the Labour Appeal Court in *LAC Steenkamp II*,[23] referred to below, and in the present case. In the end Murphy AJ postponed the section 189A(13) application for later adjudication on the basis that the remedy of compensation under paragraph (d) of subsection (13) could still be competently granted even after two years had lapsed since the dismissal.

Parkinson

[107] In *Parkinson* the Labour Court had this to say about an application that had been brought in terms of subsection (13) seven months after the dismissal:

> "Even if I were to grant to the applicant the benefit of the doubt in relation to the explanation for the delay in bringing this application, she has no prospect of success on the merits. This court has made clear on more than one occasion that the purpose of section 189A(13) is one that enables this court to supervise an ongoing retrenchment process or one that has recently been concluded; it is not a remedy that is available well after dismissals have been effected. The section intends to ensure that a fair process is followed; it is not a means to thwart retrenchment itself (see *Insurance and Banking Staff Association v Old Mutual Services and Technology*). In the present instance, the applicant's date of dismissal, as I have indicated, is 25 August 2014, a little short of two years ago. The irresistible conclusion to be drawn is that having abandoned her unfair dismissal claim, the applicant seeks redress in terms of section 189A(13), a provision ordinarily reserved for urgent intervention in a consultation process involving a significant number of employees. There is no basis, in these circumstances, for the court to intervene in the present dispute, and the applicant's prospects of success are accordingly minimal, if they exist at all."[24]

[23] *LAC Steenkamp* II above n 11.

[24] *Parkinson* above n 20 at para 4.

[108] It will be seen from this extract that the Labour Court understood subsection (13) to have one purpose only and failed to appreciate that paragraph (d) had a different purpose and an order under paragraph (d) could be granted years after the dismissal of the employees, unlike the orders contemplated under paragraphs (a) to (c). Murphy AJ's judgment in *SA Five Engineering* does not appear to have been cited to Van Niekerk J who decided *Parkinson*. Had Van Niekerk J been aware of Murphy AJ's judgment, he would have realised that Murphy AJ had held that compensation under paragraph (d) of subsection (13) could be awarded two years after dismissal when the consultation process could no longer be put back on track. That Murphy AJ's judgment was not drawn to Van Niekerk J's attention is regrettable because *Parkinson*, *Clinix* and other cases might not have followed what *Parkinson* erroneously said in this regard.

Clinix

[109] The reference to *Clinix* is a reference to the judgment of the Labour Court in *Clinix*.[25] The error that the Labour Court made in *Parkinson* was repeated in a subsequent case in the Labour Court, namely *Clinix*. *Clinix* was also a judgment of Van Niekerk J. That case had similarities to *CC Steenkamp II*. The employees had initially challenged the validity of their dismissals in the same way the employees in *CC Steenkamp I* did. After the handing down of this Court's judgment in *CC Steenkamp I*, the employees in *Clinix* abandoned the *CC Steenkamp I* route and brought an application in the Labour Court in terms of subsection (13) and sought certain orders under subsection (13). In *CC Steenkamp I* this Court held that the LRA did not provide for the remedy of an invalid dismissal for a breach of the LRA. The orders they sought included reinstatement with effect from 1 June 2015 plus directions on a consultation process and some interdict preventing the employer from issuing notices of dismissal before certain events occurred or before the expiry of a certain period. They had lodged the application about nine months after the notices of

[25] *Clinix* above n 20.

dismissals were issued or about eight months after the effective date of dismissal. That was way out of time but not as late as the employees in *CC Steenkamp II* did.

[110] Although in *Clinix* the Labour Court was satisfied that dismissing the condonation application without having regard to the prospects of success was justified, it, nevertheless, had this to say about the merits of the applicants' section 189A(13) application:

> "[The remedy provided in section 189A(13)] must necessarily be seen in terms of its proper context and purpose. It is a mechanism that enables this court to supervise an ongoing retrenchment process or one that has recently been concluded; it is not a remedy that is available well after dismissals have been effected. In short, the section intends to ensure that a fair process is followed; it is not a means to thwart retrenchment itself (see *Insurance and Banking Staff Association*)."[26]

From this excerpt it can be seen that *Clinix* followed *Parkinson*.

[111] In paragraph 7 in *Clinix* the Labour Court said in part:

> "The failure to furnish a reasonable explanation for an inordinate delay has the consequence that any prospects of success in the main application and the respective prejudice to the parties are not relevant. I would mention though given the strict temporal limits that attach to a section 189A (13) application, I fail to appreciate what prospects there are at this late stage that this court will order the respondent to recommence the consultation process. *To the extent that the applicants seek an alternative remedy of compensation, it is not the purpose of section 189A to provide for compensation for any procedural shortcomings in the consultation process well after any retrenchments have been effected*."[27] (Emphasis added.)

[26] *Clinix* above n 20 at para 5.

[27] Id at para 7.

[112] The last sentence of this excerpt – namely that it is not the purpose of section 189A to provide compensation for any procedural shortcomings in the consultation process well after any retrenchments have been effected – is, in my view, incorrect. It flows from a failure to appreciate that paragraph (d) of subsection (13) has a different purpose to the purpose of paragraphs (a) to (c). There is no reason why the Labour Court cannot award compensation under paragraph (d) one, two or even three years after the dismissal in the same way that the Labour Court is able to award compensation for procedural unfairness in dismissals for operational requirements to which section 189A does not apply. An order for the award of compensation under paragraph (d) has nothing to do with putting the consultation process back on track or reversing the dismissal of the employees. It is important to point out that, whereas the Labour Court regarded the employees' explanation for the delay in launching their subsection (13) application in *Clinix* as unsatisfactory, both the Labour Appeal Court and this Court in *CC Steenkamp II* accepted a similar explanation as plausible.

CC Steenkamp I

[113] The reference to *CC Steenkamp I* is a reference to the judgment of this Court in *CC Steenkamp I*.[28] The issue in that case was whether or not the remedy of an order of invalidity of a dismissal for a breach of the LRA was available. Two judgments were produced. The one was written by Cameron J in which Van der Westhuizen J concurred. I wrote the other one. The rest of the Justices of this Court who sat in that matter concurred in my judgment. In considering the issue before us in that matter, I discussed various provisions of the LRA including the provisions of section 189A including 189A(13).

[114] Here is part of what this Court said in *CC Steenkamp I* in regard to section 189A(13):

[28] *CC Steenkamp I* above n 11. Referring to this case in this way is meant to distinguish it from the judgment of the Labour Court and Labour Appeal Court in *Steenkamp I*.

"[157] Subsection (8)(b)(ii)(aa) and (bb) provide the only remedies available to workers or their trade union if they dispute the fairness of the reason for their dismissal. They do not have any other remedies. However, they are still better off than their colleagues to whom section 189A does not apply. This is in so far as they may be challenging the fairness of the reason for their dismissal. What if they challenge only the procedural fairness of the dismissal?

[158] It is to be noted that in such a case subsection (8)(b)(ii)(aa) and (bb) does not contemplate the referral of a dispute concerning the procedural fairness of a dismissal to the Labour Court for adjudication. In terms of that provision only a dispute concerning whether there is a fair reason for dismissal may be referred to the Labour Court for adjudication. In fact subsection (18) precludes the Labour Court from adjudicating any dispute about the procedural fairness of a dismissal for operational requirements referred to it in terms of section 191(5)(b)(ii). It reads:

> 'The Labour Court may not adjudicate a *dispute* about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii).'

Subsection (18) may seem very drastic and harsh on employees who may be having a dispute with their employer concerning the procedural fairness of their dismissal. However, it will be seen that, when read with subsection (13), it is not harsh at all. Subsection (13) provides extensive protections to employees where the employer has failed to comply with a fair procedure.

[159] I cannot think of any relief that an employee could ask for which is not provided for in this section. Subsection (17)(a) provides that an application such as the one contemplated in subsection (13) must be made not later than 30 days after the employer has given notice to terminate the employees' contracts of employment or if notice is not given, the date on which the employees were dismissed. So, a challenge based on procedural unfairness may be brought after the dismissals have taken place. However, subsection (17)(b) gives the Labour Court

power to condone, on good cause shown, any failure to comply with that time limit.

[160] If an employer has not issued notices of dismissal but has failed or is failing to comply with a fair procedure in the pre-dismissal process, a consulting party may make use of the remedy in subsection (13)(a). In such a case the consulting party would apply to the Labour Court for an order compelling the employer to comply with a fair procedure. If an employer gives employees notices of dismissal without complying with a fair procedure, or, if an employer dismisses employees without complying with a fair procedure, the consulting party may apply to the Labour Court for an order interdicting the dismissal of employees in terms of subsection (13)(b) until there is compliance with a fair procedure. This would include giving premature notices of dismissal.

[161] If any employer has already dismissed employees without complying with the fair procedure, the consulting party may apply to the Labour Court in terms of subsection (13)(c) for an order reinstating the employees until the employer has complied with the fair procedure. The significance of the remedy of reinstatement in subsection (13)(c) is that it is made available even for a dismissal that is unfair only because of non-compliance with a fair procedure. That is significant because it is a departure from the normal provision that reinstatement may not be granted in a case where the only basis for the finding that the dismissal is unfair is the employer's failure to comply with a fair procedure. In such a case the norm is that the Labour Court or an arbitrator may award the employee only compensation.

[162] Subsection (13)(d) provides that a consulting party may apply to the Labour Court for an award of compensation 'if an order in terms of paragraphs (a) to (c) is not appropriate'. It seems to me that the phrase 'if an order in terms of paragraphs (a) to (c) is not appropriate' constitutes a condition precedent that must exist before the Court may award compensation. The significance of this condition precedent is that its effect is that the Labour Court is required to regard the orders provided for in subsection (13)(a) to (c) as the preferred remedies in the sense that the Labour Court should only consider the remedy in subsection (13)(d) when it is not appropriate to make any of the orders in subsection (13)(a) to (c).

> [163] This is a reversal of the legal position that obtains in the case of dismissals for the employers operational requirements governed by only section 189 where dismissal is only procedurally unfair and not substantively unfair as well. In these cases the Labour Court is required not to order reinstatement at all. So, in making the remedy of reinstatement available for a procedurally unfair dismissal and also making it one of the preferred remedies in subsection (13), the Legislature has gone out of its way to give special protection for the rights of employees and to protect the integrity of the procedural requirements of dismissals governed by section 189A.
>
> [164] The extensive remedies in subsection (13) provide at least partial compensation for the fact that in respect of disputes concerning the procedure of fairness of dismissals the employees have been deprived of the right to adjudication that other employees have. In part the extensive remedies in subsection (13) for non-compliance with procedural fairness have been provided because of the importance of the pre-dismissal process."[29]

[115] What this Court said in *CC Steenkamp I* about section 189A(13) and (18) is consistent with what I say in this judgment about the same provisions.

LC Steenkamp II

[116] The reference to *LC Steenkamp II*[30] is a reference to the judgment of the Labour Court in *LC Steenkamp II*. After this Court's judgment in *CC Steenkamp I*, the employees involved in that case instituted an application in the Labour Court in terms of subsection (13) and sought an order of compensation as contemplated in paragraph (d) of subsection 13. By then a period of more than two years had lapsed since their dismissal. They had instituted the application two or so years outside the 30-day period after they were notified of their dismissal. They applied for condonation in instituting the section 189A(13) application way out of the 30-day period.

[29] *CC Steenkamp I* above n 11 at paras 157-164.

[30] *Steenkamp v Edcon Limited* [2017] ZALCJHB 487. Referring to this case in this way is meant to distinguish it from the judgment of the Labour Court in *Regenesys* which is referred to later as *LC Regenesys*.

[117] It is important to note that both the Labour Appeal Court in *LAC Steenkamp II* and this Court in the same case effectively accepted that the employees' explanation for their delay in lodging the subsection (13) application could not be faulted. The explanation was that the employees were pursuing the remedy of an invalid dismissal which they pursued up to this Court when they had lost in this Court in *CC Steenkamp I* before they lodged their subsection (13) application.[31] In fact in *CC Steenkamp II* this Court said:

> "Although I do accept that a subsequently overturned legal strategy may constitute a reasonable explanation for the delay, this explanation must be viewed in its proper context."[32]

The fact that both the Labour Appeal Court and this Court appeared to accept that the explanation for the delay could not be faulted means that in both courts the employees in *LAC Steenkamp II* and *CC Steenkamp II* lost because both courts thought they had no reasonable prospects of success on the merits.

[118] In *LC Steenkamp II* the Labour Court, through Malindi AJ, correctly took the view that, if the employees in that case succeeded in showing that the employer had failed to follow a fair procedure in dismissing them, "they would be entitled at least to relief under section 189A(13)(d) if relief in terms of subparagraphs (a) to (c) was not appropriate. The applicants seek relief under sub-paragraph (d)." The Labour Court made this statement in a case where the subsection (13) application had been lodged after a period of more than two years since the dismissal of the employees in that case. The view expressed by the Labour Court in *LC Steenkamp II* as referred to above accords with the analysis of subsection (13) given above. Malindi AJ may not have referred to Murphy AJ's judgment in *SA Five Engineering* but his decision was in line with Murphy AJ's decision in *SA Five Engineering* that compensation could still be granted more than two years after the dismissal of the employees in that case.

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[31] *LAC Steenkamp II* above n 11 at paras 28 and 75.

[32] *CC Steenkamp II* above n 6 at para 75.

[119] The Labour Court, through Malindi AJ, granted condonation. Malindi AJ was satisfied that under paragraph (d) of subsection (13) the employees could be granted compensation if the Court was satisfied that they had been dismissed without compliance with a fair procedure.

LAC Steenkamp II

[120] The reference to *LAC Steenkamp II* is a reference to the judgment of the Labour Appeal Court in *LAC Steenkamp II*.[33] The employer then appealed to the Labour Appeal Court against the decision of the Labour Court on condonation even before the Labour Court could decide the merits of the section 189A(13) application. The error which the Labour Court had committed in *Parkinson* and *Clinix* was repeated by the Labour Appeal Court in *LAC Steenkamp II*. In *LAC Steenkamp II* the Labour Appeal Court, through Sutherland JA, with Musi and Coppin JJA concurring, said that the principal controversy before it was "whether the granting of condonation to the respondents to bring an application in terms of section 189A(13) of the LRA after the expiry of the prescribed 30-day period was an incorrect exercise of judicial discretion. Upon the fate of that issue, hangs the propriety of consolidating the several other cases."[34]

[121] In considering that controversy the Labour Appeal Court had to consider the employees' prospects of success in their subsection (13) application. It, therefore, expressly considered the purpose, function and scope of subsection (13). In considering the purpose, scope and function of subsection (13) the Labour Appeal Court referred to the judgments of the Labour Court in *Parkinson* and *Clinix*. Unfortunately, it seems that the judgment of the Labour Court in *SA Five Engineering*, particularly paragraph 10 thereof, was not brought to the attention of the Labour Appeal Court just as it seems not to have been brought to the attention of Van Niekerk J in *Parkinson* and *Clinix*.

[33] *LAC Steenkamp II* above n 11. Referring to this case in this way is meant to distinguish it from the judgment of the Labour Court and this Court in *Steenkamp II* which is referred to as *LC Steenkamp II* and *CC Steenkamp II*.

[34] Id at para 2.

[122] In paragraph 13 in *LAC Steenkamp II* the Labour Appeal Court said:

> "[13] The complications that this present application envisages resolving arise from the fact that the sole issue upon which the respondents' grievances have hitherto been advanced have been the alleged invalidity of their dismissals, having expressly abandoned claims for procedural and substantive unfairness claims under the circumstances described. Because the viability of the 'invalidity' premise, as a cause of action, [was] dashed by this Court and by the Constitutional Court, *what the respondents want now is a chance to get a compensation order for procedural unfairness using section 189A(13)(d) as a hook. The foundation of the present claim rests on two legs; (1) first, that it can pursue a trial about unfair procedure to obtain relief in terms of section 189A(13)(d), and (2) second, they can obtain condonation of the late referral of a section 189A(13) application, years out of time, on the basis of the alleged reasonableness of pursuing an invalidity claim until the Constitutional Court scotched that hope, and thus the delay is satisfactorily explained*."[35] (Emphasis added.)

[123] In paragraph 24 and, referring to the periods in section 189A(17)(a) and (b),[36] the Labour Appeal Court said in *LAC Steenkamp II*:

> "[24] In context, these time periods speak plainly to the intrinsic urgency of judicial intervention pursuant to section 189A(13), if a party wishes a procedural fairness dispute to be addressed. The relief that a court might grant in terms of section 189A(13)(a) – (d) must be understood in that context. The remedies are designed to be available when an aggrieved applicant brings the application by not later than

[35] Id at para 13.

[36] Section 189A(17)(a) and (b) reads:

> "(a) An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed.
>
> (b) The Labour Court may, on good cause shown condone a failure to comply with the time limit mentioned in paragraph (a)."

> 30 days after the notification of the possible retrenchment, and thus, 30 days before a dismissal notice may be given. *The primary purpose is to get the retrenchment process back onto a track that is fair. Remedies (a) and (b) plainly are appropriate before a dismissal is effected. Remedy (c) is aimed at not only reversing a dismissal, but obligating the employer in future to comply with fairness during an implicitly resumed process, which implies timeous proximity to the dismissals. Remedy (d) is plainly contingent on remedies (a) (b) or (c) being inappropriate in given circumstances; it is thus subordinated to the first three options, and cannot be read disjunctively from the rest. Were it appropriate to separate remedy (d) from the rest, the effect of the section would be to totally contradict section 189A(18). Such an interpretation cannot therefore be sustained, and it is not open to a party to seek primary relief in terms of section 189A(13)(d). The function of section 189A(13)(d) is a residual power, if the given circumstances make the first three remedies inappropriate*."[37] (Emphasis added.)

[124] In paragraphs 25 and 26 in *LAC Steenkamp II* the Labour Appeal Court went on to say:

> "[25] In summary, section189A(13) is a procedure designed to enable the Labour Court to urgently intervene in a large-scale retrenchment to ensure that fair procedure is followed. It is not designed to offer a platform for ex post de facto adjudication of unfair procedure disputes. Although a failure to comply with the 30-day period can be condoned, the merits of any condonation application must be understood within the context of an urgent intervention, that being the critical functional characteristic of an application in terms of section 189A(13).
>
> [26] Moreover, the intervention contemplated, by its nature does not contemplate a trial at some future remote time. It exists not to facilitate a post mortem but, rather, to oversee the process of retrenchment while it is taking place or shortly thereafter where precipitate dismissals make

[37] *LAC Steenkamp II* above n 11 at para 24.

> intervention before actual dismissal impossible, and to reverse the dismissals. Remedy (d) is a last resort back up to cater only for the inappropriateness of remedies (a), (b) or (c)."[38]

[125] In paragraphs 44 and 45 in *LAC Steenkamp II* the Labour Appeal Court said:

> "[44] At paragraph [43] of the judgment *a quo*, the findings are premised onthe assumption that a self-standing remedy in terms of section 189A(13)(d) exists. As addressed above, that reading is incorrect.
>
> [45] The Court *a quo* therefore misdirected itself in the several respects addressed in this judgment; i.e. the proper purpose of section 189A(13) and its limitations were not recognised and the explanation in support of condonation, relying on a failed legal strategy to justify the delay is not acceptable, especially, as alluded to above, because earlier opportunities to seek condonation were spurned, causing further delay, to which must be added the express and fatal abandonment of the alternative cause of action."[39] (Emphasis added.)

[126] Two or three of the features of the Labour Appeal Court's judgment in *LAC Steenkamp II* are that the remedy of compensation contemplated in paragraph (d) of subsection (13) cannot be claimed as a standalone order and cannot be a primary remedy. I have expressed the view elsewhere in this judgment that this would be incorrect, if it meant that compensation could not be claimed separately from the orders contemplated in paragraphs (a) to (c). The Labour Appeal Court also said that the remedy of compensation under paragraph (d) could not be granted when a lot of time had passed since dismissal. I have also expressed the view that this is not correct because the purpose of paragraph (d) is different from the purpose of paragraphs (a) to (c) of subsection (13).

[38] Id at paras 25-6.

[39] Id at para 2.

[127] Another feature of the judgment of the Labour Appeal Court in *LAC Steenkamp II* is that it is based upon an identification of only the primary purpose of section 189A((13). It said nothing about the secondary purpose of the subsection which is linked to paragraph (d) of subsection (13). The Labour Appeal Court based its judgment on the view that all the orders under subsection (13), including an order under paragraph (d), serve the primary purpose of the subsection. This is not correct because an order under paragraph (d) serves the secondary purpose of subsection (13) and not the primary purpose.

[128] I have given above two scenarios where an order for compensation may be claimed a few days after the dismissal of the employees. I need not repeat those scenarios again.

[129] In so far as the Labour Appeal Court criticised the Labour Court for the assumption that a self-standing remedy in terms of section 189A(13)(d) exists, that criticism is not justified in so far as it may suggest that an order of compensation as contemplated in paragraph (d) of subsection (13) cannot be granted alone at a time when no order contemplated in paragraphs (a) to (c) can appropriately be granted. Indeed, in so far as the Labour Appeal Court criticised the Labour Court that it had misdirected itself and did not recognise the "proper purpose of section 189A(13) and its limitations", that criticism was erroneous. The Labour Court correctly took the view that an order of compensation as contemplated in paragraph (d) of subsection (13) could be granted long after the consultation process had ended.

CC Steenkamp II

[130] The reference to *CC Steenkamp II* is a reference to the judgment of this Court in *CC Steenkamp II*. In paragraph 52 in *CC Steenkamp II* this Court quoted a passage from

the judgment of the Labour Court in *Insurance and Banking Staff Association*[40] and said it recognised the purpose of section 189A(13). That passage reads:

> "The overriding consideration under section 189A is to correct and prevent procedurally unfair retrenchments as soon as procedural flaws are detected, so that job losses can be avoided. Correcting a procedurally flawed mass retrenchment long after the process has been completed is often economically prohibitive and practically impossible. All too often the changes in an enterprise with the passage of time deter reinstatement as a remedy. So, the key elements of section 189A are: early expedited, effective intervention and job retention in mass dismissals."[41]

This passage is to be found in paragraph 9 of Pillay J's judgment in *Insurance and Banking Staff Association* in the Labour Court.

[131] In paragraph 12 Pillay J said that, "if there was undue delay between the occurrence of the procedural flaw, or if the flaw was formal or insignificant, 'remedies under subsections (13)(a) to (c) would be inappropriate'".[42] Pillay J did not say between the occurrence of the procedural flaw and what. She may have meant between the occurrence of the procedural flaw and the launching of the application or the adjudication of the application. It is difficult to speculate what the said event is that she may have had in mind. Nevertheless, it is clear that Pillay J deliberately did not include the remedy of compensation contemplated in paragraph (d) of subsection (13) when she mentioned remedies in subsection (13) that would be affected by a delay between the occurrence of the procedural flaw and whatever event.

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[40] *Insurance and Banking Staff Association v Old Mutual Services and Technology Administration* (2006) 27 ILJ 1026 (LC).

[41] *CC Steenkamp II* above n 6 at para 52. Referring to this case in this way is meant to distinguish it from the judgment of the Labour Court and the Labour Appeal Court in *Steenkamp II* which is referred to as *LC Steenkamp II* and *LAC Steenkamp II*.

[42] *Insurance and Banking Staff Association* above n 40 at para 12.

[132] Pillay J seems to have recognised some difference in the purpose of the remedy in paragraphs (a) to (c) of subsection (13) and the purpose of the remedy contemplated in paragraph (d) of the same subsection. In fact she began the next paragraph with a sentence that reinforced this idea. I will quote the whole paragraph. It reads:

> "[13] In my opinion, therefore, the remedies under section 189A(13)(a)-(c) should not be granted after the retrenchment process is completed and if any of the circumstances in the preceding paragraph obtain. However, in this application, the employee does not seek relief in terms of subsections (a)-(c). If it is foreseeable at the time the application is launched that the relief in terms of subsections (13)(a)-(c) are inappropriate, or if orders in terms of those subsections are not sought, the next question that arises is whether the employee can have recourse to relief under subsection (d)."[43]

[133] In *CC Steenkamp II* this Court also fell into the error into which both the Labour Court and the Labour Appeal Court had, respectively, fallen in *Parkinson* and *Clinix* and in *LAC Steenkamp II*. This Court said in *CC Steenkamp II*:

> "[52] Where procedural irregularities arise, the process provided for in section 189A(13) of the LRA allows for the urgent intervention of the Labour Court to correct any such irregularities as and when they arise so that the integrity of the consultation process can be restored and the consultation process can be forced back on track. The purpose of section 189A(13) has been recognised in a long line of cases."[44]

This Court then quoted from Pillay J's judgment in *Insurance and Banking Staff Association* the paragraph quoted above concerning what Pillay J called "The overriding consideration under section 189A." Immediately after this, this Court quoted a passage from Murphy AJ's judgment in *SA Five Engineering* but, unfortunately, that passage was not paragraph 10 of Murphy AJ's judgment. Paragraph 10 of Murphy AJ's

[43] Id at para 13.

[44] *CC Steenkamp II* above n 6 at para 52.

judgment contains a different view and, in fact, the correct view about compensation under paragraph (d) of subsection (13).

[134] This Court went on to say in *CC Steenkamp II*:

> "[58] A central dispute between the parties is the question whether the remedy of 'compensation' provided for in section 189A(13)(d) is a self-standing remedy. The applicants insist that it is. Edcon disputes this.
>
> [59] *The remedies provided for in section 189A(13)(a)-(d) must be considered in the broader context of section 189A of the LRA and keeping in mind the overall purpose of section 189A(13).*
>
> [60] *The primary purpose of section 189A(13) is thus to allow for early corrective action to get the retrenchment process back on track. Paragraphs (a)-(d) establish a hierarchy of appropriate relief. Only where it is not appropriate to grant an order in terms of paragraphs (a)-(c) may an order for compensation be granted in terms of paragraph (d).*
>
> [61] Can it be said then that the compensation remedy provided for in paragraph (d) is self-standing? The answer is no. The remedy provided for in section 189A(13)(d) cannot, as contended by the applicants, be divorced from the remainder of this section and given self-standing meaning.
>
> [62] Before this Court, counsel for the respondent conceded that a postponement by a Judge of the consideration of the paragraph (d) compensation remedy may create the basis for compensation being considered separately. I think not.
>
> [63] Whereas a postponement of the consideration of compensation at a later stage may separate its determination procedurally, a Judge who postpones consideration of paragraph (d) compensation would at least have had the benefit of considering the other three remedies and determined their inappropriateness.
>
> [64] On its own terms, paragraph (d) provides for an exceptional remedy which is granted only where the primary remedies provided for in paragraphs (a)-(c) are inappropriate. From the reading of the

language in the text of paragraph (d), it is cogent that remedy (d) will only be considered where (a)-(c) are 'not appropriate'. This therefore means that a Judge who reaches the decision to postpone the consideration of paragraph (d) would have considered remedies in paragraphs (a)-(c) first and would have found these remedies inappropriate. Thus the compensation remedy can never be a stand-alone remedy. This was made clear by this Court in *Steenkamp I*, where it stated:

> 'Subsection (13)(d) provides that a consulting party may apply to the Labour Court for an award of compensation "if an order in terms of paragraphs (a) to (c) is not appropriate". It seems to me that the phrase "if an order in terms of paragraphs (a) to (c) is not appropriate" constitutes a condition precedent that must exist before the court may award compensation. The significance of this condition precedent is that its effect is that the Labour Court is required to regard the orders provided for in subsection (13)(a)-(c) as the preferred remedies in the sense that the Labour Court should only consider the remedy in subsection (13)(d) when it is not appropriate to make any of the orders in subsection (13)(a)-(c).'"[45] (Emphasis added.)

[135] A reading of the passage quoted from *CC Steenkamp I* at the end of this excerpt reveals that the passage from *CC Steenkamp I* does not say nor does it support the statement that the order contemplated in paragraph (d) can never be a standalone remedy. On the contrary that passage from *CC Steenkamp I* shows the opposite, namely, that an order of an award of compensation contemplated in paragraph (d) can only be granted when it would no longer be appropriate to grant any of the orders contemplated in paragraphs (a) to (c).

[136] In paragraph 66 this Court also said in *CC Steenkamp II*:

[45] Id at paras 58-64.

> "[66] The main purpose of the section and the remedies it provides is thus to 'get the retrenchment process back onto a track that is fair.' Even the remedy of compensation must be read in the context of the short-term remedies provided for in the same subsection and in light of the jurisdictional restriction provided for in section 189A(18). Compensation in terms of section 189A(13)(d) cannot be the primary relief."[46] (Emphasis added.)

[137] What the above reveals is that an error that started in the Labour Court in *Parkinson* was repeated by the Labour Appeal Court and in this Court. Nevertheless, it is in the interests of justice that this error be corrected in order to prevent injustices from being visited upon many workers who may need to be granted a remedy under section 189A(13)(d) if their employer has failed to comply with a fair procedure in dismissing them. If the erroneous interpretation of subsection (13) is allowed to continue, there are many workers whose rights not to be dismissed without compliance with a fair procedure will be violated by employers. In such a case such employees will not be granted the remedy contemplated in paragraph (d) on the basis that the consultation process can no longer be put back on track. Such employees could be awarded compensation under paragraph (d) because that remedy has nothing to do with putting the consultation process back on track. The purpose of paragraph (d) of subsection (13) is to ensure accountability, the vindication of employees' right not to be dismissed without compliance with a fair procedure and the granting of an effective remedy to the affected employees for the infringement of their rights by their employer.

[138] It appears from this Court's judgment in *CC Steenkamp II* that the Labour Court had expressed the view, in deciding the condonation application in *LC Steenkamp II*, that, should the employees in that case be successful in their procedural unfairness claim, they would at least be entitled to relief under section 189A(13)(d), if relief in terms of paragraphs (a) – (c) was no longer appropriate.[47]

[46] Id at para 66.

[47] Id at para 18.

[139] When the present matter came before the Labour Court as an application in terms of section 189A(13), Prinsloo J did not take the view that an order contemplated in paragraph (d) could no longer be granted because the consultation process could no longer be put back on track. She went ahead to adjudicate the section 189A(13) application and awarded compensation in terms of paragraph (d) to those employees whose dismissal was unfair only because there was no compliance with a fair procedure. In the present matter the Labour Court concluded that it had jurisdiction to adjudicate the employees' application brought under section 189A(13) concerning a dispute about the procedural fairness of their dismissal for operational requirements. On appeal the Labour Appeal Court decided that the Labour Court had no such jurisdiction. It did so without any analysis of section 189A(13), 189A(18) or 191 and without any analysis of any case law including its own previous decisions on the section. It relied on the judgment of this Court in *CC Steenkamp II* for its conclusion in this regard.

[140] In summary, therefore, the position is, in my view, that:

(a) subsection (13) has two purposes, not one.

(i) the primary purpose of subsection (13) is to enable the Labour Court to make an order to compel the employer to comply with a fair procedure before employees may be dismissed finally for operational requirements.

(ii) orders of the Labour Court that are capable of achieving the primary purpose of subsection (13) as articulated in (i) above are the orders contemplated in paragraphs (a) to (c) of subsection (13).

(iii) an order for the award of compensation contemplated in paragraph (d) of subsection (13) is not capable of achieving the primary purpose of subsection (13) as articulated in (i) above but serves a different purpose, namely, the secondary purpose of subsection (13) as articulated in (iv) below.

(iv) the secondary purpose of subsection (13) is to hold an employer who has dismissed employees finally for operational requirements

without compliance with a fair procedure accountable and ensure that the employees whose rights have been violated are granted appropriate relief without insisting on compliance with a fair procedure.

(v) the secondary purpose of subsection (13) relates to an order for the payment of compensation contemplated in paragraph (d).

(vi) it is correct to say that an order contemplated in paragraphs (a) to (c) cannot be granted when the consultation process can no longer be put back on track because putting the consultation process back on track is the primary purpose of orders contemplated in paragraphs (a) to (c).

(vii) an order for the payment of compensation contemplated in paragraph (d) cannot be refused on the basis that at that time the consultation process cannot be put back on track because that is not the purpose served by an order for the payment of compensation. The purpose served by an order of compensation is the secondary purpose.

(viii) the orders contemplated in paragraphs (a) to (c) are the primary or preferred orders under subsection (13).

(ix) the order contemplated in paragraph (d) is an order that is granted only when an order contemplated in paragraphs (a) to (c) is not appropriate.

(x) there is a limited time during which orders contemplated in paragraphs (a) to (c) may appropriately be granted but, once that limited period has expired, only an order of compensation contemplated in paragraph (d) can appropriately be granted because at that stage no order contemplated in paragraphs (a) to (c) is appropriate.

(xi) while an order under paragraphs (a) to (c) may not be granted years after the dismissal of the employees, an order for an award of

compensation as contemplated in paragraph (d) may be granted appropriately even years after the dismissal.

(xii) whereas the orders contemplated in paragraphs (a) to (c) are granted on the basis of a rejection of the employer's failure to comply with a fair procedure, an order of compensation contemplated under paragraph (d) is granted on the basis of an acceptance that the employer has failed to comply with a fair procedure and there is no insistence that the employer complies with a fair procedure.

(xiii) although compensation would normally not be claimable soon after the dismissal of the employees, there are few instances where it would be claimable soon after the dismissal; in each one of those instances an order under paragraphs (a) to (c) in section 189A(13) would not be appropriate.

(xiv) although an order for the payment of compensation would normally not be claimable or cannot be granted as a standalone remedy, there are circumstances in which it can be granted as a standalone remedy.

[141] It is now necessary to discuss the issue for determination in the cross-appeal. That is whether section 189A(18) excludes any jurisdiction of the Labour Court to adjudicate disputes about the procedural fairnesss of dismissals for operational requirements and, if so, whether all such disputes or only some.

Section 189A(18) and the jurisdiction of the Labour Court in regard to disputes about procedural fairness

[142] The errors disclosed above in regard to the meaning, scope and functioning of section 189A(13) of the LRA are not the only errors by the Labour Court, Labour Appeal Court and, ultimately, this Court in applications brought before the Labour Court in terms of subsection (13) and in subsequent appeals to the Labour Appeal Court and this Court. Another one is that the Labour Appeal Court has

held that the Labour Court has no jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements, even in a case where employees have approached the Labour Court by way of an application in terms of section 189A(13) complaining that, in dismissing them for operational requirements, their employer to which section 189A applied did not comply with a fair procedure. In such a case they would be asking for one or other order in terms of subsection (13)(a) to (d).

[143] This is what the Labour Appeal Court decided in the present matter when this matter was before that Court. The Labour Appeal Court relied upon section 189A(18) for this holding and on this Court's judgment in *CC Steenkamp II*. The Labour Court, the Labour Appeal Court and this Court have also made various statements in certain cases that by virtue of section 189A(18) the Labour Court has no jurisdiction at all to adjudicate disputes about the procedural fairness of dismissals based on the employer's operational requirements or that it has no jurisdiction to adjudicate such matters under section 191 or that the Labour Court has no jurisdiction to adjudicate such matters under section 189A(13) even when the dismissal relates to employees to whose employer section 189A applies.

[144] The Labour Court, Labour Appeal Court and this Court have made such statements at the different levels of the cases in *Steenkamp* and/or *Barloword* and, in the case of the Labour Appeal Court, also in the present matter. I propose to quote section 189A(18), then deal with what the provision means and, thereafter, discuss various cases which dealt with the meaning and effect of section 189A(18) and the jurisdiction of the Labour Court in regard to disputes about the procedural fairness of dismissals for operational requirements.

[145] Section 189A(18) reads:

> "The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational

> requirements in any dispute referred to it in terms of section 191(5)(b)(ii)."

The first feature that, in my view, needs to be borne in mind in interpreting this provision is that subsection (18) is a subsection under section 189A. The implication hereof is that under section 189A any reference to "employer" is a reference to an employer as contemplated in section 189A(1). That means an employer who employs more than 50 employees. This alone immediately tells one that the dismissal referred to in subsection (18) is a dismissal of employees to whose employer section 189A applies or, put differently, whose employer employs more than 50 employees as contemplated in section 189A(1). That, therefore, must mean that in terms of section 189A(18) the Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal for the employer's operational requirements in a dispute referred to the Labour Court for adjudication under section 191 where the employer concerned employs more than 50 employees. Section 189A(18) precludes the Labour Court from adjudicating under section 191 any dispute about the procedural fairness of dismissals for operational requirements relating to employees to whose employer section 189A applies if such dispute is referred to the Labour Court in terms of section 191 of the Act.

[146] In my view, the following points must be emphasised about subsection (18), read with section 191(5)(b)(ii) and subsection (13):

(a) The Labour Court has jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements to which section 189A applies and which are brought to the Labour Court by way of applications in terms of subsection (13).

(b) By virtue of subsection (18), the Labour Court has no jurisdiction to adjudicate in terms of section 191(5)(b)(ii) a dispute about the procedural fairness of a dismissal for operational requirements to which section 189A applies because the LRA provides a special procedure and special remedies in subsection (13) for such disputes. In other words, such disputes cannot competently be referred to the Labour Court in terms

of section 191(5)(b)(ii) for adjudication because the LRA has a special procedure and special remedies for such disputes in subsection (13) in terms of which they can be adjudicated by the Labour Court.

(c) The Labour Court's jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements to which section 189A does not apply and which are referred to it for adjudication in terms of section 191(5)(b)(ii) is not ousted by subsection (18). That jurisdiction remains intact and the Labour Court has jurisdiction to adjudicate such disputes.

[147] If subsection (18) was a subsection of section 191, it, indeed, would have ousted the Labour Court's jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements to which section 189A does not apply and which are referred to the Labour Court in terms of section 191(5)(b)(ii) for adjudication. However, subsection (18) is not located as a subsection to section 191. It is located as a subsection of section 189A. That is not a coincidence. The reason for that is that, like all the subsections to section 189A, subsection (18) relates to dismissals for operational requirements to which section 189A applies. If it was meant to relate to dismissals for operational requirements to which section 189A does not apply, it would have been located as a subsection to section 191.

[148] The interpretation that subsection 189A(18) has ousted the jurisdiction of the Labour Court to adjudicate disputes about the procedural fairness of dismissals for operational requirements referred to it in terms of section 191(5)(b)(ii) is not accurate. What is accurate is the interpretation that says that, by virtue of subsection (18), the Labour Court's jurisdiction to adjudicate under section 191 disputes about the procedural fairness of dismissals for operational requirements of employees to whose employer section 189A applies has been ousted because the LRA has created a special process and remedy for such disputes in terms of subsection (13). I now proceed to refer to and discuss the cases in which the Labour Court, Labour Appeal Court and this Court have made inaccurate statements about the jurisdiction of the Labour Court in

respect of disputes about the procedural fairness of dismissals for operational requirements.

Discussion of relevant case law

CC Steenkamp I

[149] The reference to *CC Steenkamp I* is a reference to the judgment of this Court in *Steenkamp I*.[48] This Court pointed out in *CC Steenkamp I* that "section 189A creates special rights and obligations for which it provides special remedies."[49] This Court went on to say in paragraphs 157 and 158:

> "[157] Subsections (8)(b)(ii)(aa) and (bb) [of section 189A] provide the only remedies available to workers or their trade union if they dispute the fairness of the reason for their dismissal. They do not have any other remedies. However, they are still better off than their colleagues to whom section 189A does not apply. That is insofar as they may be challenging the fairness of the reason for their dismissal. What if they challenge only the procedural fairness of the dismissal?
>
> [158] *It is to be noted that in such a case subsection (8)(b)(ii)(bb) does not contemplate the referral of a dispute concerning* the procedural fairness of a dismissal *to the Labour Court for adjudication*. In terms of that provision only a dispute concerning whether there is a fair reason for dismissal may be referred to the Labour Court for adjudication. In fact subsection (18) precludes the Labour Court from adjudicating any dispute about the procedural fairness of a dismissal for operational requirements referred to it in terms of section 191(5)(b)(ii). It reads:
>
> > 'The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii).'

[48] *CC Steenkamp I* above n 11. Referring to this case in this way is meant to distinguish it from the judgment of the Labour Court and the Labour Appeal Court in *Steenkamp I*.

[49] Id at para 147.

> Subsection (18) may seem very drastic and harsh on employees who may be having a dispute with their employer concerning the procedural fairness of their dismissal. However it will be seen that when read with subsection (13), it is not harsh at all. Subsection (13) provides extensive protections to employees where the employer has failed to comply with a fair procedure."[50] (Emphasis added.)

What the last two sentences in this excerpt mean is that subsection (18) is not so harsh because disputes about the procedural fairness of dismissals for operational requirements of employees to whose employer section 189A applies can still be adjudicated by the Labour Court under section 189A(13). In saying that in *CC Steenkamp II* this Court affirmed that the disputes about the procedural fairness of dismissals based on the employer's operational requirements which subsection (18) says cannot be adjudicated by the Labour Court under section 191 can actually be adjudicated by that same court under section 189A(13).

[150] It needs to be made clear that, in stating in *CC Steenkamp I* that subsection (18) "precludes the Labour Court from adjudicating any dispute about the procedural fairness of a dismissal for operational requirements", this Court did not stop there but it added the qualification "referred to [the Labour Court] in terms of section 191(5)(b)(ii)" which is part of subsection (18). What this Court said in *CC Steenkamp I* regarding subsection (18) is simply the literal meaning of subsection (18) as it is without any interpretation. Some of the cases have ignored that qualification and have given subsection (18) a meaning to the effect that except for subsection (13) jurisdiction, the Labour Court has no jurisdiction to adjudicate any cases relating to procedural fairness in dismissals for operational requirements whatsoever or has no jurisdiction if those disputes have been referred to the Labour Court in terms of section 191(5)(b)(ii).

[151] Those cases have said that subsection (18) has ousted the jurisdiction of the Labour Court to adjudicate disputes about the procedural fairness of dismissals for

[50] Id at paras 157-8.

operational requirements without any reference to section 191. What subsection (18) means is that a dispute about the procedural fairness of a dismissal for operational requirements to which section 189A applies cannot be referred to the Labour Court in terms of section 191(5)(b)(ii) for adjudication. This is because the legislature has provided a special process for the adjudication of such disputes under subsection (13).

[152] Subsection (18) does not relate to disputes about the procedural fairness of dismissals to which section 189A does not apply. Those may still be referred to the Labour Court in terms of section 191(5)(b)(ii) for adjudication. Later on, this Court said in paragraph 164 in *CC Steenkamp I*:

> "[164] *The extensive remedies in subsection (13) provide at least partial compensation for the fact that, in respect of disputes concerning the procedural fairness of dismissals, the employees have been deprived of the right to adjudication that other employees have*. In part, the extensive remedies in subsection (13) for non-compliance with procedural fairness have been provided because of the importance of the pre-dismissal process."[51] (Emphasis added.)

It is vitally important to point out that the first sentence of paragraph 164 does not say that employees to whom section 189A does not apply have been deprived of the right to adjudication in respect of their disputes about the procedural fairness of dismissals for operational requirements.

[153] The reference to "the employees" at the beginning of the second half of that sentence is a reference to employees to whom "[t]he extensive remedies in subsection (13)", which appears at the beginning of the sentence, are available and those are the employees to which section 189A applies. In other words, that sentence says in effect that, although the employees to which section 189A applies are deprived of the right of adjudication which other employees have, which is the right of adjudication of a dispute about the procedural fairness of a dismissal for operational requirements that

[51] Id at para 164.

follows after a referral of such dispute to the Labour Court in terms of sections 191(5)(b)(ii), subsection (13) provides employees to which section 189A applies with "partial compensation".

[154] Subsection (18) is the provision on which the Labour Appeal Court and this Court in *CC Steenkamp II* relied to say that the Labour Court's jurisdiction to adjudicate the procedural fairness of dismissals for operational requirements had been ousted. In saying so, both the Labour Appeal Court and this Court were also referring to disputes about the procedural fairness of dismissals for operational requirements to which section 189A applies and which are brought in the Labour Court by way of applications in terms of section 189A(13). As I say elsewhere in this judgment, in giving section 189A(18) that meaning, this Court and the Labour Appeal Court interpreted section 189A(18) as if the words that appear after the word "dispute" in that provision are not there. The view that section 189A(18) ousts the jurisdiction of the Labour Court to adjudicate the procedural fairness of dismissals for operational requirements including where a dispute about procedural fairness is brought before the Labour Court in terms of subsection (13) is not correct.

LC Steenkamp II

[155] The reference to *LC Steenkamp II* is a reference to the judgment of the Labour Court in *Steenkamp II*.[52] After the employees involved in *CC Steenkamp I* had failed in their bid to obtain an order that their dismissals had been invalid, they approached the Labour Court by way of an application in terms of section 189A(13) for an order for the payment of compensation. The employees' section 189A(13) application was more than two years late. They applied for condonation. The Labour Court granted condonation. It said that the employees would still be able to be awarded compensation in terms of section 189A(13) if they succeeded in proving that the employer had failed to comply with a fair procedure. This shows that the Labour Court,

[52] *LC Steenkamp II* above n 30. Referring to this case in this way is meant to distinguish it from the judgment of the Labour Appeal Court and this Court in *Steenkamp II* which is referred to as *LAC Steenkamp II* and *CC Steenkamp II*.

through Malindi AJ, did not think that the Labour Court had no jurisdiction to adjudicate under section 189A(13) disputes about the procedural fairness of dismissals for operational requirements in respect of employees to whose employer section 189A applies.

LAC Steenkamp II

[156] The reference to *LAC Steenkamp II* is a reference to the judgment of the Labour Appeal Court in *Steenkamp II*.[53] In *LAC Steenkamp II* the Labour Appeal Court accepted that the Labour Court had jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements properly brought before the Labour Court in terms of section 189A(13). However, without any qualification the Labour Appeal Court made certain statements about the Labour Court not having jurisdiction.

In *LAC Steenkamp II* the Labour Appeal Court also said, after quoting section 189A(13):

> "This jurisdictional competence cannot be read disjunctively from section 191(5)(b)(ii) and section 189A(18). *Plainly, this power is an exception to the primary prescription that no adjudication can occur about unfair procedure*."[54] (Emphasis added.)

[157] These statements do not say that the Labour Court has no jurisdiction under section 191 to adjudicate disputes about the procedural fairness of the dismissals for operational requirements of employees to which section 189A applies and that such disputes, in so far as they may relate to employees to whose employer section 189A does not apply, can still be adjudicated by the Labour Appeal Court.

[53] *LAC Steenkamp II* above n 11. Referring to this case in this way is meant to distinguish it from the judgment of the Labour Court and this Court in *Steenkamp II* which is referred to as *LC Steenkamp II* and *CC Steenkamp II*.

[54] Id at para 21.

[158] After quoting subsection (18), the Labour Appeal Court said in *LAC Steenkamp II* in paragraphs 18 and 19:

> "[18] An employer who dismisses an employee must justify the decision to do so. Section 189 regulates that obligation. Furthermore, in large scale retrenchments, like that in this case, additional obligations are imposed on the employer by section 189A. Central to the present controversy is section 189A(18) which provides that:
>
> > 'The Labour Court may not adjudicate a dispute about procedural fairness of a dismissal based on the employer's operational requirements referred to it in terms of section 191(5)(b)(ii)'.
>
> [19] *There could be no clearer indication that after a dismissal had taken place under the stipulated circumstances of operational requirements of an employer, the Labour Court is bereft of jurisdiction, save in respect of substantive fairness*. That express exclusion of jurisdiction to evaluate procedural unfairness ex post facto is in stark contrast to the jurisdictional competence of the Labour Court in other kinds of dismissal disputes."[55] (Emphasis added.)

What the Labour Appeal Court was saying in the emphasised sentence is in effect that the Labour Court has no jurisdiction to adjudicate disputes about the procedural fairness of dismissals based on the employer's operational requirements. It was also saying that, in disputes concerning dismissals for operational requirements, the Labour Court remains only with the jurisdiction in respect of the substantive fairness of such dismissals. That statement is not correct because the Labour Court still has jurisdiction to adjudicate disputes about the procedural fairness of dismissals of employees whose employer employs less than 50 employees.

[55] *LAC Steenkamp II* above n 23 at paras 18-9.

CC Steenkamp II

[159] The reference to *CC Steenkamp II* is a reference to the judgment of this Court in *Steenkamp II*.[56] I repeat that this was a case where employees launched their application in terms of section 189A(13) more than two years after the dismissal of the employees. The issues before this Court were whether the Labour Appeal Court's decision setting aside the Labour Court's decision granting condonation for the delay in the launching of the section 189A(13) application was correct and whether the remedy of compensation under section 189A(13)(d) was a self-standing-remedy.

[160] Although this Court concluded that the Labour Appeal Court had correctly exercised its discretion in setting aside the Labour Court's decision, it, through Basson AJ, made various statements about section 189A(18) and the jurisdiction of the Labour Court in respect of disputes about the procedural fairness of dismissals for operational requirements. Some of those statements about the jurisdiction of the Labour Court and section 189A(18) are inaccurate. One of the statements made by this Court in *CC Steenkamp II* was this:

> "Disputes about procedural fairness have been removed from the adjudicative reach of the Labour Court and may no longer be referred to the Labour Court as a distinctive claim or cause of action that a dismissal on the basis of operational requirements was procedurally unfair."[57]

This statement is unqualified and basically says that the Labour Court no longer has jurisdiction in respect of disputes about procedural fairness and such disputes may no longer be referred to the Labour Court "as a distinctive claim or cause of action" relating to a dismissal for operational requirements.

[56] *CC Steenkamp II* above n 6. Referring to this case in this way is meant to distinguish it from the judgment of the Labour Court and the Labour Appeal Court in *Steenkamp II* which is referred to as *LC Steenkamp II* and *LAC Steenkamp II*.

[57] Id at para 48.

[161] This is not correct because the Labour Court still has jurisdiction in respect of disputes about the procedural fairness of dismissals for operational requirements in regard to employees to whose employer section 189A does not apply. This Court itself accepted that the Labour Court has jurisdiction in respect of disputes about the procedural fairness of dismissals for operational requirements that are properly brought before the Labour Court in terms of section 189A(13). What this Court should have said is that the Labour Court may not adjudicate under section 191(5)(b)(ii) a dispute about the procedural fairness of a dismissal for operational requirements of employees to whose employer section 189A applied.

[162] Under the heading "Nature, purpose and functioning" of section 189A(13), in *CC Steenkamp II* this Court, inter alia, said at paragraphs 47 to 48:

> "[47] A distinctive feature of section 189A(13) of the LRA is the separation of disputes about procedural fairness. Disputes about substantive fairness may be dealt with by resorting to strike action or by referring a dispute about the substantive fairness of the dismissals to the Labour Court in terms of section 191(11) of the LRA.
>
> [48] *Disputes about procedural fairness have been removed from the adjudicative reach of the Labour Court and may no longer be referred to the Labour Court as a distinctive claim or cause of action that a dismissal on the basis of operational requirements was procedurally unfair*."[58]

[163] This Court also made the following statements about the jurisdiction of the Labour Court:

> "[49] Although a clear policy decision has been made to remove claims of procedural unfairness from the ex post facto jurisdictional competence of the Labour Court, employees are not left without a remedy. In what the Labour Appeal Court referred to as a 'partial claw-back of jurisdiction', they may approach the Labour Court in terms of section 189A(13) of the LRA for an order compelling the

[58] Id at paras 47-8.

> employer to comply with a fair procedure. Where employees have already been dismissed, the Labour Court has the additional power in terms of section 189A(13)(c) of the LRA to reinstate such an employee to allow for the consultation process to run its course.
>
> . . .
>
> [51] The rationale for the removal of the Labour Court's jurisdiction in respect of procedural issues from the ambit of section 191(5)(b)(ii) of the LRA must be viewed against the broader context and purpose of section 189A as a whole. Recognising that large-scale retrenchments may benefit from the intervention of third parties, section 189A provides for an assisted consultative framework in the context of large-scale retrenchments albeit only for a limited time."[59]

[164] This Court commented on the Labour Appeal Court's interference with the Labour Court's decision to grant the employees condonation for their delay in launching their section 189A(13) application. This Court said:

> "[69] The Labour Appeal Court interfered with the Labour Court's discretion because of the Labour Court's misconception about the purpose and functioning of section 189A(13) of the LRA. Here the Labour Appeal Court criticises the Labour Court's acceptance that it has jurisdiction to adjudicate disputes about unfair procedure in the context of large scale retrenchments. It concludes by emphasising the point that the jurisdictional competence assigned to the Labour Court in section 189A(13) cannot be read disjunctively from sections 191(5)(b)(ii) and section 189A(18) because 'plainly, this power is an exception to the primary prescription that no adjudication can occur about unfair procedure.'
>
> [70] The Labour Appeal Court's criticism is warranted. The Labour Court misunderstood the jurisdictional competence conferred on it by section 189A(13) of the LRA. This much is clear if regard is had to the order granted by the Labour Court. In its order the Labour Court consolidated the application for compensation in respect of procedural unfairness under section 189A with the main action and

[59] Id at paras 49 and 51.

> referred it to trial. This is wrong. The jurisdiction of the Labour Court to adjudicate on the procedural fairness of a dismissal based on the employer's operational requirements has been ousted by section 189A(18) of the LRA. As the Labour Appeal Court correctly stated, the Labour Court's jurisdictional competence 'cannot be read disjunctively from section 191(5)(b)(ii) of the LRA and section 189A(18) of the LRA.'"[60]

[165] In paragraph 69 there is a sentence where this Court says the Labour Appeal Court criticised the Labour Court for accepting that it (i.e. the Labour Court) had "jurisdiction to adjudicate disputes about unfair procedure in the context of large scale retrenchments." Although I accept that the Labour Appeal Court criticised the Labour Court extensively, I do not think that it criticised the Labour Court for accepting that it had jurisdiction to adjudicate a dispute about the procedural fairness of dismissals for operational requirements in large scale retrenchments. In its judgment the Labour Appeal Court made some statements about the jurisdiction of the Labour Court but it is not clear from its judgment why those statements were relevant because the issue of jurisdiction of the Labour Court to adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements of employees to whose employer section 189A applied that was brought in the Labour Court in terms of section 189A(13) was not in dispute. The Labour Court clearly had jurisdiction in terms of section 189A(13) to adjudicate this matter because this was a dispute about the procedural fairness of dismissals for operational requirements of employees to whose employer section 189A applied and which had been brought in the Labour Court in terms of section 189A(13). The employees had launched their section 189A application very late but they applied for condonation and whether or not the Labour Court would get to adjudicate the dispute depended upon whether or not the employees' delay in launching their application was to be condoned. The Labour Court had granted condonation but the Labour Appeal Court had reversed that decision and dismissed the condonation application.

[60] Id at paras 69-70.

[166] It will have been seen from paragraph 70 in *CC Steenkamp II* as quoted above that this Court went on to say that it was wrong for the Labour Court to consolidate the matter relating to procedural fairness (that was brought in the Labour Court in terms of section 189A(13)) and the matter relating to the substantive fairness of the dismissal (that was referred to the Labour Court in terms of section 191(5)(b)(ii) for adjudication). This Court gave the basis for its criticism as being the following:

> "The jurisdiction of the Labour Court to adjudicate on the procedural fairness of a dismissal based on the employer's operational requirements has been ousted by section 189A(18) of the LRA. As the Labour Appeal Court correctly stated, the Labour Court's jurisdictional competence 'cannot be read disjunctively from section 191(5)(b)(ii) of the LRA and section 189A(18) of the LRA.'"[61]

Quite clearly, this passage relates to the dispute about the procedural fairness that was consolidated by an order of the Labour Court with the dispute about the substantive fairness of the dismissal.

[167] The dispute about the procedural fairness was not referred to the Labour Court in terms of section 191(5)(b)(ii). Because of that, the exclusion of the Labour Court's jurisdiction in section 189A(18) did not get triggered. That dispute was brought in the Labour Court in terms of section 189A(13) and, quite clearly, the Labour Court had jurisdiction to adjudicate it if condonation for the delay was granted. Paragraph 70 of this Court's judgment in *CC Steenkamp II* may well be the paragraph that led the Labour Appeal Court in the present matter to think that that judgment was authority for the proposition that the Labour Court had no jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements of employees to whose employer section 189A applied even if it had been brought in the Labour Court in terms of section 189A(13). I say this because that is what the Labour Appeal Court

[61] Id at para 70.

effectively decided in the present matter despite the clear language of section 189A(13). To the extent that this is what paragraph 70 says, it is not correct.

[168] To the extent that this Court criticised the Labour Court for consolidating the matter of substantive fairness of the dismissal that was referred to the Labour Court in terms of section 191 with the matter of the procedural fairness of the dismissal that was brought in the Labour Court in terms of section 189A(13), I do not think that it was justified. Actually, the consolidation of such matters (where the employees in a section 189A(13) application only seek compensation) and the substantive fairness matter makes sense because these are two components of the same dispute. The role players in the two matters will usually be the same. If such matters are consolidated, they will be heard by the same Judge whereas, if they are not consolidated, they could be heard by different Judges. If that were to happen, the one Judge could find that a particular witness is unreliable or dishonest and the Judge hearing the other matter finds that the same witness' evidence is credible with all the problems that could flow from that. If the matters are consolidated and heard by the same Judge, the Judge would simply have to bear in mind that he or she is adjudicating one matter under section 191 and the other under section 189A(13).

[169] There are statements made by this Court in *CC Steenkamp II* which suggest that this Court accepted that the Labour Court has jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements that are brought in the Labour Court by way of applications in terms of section 189A(13).[62]

LC Barloworld

[170] The reference to *LC Barloworld* is a reference to the judgment of the Labour Court in *Barloworld*.[63] In *Barloworld* the Labour Court dealt with two applications brought by two unions in terms of section 189A(13). The two unions

[62] Id at paras 49, 52 and 54.

[63] *LC Barloworld* above n 11. Referring to this case in this way is meant to distinguish it from the judgment of this Court in *Barloworld* which is referred to as *CC Barloworld*.

complained that the employer, namely, Barloworld, had dismissed their respective members without compliance with a fair procedure. Both unions contended that such consultation as Barloworld may have purported to undertake was inadequate. The Labour Court held that the applications did not raise issues of non-compliance with a fair procedure but they raised issues of procedural fairness. The Labour Court sought to draw a distinction between the concept of procedural fairness of a dismissal and the concept of compliance with a fair procedure.

[171] The Labour Court went on to say that the matters that could be brought to it in terms of subsection (13) were those that related to a failure to comply with a fair procedure and not matters that related to the procedural fairness of a dismissal. It held that matters concerning the procedural fairness of dismissals could not be brought to it in terms of subsection (13). The Labour Court's conclusion in *LC Barloworld* that the two phrases meant different things was contrary to a decision of this Court in *CC Steenkamp I* where this Court expressly said:

> "[126] The procedural obligations placed upon an employer in section 189A, including those in section 189A(8), relate to procedural fairness contemplated in section 188(1)(b). Then, when subsection (13) refers to non-compliance with a fair procedure, it refers to procedural fairness made up of the procedural obligations and rights provided for in section 189A."[64]

[172] In *LC Barloworld* the Labour Court dismissed the two subsection (13) applications. The basis for the Labour Court's decision to dismiss these two applications was that the two unions were complaining about the dismissal of employees on the basis that the dismissals were procedurally unfair whereas section 189A(13) did not relate to disputes about the procedural fairness of dismissals but about dismissals without compliance with a fair procedure. The distinction that the Labour Court tried to make about these phrases is without any justification.

[64] *CC Steenkamp I* above n 11 at para 126.

[173] Although the Labour Court did not therefore say that it had no jurisdiction to adjudicate disputes about non-compliance with a fair procedure, in saying that it had no jurisdiction to adjudicate under section 189A(13) disputes about the procedural fairness of dismissals for operational requirements of employees to whose employer section 189A applied, it created the impression that there were some disputes concerning the procedural fairness of dismissals for operational requirements in respect of which the Labour Court had no jurisdiction.

[174] Nevertheless, the Labour Court made this statement which, unqualified as it is, could be understood as meaning that the Labour Court's jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements that the Labour Court adjudicates under section 191 of the LRA had been ousted. The passage reads:

> "As a build up to what was said in *TAWUSA*, it is important to add that in terms of section 189A (18) of the LRA, this Court is precluded from adjudicating disputes about the procedural fairness of a dismissal based on the employer's operational requirements. As confirmed by the Constitutional Court in [*CC Steenkamp II*] the jurisdiction of the Labour Court to adjudicate on procedural fairness of a dismissal based on the employer's operational requirements has been ousted."[65]

So, the judgment purported to bar certain workers from bringing some of their disputes to the Labour Court and bar workers to which section 189A did not apply from having their disputes about the procedural fairness of dismissals for operational requirements brought to the Labour Court for adjudication. In the *LC Barloworld* case the Labour Court also said:

> "[13] Where this Court adjudicates procedural fairness disputes under the banner of section 189A(13) this Court would be acting *ultra vires*. Its powers were taken away by section 189A(18)."[66]

[65] *LC Barloworld* above n 64 at para 7.

[66] Id at para 13.

Quite clearly, in this passage the Labour Court was saying that it has no power or jurisdiction to adjudicate disputes about procedural unfairness under section 189A(13) which is clearly incorrect. In this passage the Labour Court says the Labour Court's power to adjudicate such disputes were taken away by section 189A(18). That is also not correct. The Labour Appeal Court refused leave to appeal. The Labour Appeal Court's refusal of leave meant that the Labour Appeal Court agreed with the decision of the Labour Court.

CC Barloworld

[175] The reference to *CC Barloworld* is a reference to the judgment of this Court in *Barloworld*.[67] *CC Barloworld* was an appeal to this Court by Solidarity against the Labour Court's judgment in *LC Barloworld*. Tshiqi J gave this Court's unanimous judgment.[68] This Court considered the merits of the two applications brought by these two unions in the Labour Court in terms of section 189A(13) of the LRA and concluded that there had been a meaningful consultation before the members of the two unions were dismissed and that, for that reason, the appeals fell to be dismissed. NUMSA did not take part in the appeal before this Court.

[176] The essence of the dispute, said Tshiqi J in her judgment in this Court, was whether or not there had been a meaningful joint consensus-seeking process as envisaged in section 189(2). In *CC Barloworld* this Court, quite correctly, rejected the distinction that the Labour Court sought to make between procedural fairness and compliance with a fair procedure in the context of dismissal disputes. I would go further than this Court did in *CC Barloworld*. This Court seemed to leave open a window of opportunity for an argument in some future case in which the distinction could be shown to exist. There is no such chance. These are different phrases which mean exactly the

[67] *CC Barloworld* above n 11. Referring to this case in this way is meant to distinguish it from the judgment of the Labour Court in *Barloworld* which is later referred to as *LC Barloworld*.

same thing. In essence they both relate to the observance or non-observance of the *audi alteram partem* rule in labour law.

[177] A look at the history of our jurisprudence on unfair dismissal law in the 1980s will reveal that in its first few unfair labour practice cases in the early 1980s the Industrial Court relied on the *audi alteram partem* rule to hold that an employer was obliged to give an employee an opportunity to be heard before such employee could be dismissed. In the context of dismissals for misconduct that requirement remained one for a hearing. In the context of dismissals for incapacity, that requirement developed in due course to be counselling. In the case of retrenchment, that requirement developed to a requirement for consultation. Also, in due course, our courts and academic writers began to refer to procedural fairness and to failure to follow, or, comply with, a fair procedure interchangeably. The notorious 1988 amendments to the 1956 LRA included a reference to a "fair procedure". Accordingly, not only is the distinction sought to be drawn by the Labour Court not supported by common sense and logic, it is also inconsistent with the historical development of our jurisprudence on unfair dismissal law. Accordingly, procedural fairness and fair procedure in the context of dismissal disputes refer to the same thing. Their origin is the same. It is the *audi alteram partem* rule.

[178] In *CC Barloworld* this Court referred to this Court's judgment in *CC Steenkamp I* extensively. It then concluded that in *CC Steenkamp I* this Court had stated on the basis of subsection (18) that the Labour Court had no jurisdiction to adjudicate disputes about the procedural fairness in dismissals for operational requirements referred to it in terms of section 191(5)(b)(ii). In *CC Barloworld* this Court then said:

> "[65] *It is thus clear that the Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii)*. As this Court reasoned, in *Steenkamp I*, section 189A(13) provides adequate protection for employees where there has been a failure to comply with a fair procedure. Moreover, in

Steenkamp II, this Court confirmed the features of section 189A(13) and said:

> 'A distinctive feature of section 189A(13) of the LRA is the separation of disputes about procedural fairness from disputes about substantive fairness. Disputes about substantive fairness may be dealt with by resorting to strike action or by referring a dispute about the substantive fairness of the dismissals to the Labour Court in terms of section 191(11) of the LRA. *Disputes about procedural fairness have been removed from the adjudicative reach of the Labour Court and may no longer be referred to the Labour Court as a distinctive claim or cause of action that a dismissal on the basis of operational requirements was procedurally unfair.*'

. . .

> [67] *The above excerpts read with section 189A(18) remove disputes about procedural fairness, as a distinctive claim or cause of action, that a dismissal on the basis of operational requirements was procedurally unfair, from the adjudicative reach of the Labour Court.*
>
> [68] *It follows from this jurisprudence that, in order for the Labour Court to adjudicate a claim of the unfairness of a procedure in dismissals for operational requirements, the Court must be approached in terms of section 189A(13) on the basis of non-compliance with the procedures prescribed by sections 189 or 189A of the LRA.*"[69] (Emphasis added.)

What this Court was saying here was that the only remaining route for the adjudication of disputes about the procedural fairness of dismissals for operational requirements was section 189A(13). This is not correct because the Labour Court still has jurisdiction to adjudicate disputes about the procedural fairness of dismissals on the basis of the employer's operational requirements in regard to employees to whose employer section 189A applies.

[69] Id at paras 65 and 67-8.

[179] In *CC Barloworld* this Court also made certain unqualified statements which suggested that the Labour Court had no jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements of employees to whose employer section 189A applied. It said:

> "[65] It is thus clear that the Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements *in any dispute* referred to it in terms of section 191(5)*(b)*(ii). As this Court reasoned in *Steenkamp I*, section 189A(13) provides adequate protection for employees where there has been a failure to comply with a fair procedure. Moreover, in *Steenkamp II*, this Court confirmed the features of section 189A(13) and said:
>
> > 'A distinctive feature of section 189A(13) of the LRA is the separation of disputes about procedural fairness from disputes about substantive fairness. Disputes about substantive fairness may be dealt with by resorting to strike action or by referring a dispute about the substantive fairness of the dismissals to the Labour Court in terms of section 191(11) of the LRA. Disputes about procedural fairness have been removed from the adjudicative reach of the Labour Court and may no longer be referred to the Labour Court as a distinctive claim or cause of action that a dismissal on the basis of operational requirements was procedurally unfair.'"[70]

[180] Later on, this Court also said in *CC Barloworld*:

> "It follows from this jurisprudence that, in order for the Labour Court to adjudicate a claim of the unfairness of a procedure in dismissals for operational requirements, the court must be approached in terms of section 189A(13) on the basis of non-compliance with the procedures prescribed by section 189 or 189A of the LRA."[71]

[70] Id at para 65.

[71] Id at para 68.

[181] Later, this Court went on to say in *CC Barloworld*:

> "[71] The following emanates from the above discussion. Firstly, the power of the Labour Court to adjudicate the procedural fairness of retrenchment consultations is limited to the 'fair procedure' that is prescribed in sections189 and 189A, which give effect to section 188. *Secondly, it is evident that a party seeking* the *Labour Court's intervention when an employer fails to follow a fair procedure during retrenchment* consultations must approach the Court for *relief in terms of section 189A(13). This is because the Labour Court is barred from determining the procedural fairness of a dismissal based on operational requirements when it is approached in terms of section 191(5)(b)(ii)*." (Emphasis added.)

[182] This Court also stated that until there was a basis for drawing a distinction between non-compliance with a fair procedure and procedural unfairness, "it may be safely concluded that the Labour Court's jurisdiction to adjudicate procedural fairness is only ousted in respect of unfair dismissal proceedings brought in terms of section 191(5)(b)(ii). It is uncontroversial and has been settled by this Court that if an employer fails to follow the procedures prescribed by sections 189 and 189A of the LRA, a party is entitled to approach the Labour Court in terms of section 189A(13) and the Court, in turn, is entitled to grant any of the remedies contained in that provision."[72]

[183] The essence of this Court's judgment in *CC Barloworld* was that, by virtue of subsection (18), the Labour Court no longer had jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements referred to it in terms of section 191(5)(b)(ii) but that it did have jurisdiction to adjudicate disputes about the procedural fairness in dismissals for operational requirements to which section 189A applied if they were brought by way of applications in terms of subsection (13). While the second part of this statement correctly reflects the legal position, the first part does not, in my respectful view, reflect the correct interpretation of subsection (18). This is so because the Labour Court still has jurisdiction to

[72] Id at para 72.

adjudicate disputes about the procedural fairness of dismissals based on the employer's operational requirements of employees to whose employer section 189A does not apply and the first part of that statement says the opposite.

LAC Regenesys

[184] The reference to *LAC Regenesys* is a reference to the Labour Appeal Court's judgment in *Regenesys*[73] which is the present matter. Regenesys' appeal against the judgment and order of the Labour Court came before the Labour Appeal Court. The Labour Appeal Court upheld Regenesys' appeal against the decision of the Labour Court that the dismissal was effected without compliance with a fair procedure and the order for the payment of various amounts of compensation.

[185] The dispute between the employees and Regenesys in this case has two components. The one component relates to the procedural fairness of the dismissal. That is the one referred to in the above excerpt. The dismissal here was based on the employer's operational requirements. Regenesys employed more than 50 employees. The other component of the dispute relates to the substantive fairness of the dismissal. The two components of the dispute were consolidated by an order of the Labour Court.

[186] In a judgment penned by Savage AJA and concurred in by Davis JA and Coppin JA, the Labour Appeal Court said:

> "The first issue in this appeal is whether the Labour Court had jurisdiction to determine the procedural fairness together with the substantive fairness of a dismissal of the respondents"[74]

[187] Savage AJA then quoted section 189A(13) and 189A(18) in succession and said:

> "In [*CC Steenkamp II*], the Constitutional Court noted that the primary purpose of section 189A(13) is thus to allow for early corrective action to get the

[73] *LAC Regenesys* above n 11. Referring to this case in this way is meant to distinguish it from the judgment of the Labour Court in *Regenesys* which is referred to later as *LC Regenesys*.

[74] Id at para 13.

retrenchment process back on track. Section 189A regulates dismissals for operational requirements by employers with more than 50 employees, with it found that section 189A(18) expressly deprives the Labour Court of jurisdiction to determine procedural fairness in such cases. As a result, it was found that the Labour Court erred in consolidating the application for compensation in respect of procedural unfairness under section 189A with the main action and refer it to trial, on the basis that:

> 'The jurisdiction of the Labour Court to adjudicate on the procedural fairness of a dismissal based on the employer's operational requirements has been ousted by section 189A(18) of the LRA. As the Labour Appeal Court correctly stated, the Labour Court's jurisdictional competence 'cannot be read disjunctively from section 191(5)(b)(ii) of the LRA and section 189A(18) of the LRA.'"[75]

[188] The Labour Appeal Court continued at para 17:

> "It was incompetent for Gush J to issue the order that he did in that section 189A(18) expressly provides that the Labour Court may not adjudicate a dispute concerned with the procedural fairness of a dismissal based on the employer's operational requirements. In such circumstances, Prinsloo J ought properly to have refused to conduct the trial in accordance with the terms of that order. The Labour Court erred in adjudicating the procedural fairness of the respondents' retrenchment given that its jurisdiction to do so has been ousted by section 189A(18). It follows that the finding that the dismissals of the respondents were procedurally unfair must consequently be set aside."[76]

[189] It is not very clear from the judgment of the Labour Appeal Court in *LAC Regenesys* what role the consolidation of the substantive fairness matter and the procedural fairness matter played in determining whether the Labour Court had jurisdiction to deal with this matter which was brought before it in terms of

[75] Id at para 15.

[76] Id at para 17.

section 189A(13). Of course, the consolidation of any matter with another matter cannot affect the jurisdiction of a court to deal with a particular matter. Accordingly, if the Labour Court had jurisdiction in respect of a matter before its consolidation with another matter, it would still have jurisdiction in respect of that matter even after the matter has been consolidated with the other one. Consolidation cannot confer upon a court jurisdiction which the Court otherwise does not have. Nor can consolidation take away from a court jurisdiction that the Court otherwise has.

[190] The Labour Appeal Court could not have intended to say the Labour Court did not have jurisdiction to adjudicate this matter because of its consolidation with the matter relating to the substantive fairness matter. However, I do not understand why it included the issue of the consolidation of the two matters in articulating the first issue for determination before it. The Labour Appeal Court articulated the first issue before it thus:

> "The first issue in this appeal is whether the Labour Court *had jurisdiction to determine the procedural fairness together with the substantive fairness of a dismissal of the respondents.*"[77]

[191] It must be noted that the Labour Appeal Court did not say: The first issue in this appeal is whether the Labour Court had jurisdiction to determine the dispute about the procedural fairness of the dismissal for operational requirements brought to the Labour Court in terms of section 189A(13). It said "The first issue in this appeal is whether the Labour Court had jurisdiction to determine the procedural fairness *together with the substantive fairness of a dismissal of the respondents*." This way of formulating the first issue in that appeal suggests that the Labour Appeal Court may have considered the consolidation of the two matters as relevant to the determination of the Labour Court's jurisdiction.

[192] The Labour Appeal Court also said in *Regenesys*:

[77] Id at para 13.

> "As a result, it was found that the Labour Court erred *in consolidating the application for compensation in respect of procedural unfairness under section 189A with the main action and refer it to trial, on the basis that*:
>
> > 'The jurisdiction of the Labour Court to adjudicate on the procedural fairness of a dismissal based on the employer's operational requirements has been ousted by section 189A(18) of the LRA. As the Labour Appeal Court correctly stated, the Labour Court's jurisdictional competence 'cannot be read disjunctively from section 191(5)(b)(ii) of the LRA and section 189A(18) of the LRA.'"[78]

[193] If the Labour Appeal Court was of the view that the Labour Court was wrong to have consolidated the two matters but it, otherwise, accepted that the Labour Court had jurisdiction to adjudicate the two matters under different sections of the LRA, one would have expected that it would have remitted the matter to the Labour Court to adjudicate it separately from the substantive fairness matter or that it would have dealt with the matter itself in the way in which it believed the Labour Court should have dealt with it. The fact that the Labour Appeal Court made the decision it made suggests that, indeed, the view it took was that the Labour Court had no jurisdiction to adjudicate a dispute about the procedural fairness of a dismissal for operational requirements of employees to whose employer section 189A applied despite the clear language of section 189A(13).

[194] It is quite clear that in paragraph 17 in *LAC Regenesys*, quoted above, the Labour Appeal Court was saying that in *CC Steenkamp II* this Court held that "section 189A(13) *expressly deprive[d] the Labour Court of jurisdiction to determine procedural fairness in such cases*". The reference to such cases at the end of the sentence is a reference to cases brought before the Labour Court under section 189A(13). It is difficult to understand how the Labour Appeal Court could say that section 189A(18) took away the Labour Court's jurisdiction to deal with a matter

[78] Id at para 15.

brought before it in terms of section 189A(13) when the latter section is so clear and it expressly refers to the Labour Court making the orders that are listed in the subsection.

[195] One would have expected that the moment the Labour Appeal Court was thinking of saying section 189A(18) meant that the Labour Court had no jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements brought in the Labour Court in terms of section 189A(13), the question that would have arisen in their minds would have been: How can the Labour Court not have jurisdiction to entertain such matters under section 189A(13) because the subsection is so clear? Another question that one expects to have arisen in their minds is: if employees to whose employer section 189A applies cannot bring to the Labour Court their disputes about the procedural fairness of their dismissals for operational requirements under section 189A(13), where may they take those disputes to because it cannot be that the LRA means that they may not take them anywhere? If these questions had arisen in the minds of the Labour Appeal Court panel, they would have appreciated that there was something wrong with that interpretation and would have analysed this Court's judgment in *CC Steenkamp II* on which they relied and, the relevant statutory provisions, closely.

[196] The Labour Appeal Court relied on a portion of paragraph 70 of this Court's judgment in *CC Steenkamp II* to support its conclusion that the Labour Court had no jurisdiction to determine this dispute. It is appropriate to quote the whole of paragraph 70. It reads:

> "[70] The Labour Appeal Court's criticism is warranted. The Labour Court misunderstood the jurisdictional competence conferred on it by section 189A(13) of the LRA. This much is clear if regard is had to the order granted by the Labour Court. In its order the Labour Court consolidated the application for compensation in respect of procedural unfairness under section 189A with the main action and referred it to trial. This is wrong. The jurisdiction of the Labour Court to adjudicate on the procedural fairness of a dismissal based on the employer's operational requirements has been ousted by

> section 189A(18) of the LRA. As the Labour Appeal Court correctly stated, the Labour Court's jurisdictional competence 'cannot be read disjunctively from section 191(5)(b)(ii) of the LRA and section 189A(18) of the LRA.'"[79]

[197] While the statements made by this Court in paragraph 70 in *CC Steenkamp II* may, when read alone, have justified the Labour Appeal Court's conclusion that this Court had held that the Labour Court had no jurisdiction "to adjudicate on the procedural fairness of a dismissal based on the employer's operational requirements" because it was ousted by section 189A(18), if the Labour Appeal Court had also looked at the next paragraph, namely, paragraph 71, it would have realised that this Court also said that the Labour Court could deal with disputes about the procedural fairness of dismissals for operational requirements if brought as applications in terms of section 189A(13). In paragraph 71 in *CC Steenkamp II* this Court said in part:

> "[71] Moreover, the procedure within section 189A(13) of the LRA provides for an urgent remedy on application whilst the parties are still locked in consultations or shortly thereafter in circumstances where the reinstatement of the dismissed employees can still salvage the consultation process by restoring the status quo ante. This process does not contemplate a trial at some future time after the horse has bolted. It cannot be said that the application had any prospects of success and thus it could not be said to have been in the interests of justice to grant condonation."[80]

[198] Although there are statements in *CC Steenkamp II* which suggest that this Court may have been saying that the Labour Court had no jurisdiction to adjudicate a dispute about the procedural fairness of a dismissal for operational requirements – whether under section 191 or 189A(13) – a proper reading of this Court's *CC Steenkamp II* judgment reveals that this Court did not hold that the Labour Court had no jurisdiction to adjudicate under section 189A(13) disputes about the procedural fairness of

[79] *CC Steenkamp II* above n 6 at para 70.

[80] Id at para 71.

dismissals for operational requirements to which section 189A applied. In support of this, let me refer below to a few areas in this Court's judgment in *CC Steenkamp II*.

[199] In *CC Steenkamp II* this Court said in paragraphs 49-50:

> "[49] Although a clear policy decision has been made to remove claims of procedural unfairness from the ex post facto jurisdictional competence of the Labour Court, *employees are not left without a remedy. In what the Labour Appeal Court referred to as a 'partial claw-back of jurisdiction', they may* approach *the Labour Court in terms of section 189(A)(13) of the LRA for an order compelling the employer to comply with a fair procedure. Where employees have already been dismissed, the Labour Court has the additional power in terms of section 189A(13)(c) of the LRA to reinstate such an employee to allow for the consultation process to run its course.*
>
> [50] *Only where these orders are not appropriate, may the Labour Court, where it is appropriate to do so, order compensation in terms of subsection (d).*"[81] (Emphasis added.)

These two paragraphs also make it clear that this Court was saying that the Labour Court had jurisdiction under section 189A(13) to adjudicate disputes about the procedural fairness of dismissals based on the employer's operational requirements concerning employees to whose employer section 189A applied.

[200] This Court also said in *CC Steenkamp II* at paragraph 52:

> "[52] *Where procedural irregularities arise, the process provided for in section 189A(13) of the LRA allows for the urgent intervention of the Labour Court to correct any such irregularities as and when they arise so that the integrity of the consultation process can be restored and the consultation process can be forced back on track.*"[82] (Emphasis added.)

[81] Id at paras 49-50.

[82] Id at para 52.

This Court pointed out in this paragraph in *CC Steenkamp II* that, where there are procedural irregularities, the Labour Court could intervene in terms of section 189A(13).

[201] In paragraph 54 in *CC Steenkamp II* this Court said:

> "[54] *In exercising its powers in terms of section 189A(13) of the LRA, the Labour Court thus acts 'as the guardian of the process' and exercises a 'degree* of judicial' management or oversight over the process. The aim is to proactively foster the consultation process by allowing parties to seek the intervention of the Labour Court on an expedited basis to ensure that procedural irregularities do not undermine or derail the consultation process before it ends. The Labour Court in *Anglo American* expounds:
>
> > 'Section 189A(13) *was introduced in 2002 and was intended, broadly speaking, to provide for the adjudication of disputes about procedural fairness in retrenchments at an earlier stage in the ordinary dispute-*resolution process, and by providing for their determination, inevitably as a matter of urgency, on application rather than by way of referral. *The section empowers employees and their representatives to approach the court to require an employer to apply fair procedure, assuming, of course, that the jurisdictional requirements set out in section 189A are met. The section affords the court a broad range of powers, most of which appear to suggest that where a complaint about procedure is made by a consulting party, the court has a broad discretion to make orders and issue directives, thereby extending to the* court an element of what might be termed a degree of judicial management into a contested consultation process.'" (Emphasis added.)

It is quite clear from these passages in the judgment of this Court in *CC Steenkamp II* that this Court accepted that the Labour Court had jurisdiction to adjudicate disputes

about the procedural fairness of dismissals for operational requirements that have been brought before the Labour Court in terms of section 189A(13).

[202] After paragraph 57 of this Court's judgment in *CC Steenkamp II* there is a heading that reads: "Is section 189A(13)(d) a self-standing remedy?" It is written in bold. Seeing that heading alone should have alerted the Labour Appeal Court that this Court could not have been saying that the Labour Court had no jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements brought in the Labour Court under section 189A(13). The discussion in the second half of that page consisting of paragraphs 58 – 66 could only mean that this Court was saying that the Labour Court had jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements brought in terms of section 189A(13).

[203] Lastly, this Court also said in part in *CC Steenkamp II* at paragraph 71:

> "[71] Moreover, the procedure within section 189A(13) of the LRA provides *for an urgent remedy on application whilst the parties are still locked in consultations or shortly thereafter in circumstances where the reinstatement* of the dismissed employees can still salvage the consultation process by restoring the status quo ante." (Emphasis added.)

[204] Given these passages which clearly show that this Court accepted that the Labour Court had jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements brought in the Labour Court in terms of section 189A(13), one can only conclude that the Labour Appeal Court did not properly apply its mind to this Court's judgment in *CC Steenkamp II*. It is also unfortunate that there is no indication in the Labour Appeal Court judgment that the Labour Appeal Court undertook any analysis of this Court's judgment in *CC Steenkamp II*. The Labour Appeal Court erred in a serious way in attributing to this Court's judgment in *CC Steenkamp II* the holding that it did. The Labour Appeal Court

should have rejected Regenesys' contention and held that the Labour Court was correct in adjudicating the procedural fairness dispute under section 189A(13).

[205] I believe that the statements I have quoted above do show that, indeed, there are judgments in which the Labour Court, Labour Appeal Court and this Court made statements about the jurisdiction of the Labour Court and section 189A(18) which were inaccurate and created the impression either that the Labour Court had no jurisdiction whatsoever to adjudicate disputes about the procedural fairness of dismissals for operational requirements or that the Labour Court had no jurisdiction to adjudicate such disputes in terms of section 191 or section 189A(13) or both. I have also shown that in relying on this Court's judgment in *CC Steenkamp II* to hold that the Labour Court had no jurisdiction to adjudicate disputes about the procedural fairness of dismissals in the present case, the Labour Appeal Court had overlooked a number of passages which made it clear that this Court accepted that the Labour Court had jurisdiction to adjudicate disputes about procedural fairness contemplated in section 189A(13) under that provision.

[206] The interpretation of subsection (18) to the effect that the latter provision has ousted the jurisdiction of the Labour Court to adjudicate disputes about the procedural fairness in dismissals for operational requirements brought before it in terms of section 191(5)(b)(ii) or in terms of subsection (13) or both is inconsistent with the right of access to courts in terms of section 34 of the Constitution and section 38 of the Constitution.

[207] Section 34 of the Constitution reads:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

Section 38 of the Constitution reads:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members."

[208] The reason why the interpretation of subsection (18) that the Labour Court has no jurisdiction to adjudicate disputes about procedural fairness of dismissals for operational requirements either in general or those referred to it in terms of section 191 (5)(b)(ii) is that it means that workers/trade unions and employers which have such disputes – which are clearly disputes that can be resolved by the application of law – have nowhere to take such disputes. That interpretation means that workers have a right to procedural fairness but they have nowhere to go in order to enforce that right. Such an interpretation should be avoided if there is another interpretation which can be adopted without doing violence to the language of the statute. In terms of the interpretation advanced in this judgment no worker who has a right to procedural fairness has nowhere to go to enforce or protect that right.

[209] In my view, although in both *CC Steenkamp II* and *CC Barloworld* this Court discussed what subsection (18) means, the statements it made on the meaning of subsection (18) were not necessary for its decision in both cases. Therefore, what this Court said about the meaning of subsection (18) was not part of the ratio of its decision in each case. *CC Steenkamp II* was an appeal to this Court against the judgment of the Labour Appeal Court in *LAC Steenkamp II*. In its judgment in *LAC Steenkamp II* the Labour Appeal Court said:

> "[2] The principal controversy in the appeal is whether the granting of condonation to the respondents to bring an application in terms of

> section 189A(13) of the [LRA] after the expiry of the prescribed 30 day-period was an incorrect exercise of judicial discretion. Upon the fate of that issue, hangs the propriety of consolidating the several other cases."[83]

It is clear from this excerpt that the case before the Labour Appeal Court in *LAC Steenkamp II* had little, if anything, to do with subsection (18).

[210] Later on, the Labour Appeal Court said in *LAC Steenkamp II*:

> "[15] In our view the application by the respondents is fatally flawed and the judgment *a quo* in error. Upon these grounds the appeal has to succeed. The principal reason for this outcome is the misconception about the purpose and functioning of section 189A(13)."[84]

From this it is clear that the principal or main reason for the Labour Appeal Court's decision which was on appeal before this Court in *CC Steenkamp II* was based on the purpose and functioning of section 189A(13) and not the purpose, meaning and functioning of section 189A(18).

[211] The Labour Appeal Court did not anywhere decide or say that the Labour Court had no jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements brought to it by way of applications in terms of section 189A(13). The case before it was an appeal on a decision on condonation in regard to the failure by the employees to lodge their section 189A(13) application timeously. The Labour Appeal Court's conclusions at the end of its judgment in *LAC Steenkamp II* do not include a conclusion on subsection (18). Its conclusions are recorded as follows:

> "Conclusions
>
> [46] Accordingly, our findings can be summarised thus:

[83] *LAC Steenkamp II* above n 23 at para 2.

[84] Id at para 15.

> On the law:
>
> 46.1. Section 189A(13) is a procedure to be utilised expeditiously, to address an ongoing retrenchment process and is not available long after.
> 46.2. Section 189A(13)(d) is not a self-standing remedy that can be disaggregated from (a), (b) and (c), because it is subordinate and ancillary to those provisions.
> 46.3. The explanation that a failed legal choice of strategy is the reason why a delay occurred to exercise a legal option is not an acceptable explanation."[85]

After this, the Labour Appeal Court said: "The respondent made out no sound case for condonation."[86]

[212] In *CC Steenkamp II* this Court described the issues it was called upon to adjudicate in these terms:

> "[21] The pertinent issues before this Court are: first, whether the Labour Appeal Court was correct in overturning the decision of the Labour Court granting condonation to the applicants, in circumstances where they launched their procedurally unfair dismissal claim years outside of the 30-day statutorily prescribed time period and where the cause of action initially relied upon was found to be inappropriate by this Court in *Steenkamp I*, and second, whether compensation for procedural unfairness can be claimed as a self-standing remedy in the context of large-scale retrenchments in terms of section 189A(13)(d) of the LRA."

It is clear from this passage that the meaning of subsection (18) was not one of the issues that this Court was called upon to decide. Therefore, its pronouncement on the meaning of subsection (18) was *obiter dictum* and is, therefore, not binding.

[85] Id at para 46.

[86] Id at para 46.4.

[213] In *CC Barloworld* this Court made statements both to the effect that the Labour Court had no jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements and that the Labour Court had no jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements referred to it in terms of section 191(5)(b)(ii). I show this below.

[214] It must be remembered that in *CC Barloworld* the employees had lodged their subsection (13) application about a month after the employer had issued notices of dismissals. Accordingly, the applications were lodged within the prescribed 30 days from the date when the notices of dismissals were issued. This Court said that the matter concerned "the interpretation of the LRA and the crisp question before the Court relates to the interpretation of sections 189 and 189A." After referring to, and quoting extensively from, *CC Steenkamp II*, this Court said in *CC Barloworld*:

> "[65] It is thus clear that the Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements *in any dispute referred to it in terms of section 191(5)(b)(ii)*".[87] (Emphasis added.)

This is in accordance with the text of subsection (18).

[215] After having regard to various statements in *CC Steenkamp II*, this Court said in *CC Barloworld*:

> "[71] The following emanates from the above discussion. *Firstly, the power of the Labour Court to adjudicate the procedural fairness of retrenchment consultations is limited to the 'fair procedure' that is prescribed in sections 189 and 189A, which give effect to section 188. Secondly, it is evident that a party seeking the Labour Court's intervention when an employer fails to follow a fair procedure during retrenchment consultations must approach the court for relief in terms of section 189A(13). This is because the Labour Court is barred from determining the procedural fairness of a dismissal based on*

[87] *CC Barloworld* above n 11 at para 65.

> *operational requirements when it is approached in terms of section 191(5)(b)(ii).* Thirdly, it is evident that these provisions are in place to serve the interests of expediency and efficiency, and to ensure that the procedure requirements of the LRA are followed when parties engage in consultation in anticipation of a large-scale retrenchment, and that any defects in the procedures can be cured before jobs are lost. This policy choice was adopted to avoid the courts having to adjudicate alleged procedural unfairness in the aftermath of mass retrenchments. It was self-evidently a sensible legislative decision, for it reduces the likelihood of parties being exposed to the inconveniences and complications that could arise from a court ordering them to unscramble the proverbial scrambled egg. Of course section 189A(13) does envisage, and apply to a situation where it dismissal has already taken place. Paragraph (c) of this section empowers the court to direct 'the employer to reinstate an employee until it has complied with a fair procedure'. Because the section 189A(13) process is meant to take place immediately and to be finalised expeditiously, the paragraph (c) power does not detract from the metaphor of the scrambled egg, because the scrambling will not be complete."[88]

[216] It will be realised that one of this Court's conclusions after referring to, and, quoting from, *CC Steenkamp II* was that "*a party seeking the Labour Court's intervention when an employer fails to follow a fair procedure during retrenchment consultations must approach the Court for relief in terms of section 189A(13)*."[89] To the extent that in this statement this Court meant employees to whose employer section 189A applies, that statement is correct. However, if it was meant to suggest that even employees whose employer is not subject to section 189A could use section 189A(13) for relief in regard to a dispute about the procedural fairness of a dismissal for operational requirements, I would respectfully disagree. The following statement in *CC Barloworld* suggests that this Court was saying that the Labour Court's

[88] Id at para 71.

[89] Id.

jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements had been ousted. That statement reads:

> "[47] A distinctive feature of section 189A(13) of the LRA is the separation of disputes about procedural fairness from disputes about substantive fairness. Disputes about substantive fairness may be dealt with by resorting to strike action or by referring a dispute about the substantive fairness of the dismissals to the Labour Court in terms of section 191(11) of the LRA.
>
> [48] Disputes about procedural fairness have been removed from the adjudicative reach of the Labour Court and may no longer be referred to the Labour Court as a distinctive claim or cause of action that a dismissal on the basis of operational requirements was procedurally unfair."[90]

[217] The procedure and remedies provided for in subsection (13) only apply to employees whose employer is subject to section 189A, namely employers who employ more than 50 employees. Employees employed or formerly employed by an employer who employed less than 50 employees cannot utilise section 189A(13). Those may use section 191 of the LRA to get their disputes about the procedural fairness of a dismissal for operational requirements resolved. Lastly, in *CC Barloworld* this Court decided the appeal on the merits of whether or not the consultation that had been undertaken constituted a joint-consensus-seeking process. It concluded that that consultation was such a process. In that way this Court decided that section 189A(13) application on its merits.

[218] I conclude that that the Labour Appeal Court erred when it decided in the present case that the Labour Court had no jurisdiction to adjudicate disputes about the procedural fairness in dismissals for operational requirements. The position is that the only jurisdiction of the Labour Court that subsection (18) has ousted is its jurisdiction to adjudicate under section 191 disputes about the procedural fairness of dismissals for

[90] Id at para 65.

operational requirements of employees to whose employer section 189A applies. Otherwise, the Labour Court still has jurisdiction to adjudicate disputes about the procedural fairness of the dismissals for operational requirements to which section 189A does not apply.

[219] Contrary to certain statements that appear in judgments of the Labour Court in *Parkinson*, *Clinix*, those of the Labour Appeal Court in *LAC Steenkamp II* and *LAC Regenesys* and those of this Court in *CC Steenkamp II* and *CC Barloworld*, the effect of this judgment in regard to section 189A(13) is as set out in paragraph 140 above. Contrary to certain statements by the Labour Appeal Court in *LAC Steenkamp II*, the judgment of the Labour Appeal Court in *LAC Regenesys* and certain statements by this Court in *CC Steenkamp II* and *CC Barloworld*, the effect of this judgment in regard to section 189A(18) is that:

(a) section 189A(18) does not take away the jurisdiction of the Labour Court to:

(i) adjudicate under section 191 a dispute about the procedural fairness of a dismissal for the employer's operational requirements of employees to whose employer section 189A does not apply.

(ii) adjudicate under section 189A(13) disputes about the procedural fairness of dismissals for operational requirements of employees to whose employer section 189A applies.

(b) section 189A(18) takes away the jurisdiction of the Labour Court to adjudicate under section 191(5)(b)(ii) a dispute about the procedural fairness of a dismissal for operational requirements of employees to whose employer section 189A applies.

(c) there is nothing wrong with the consolidation of a dispute about procedural fairness brought in the Labour Court in terms of section 189A(13) with a dispute about the substantive fairness of a

> dismissal for operational requirements referred to the Labour Court for adjudication in terms of section 191(5)(b)(ii) where an order under section 189A(13)(a) to (c) is not appropriate and the remedy being pursued by the employees at the time is compensation in terms of section 189A(13)(d). Indeed, in such a case a consolidation of the two matters makes sense.

Was the Labour Court right in awarding compensation in terms of section 189A(13)(d)?

[220] Unlike some of the cases referred to earlier in this judgment which were brought to the Labour Court in terms of subsection (13) which were lodged in the Labour Court a year or two after the dismissal, the employees' application in terms of subsection (13) in the present case was lodged about five weeks after the effective date of the employees' dismissal. They applied for condonation for their failure to lodge it within the prescribed 30 days from the date the notices of dismissal were issued. The Labour Court granted condonation. The effect of that decision of the Labour Court condoning their failure to comply is that their application must be treated in the same way the Court would have treated an application that was lodged within the prescribed period. Nobody can legitimately suggest that the consultation process could not have been put back on track as at 8 September to 15 September 2015 if the Labour Court had adjudicated the application as an urgent application.

[221] In their notice of motion, the employees asked that their application be dealt with on an urgent basis. They also asked that a Judge be assigned to their application in terms of the Labour Court Practice Manual so as to ensure that their application was dealt with expeditiously. It would appear that Gush J may have been assigned to "case manage" the application. At some stage during the first two weeks of October 2015 – that is about a month or just over a month after the application had been lodged – Gush J made an order consolidating the employees' section 189A(13) application and the dismissal dispute referred to the Labour Court for adjudication in terms of section 191(5) of the LRA so that the two matters would be adjudicated

together. The dismissal dispute that was referred to the Labour Court in terms of section 191(5) included the procedural fairness of the dismissal.

[222] In their section 189A(13) application the employees asked for the orders contemplated in paragraphs (a) to (c) alternatively an award of compensation in terms of section 189A(13)(d). There is a good chance that Gush J, being a Judge of the Labour Court, took the view, rightly or wrongly, that as at October 2015, the orders contemplated in paragraphs (a) to (c) of subsection (13) were no longer appropriate and that the only order that could be appropriate at that stage was an order of compensation contemplated in paragraph (d) of subsection (13). In such a case he may have realised that there was no urgency about an order for the payment of compensation and that, in all of the circumstances, it made sense that the two matters be decided by the same Judge, hence the consolidation.

[223] Those two matters were the dispute about the procedural fairness of the dismissal of the employees for operational requirements brought to the Labour Court by way of a subsection (13) application and the dispute about the substantive fairness of the dismissal of the same employees for operational requirements. That would explain why Gush J consolidated the two matters and ordered that they be adjudicated together. Once it would no longer be appropriate for the Labour Court to grant any of the orders contemplated in paragraphs (a) to (c), it became appropriate for compensation to be awarded if it was established that Regenesys had failed to comply with a fair procedure in dismissing the employees.

[224] Although it may still have been appropriate for the Labour Court to grant an order contemplated in paragraph (c) of subsection (13) when Gush J consolidated the two matters in October 2015, it certainly would no longer have been appropriate for the Labour Court to grant the orders contemplated in paragraphs (a) to (c) when the Labour Court eventually adjudicated the two matters in February 2020, because that was more than four-and-a-half years after the dismissals. Therefore, the Labour Court was obliged to adjudicate both disputes when it did.

[225] Section 189A(14) reads:

> "Subject to this section, the Labour Court may make any appropriate order referred to in section 158(1)(a)."

Section 158(1)(a) of the LRA reads:

> "158. Powers of Labour Court
>
> (1) The Labour Court may—
>
> (a) make any appropriate order, including—
>
> (i) the grant of urgent interim relief;
>
> (ii) an interdict;
>
> (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;
>
> (iv) a declaratory order;
>
> (v) an award of compensation in any circumstance contemplated in this Act;
>
> (vi) an award of damages in any circumstances contemplated in this Act; and
>
> (vii) an order for costs;"

[226] When Prinsloo J adjudicated the dispute about the procedural fairness of the dismissal in the Labour Court in this matter, she was alive to the fact that that dispute had been brought in the Labour Court by way of an application in terms of section 189A(13) and it was not a dispute about the procedural fairness of dismissals referred to the Labour Court in terms of section 191(5)(b)(ii) for adjudication. It will be recalled that I said earlier that the dismissal dispute that was consolidated with the section 189A(13) application concerned both the procedural and substantive fairness of the dismissal of the employees. In paragraph 138 of her judgment Prinsloo J said that "it is undisputed that [Regenesys] did not comply with the consultation period or the

process provided for in section 189A of the LRA". Just above paragraph 153, she put this heading: "Was there compliance with section 189A".

[227] The Labour Court dealt with the procedural fairness of the dismissal from paragraph 133 to paragraph 155. In paragraph 133 Prinsloo J said that the employees "challenged the procedural fairness of their dismissal in the section 189A(13) application of the LRA filed in this Court in September 2015." She mentioned four grounds advanced by the employees in support of their challenge to the procedural fairness of their dismissal. She recorded the first one as being:

> "[Regenesys'] retrenchment exercise fell squarely within the ambit of section 189 of the LRA, yet [Regenesys] has not complied with the provisions of the said section and terminated the [employees'] services within a few days after they were issued with a notice in terms of section 189(3) of the LRA, in total disregard for the period prescribed by section 189A."[91]

She recorded that the employees contended that they were dismissed within a few days after they had been issued with section 189(3) notices and there was no justification for the consultation process to be concluded so quickly.

[228] Another ground was that there was no meaningful joint consensus seeking process. Another one was that there was no proper attempt to avoid the retrenchment. The last one was that the employees were given only one opportunity to make representations on very short notice.

[229] In paragraph 134 Prinsloo J referred to the relationship between sections 189 and 189A. She quoted a passage in paragraph 34 of the Labour Appeal Court's judgment in *Gijima*.[92] The passage reads:

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[91] *Nortje v Regenesys Management (Pty) LTD* (JS776/15 & D1824/2015) (27 February 2020) ZALCJHB at para 133.1. Referring to this case in this way is meant to distinguish it from the judgment of the Labour Appeal Court in *Regenesys* which is referred to as *LAC Regenesys*.

[92] *Gijima AST (Pty) Ltd v Hopley* [2014] ZALAC 9; (2014) 35 ILJ 2115 (LAC) at para 34.

"[134] The relationship between sections 189 and 189A of the LRA is symbiotic and this was confirmed by the Labour Appeal Court in [*Gijima*] where it was held that:

> 'The two sections must be read together since they both apply to dismissals for operational requirements. Further, the overall obligation imposed by the two sections is for consultation on the matters referred to in section 189. It is also significant to note that the section 189A process is initiated by the very same section 189(3) notification issued for retrenchments. The items that form the subject of consultation are only listed in section 189(2) which includes the method for selecting employees to be dismissed. Such a provision is not found in section 189A.'"[93]

[230] Prinsloo J said in paragraphs 149 to 152 of her judgment:

"[149] It is evident from the section 189(3) letter issued on 18 June 2015 that the reason for the contemplated retrenchment was stated as 'because the company is implementing a new business model and the organisational structure to improve operational efficiencies and effectiveness.' Accordingly, the Respondent's affected employees were invited to make proposals and recommendations 'regarding the proposed restructuring process and the proposed organisational structure'. No mention was made of the financial crisis the Respondent experienced and the employees were not invited to make any submissions on that.

[150] The Applicants were only invited to comment on the proposed structure and there was no consultation on any of the issues prescribed by section 189 of the LRA. In fact, Ms Brownlee conceded in her evidence that there was no consultation with the Applicants on measures to avoid dismissal, on minimising the dismissals, on the timing thereof or to mitigate the adverse effect of the dismissal, severance pay or selection criteria. These are not only topics of crucial

[93] *LC Regenesys* above n 91 at para 104.

> importance to consult on, but are prescribed by the LRA and which were ignored by the Respondent.
>
> [151] Not only were the Applicants deprived of an opportunity to consult, they were also not provided with information relating to the real reason behind the retrenchment. Up to the moment the section 189(3) notice was issued, the Respondent presented a sugar coated version and never communicated and engaged with its employees on the real reason behind the restructuring and the retrenchments. For that the Respondent was far too concerned about its own image, its own interests and its own livelihood.
>
> [152] The Applicants were not consulted on the issues prescribed by the LRA and the Respondent made no serious effort to engage them in a joint consensus-seeking process."[94]

[231] In paragraph 153 Prinsloo J said:

> "[153] It was conceded by Dr Law that the process and time frames prescribed by section 189A had not been complied with. The rushed process followed by [Regenesys] underlines [Regenesys'] failure in this regard."[95]

[232] The Labour Court concluded that the dismissal of the employees for operational requirements "was procedurally unfair."[96] The Labour Court made this conclusion under a heading that read: "Was there compliance with section 189A?" This, once again, shows that Prinsloo J was alive to the fact that she was adjudicating a dispute about the procedural fairness brought to the Labour Court in terms of subsection (13) and not one referred to the Labour Court in terms of section 191(5)(b)(ii).

[233] In the light of the above, there can be no doubt that the Labour Court adjudicated the procedural fairness of the dismissal that was brought in the Labour Court by a way

[94] Id at paras 149-152.

[95] Id at para 153.

[96] Id at para 155.

of an application in terms of section 189A(13). It did not adjudicate the procedural fairness of a dismissal dispute referred to it in terms of section 191(5)(b)(ii) as contemplated in section 189A(18). This means that, as is stated elsewhere in this judgment, in the present matter the Labour Appeal Court's decision was to the effect that the Labour Court did not have jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements irrespective of whether such disputes were brought before it by way of section 189(13) or section 191(5)(b)(ii).

[234] There can be no basis for suggesting that the Labour Appeal Court thought that in this case the Labour Court had adjudicated under section 191 a dispute about procedural fairness of the dismissals of employees to which section 189A applied. I say this because, as I have indicated above, Prinsloo J's judgment made it crystal clear in a number of areas that the Labour Court was adjudicating a section 189A(13) matter. There is no way that the Labour Appeal Court could not have appreciated this. In fact, the Labour Appeal Court had thought that the Labour Court had adjudicated the matter under section 191 when it should have adjudicated it under section 189A(13) it (i.e. the Labour Appeal Court) would have said that the Labour Court had no jurisdiction to adjudicate the dispute under section 191 because it was a section 189A(13) matter. The Labour Appeal Court did not make that distinction. In fact none of the judgments in which the Labour Appeal Court dealt with matters that had been brought to the Labour Court under section 189A(13) did it make such a distinction. This includes its judgment in *LAC Steenkamp II*. The reason why it did not make that distinction is that its view was that the Labour Court's jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements – whether under section 191 or 189A(13) – had been ousted. The Labour Appeal Court believed, wrongly in my view, that that was the effect of this Court's judgment in *CC Steenkamp II*. This is not a conclusion that one can reach lightly but it is the only explanation of the Labour Appeal Court's decision in the present case.

[235] If the reason why the Labour Appeal Court made the decision that it made was that it was of the view that the Labour Court had adjudicated under section 191 a dispute

that it should have adjudicated under section 189A(13), it would have done one of two things. Since all the evidence was in the record before it, it could have proceeded to adjudicate the employees' section 189A(13) claim on the merits. It did not follow this route. Another route would have been for the Labour Appeal Court to remit the matter to the Labour Court and direct that the Labour Court should adjudicate it under section 189A(13). It did not follow this route either. The Labour Appeal Court simply held that the Labour Court had no jurisdiction to adjudicate the dispute about the procedural fairness of the dismissal for operational requirements and did not qualify this statement in any way by reference to either section 191 or 189A(13).

[236] This position taken by the Labour Appeal Court is consistent only with the view that the Labour Court's jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements – whether under section 191 or 189A(13) – had been ousted. I accept that it is difficult to understand how the Labour Appeal Court could reach the decision that the Labour Court had no jurisdiction even to adjudicate disputes about the procedural fairness of dismissals for operational requirements of employees to which section 189A applied which were brought to the Labour Court in terms of section 189A(13) when the statute is as clear as it is in that provision. However, I come back to the question: if the Labour Appeal Court believed that the Labour Court did have jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements under section 189A(13) if section 189A applied to the employees concerned, why did it not adjudicate the matter on the merits or remit it to the Labour Court to adjudicate it under section 189A(13)?

[237] The effects of that decision of the Labour Appeal Court were far-reaching. The decision meant that potentially millions of workers in this country who have disputes with their employers about the procedural fairness of their dismissal for operational requirements, can no longer bring those disputes to the Labour Court or any independent tribunal or forum as contemplated in section 34 of the Constitution for adjudication. Those are the disputes about the procedural fairness of dismissals for operational requirements irrespective of whether such disputes have been brought by way of

applications as contemplated by subsection (13) or by way of a referral to the Labour Court in terms of section 191(5).

[238] The Labour Appeal Court erred in concluding that the Labour Court had no jurisdiction to adjudicate disputes about procedural fairness of dismissals for operational requirements that it adjudicated. Its decision in this regard falls to be set aside. It is not correct, as the Labour Appeal Court said, that the Labour Court had misunderstood the legal position. The Labour Court had correctly understood the legal position in taking the approach that it had jurisdiction to adjudicate the procedural fairness of the employees' dismissal for operational requirements which had been brought before it by way of an application in terms of subsection (13).

Other misdirections in the Labour Appeal Court's order

[239] The order that was made by the Labour Appeal Court setting aside the whole order of the Labour Court including orders that it had not concluded were wrongly granted by the Labour Court is strange. The only orders that the Labour Appeal Court was entitled to set aside were the Labour Court's declaration that the dismissals of the employees were procedurally unfair and the order for the payment of compensation to those employees whose dismissals had been found to be procedurally unfair only. When I say "entitled", this is on the assumption that the Labour Appeal Court was correct in its conclusion that the Labour Court had no jurisdiction to adjudicate the procedural fairness of the dismissals of the employees.

[240] Furthermore, the Labour Appeal Court set aside the order of costs made by the Labour Court against Regenesys and replaced it with an order that "there is no order as to costs" even though there is no indication in its judgment that Regenesys had appealed against the Labour Court's court order. Indeed, for all intents and purposes the position must be that Regenesys did not seek to pursue any appeal against the costs order because, if it had, the Labour Appeal Court would have covered its contentions on costs in its judgment. The Labour Appeal Court erred in this regard. A court of appeal cannot just set aside an order of a lower court if it has not been appealed against and such

appeal has been upheld. Furthermore, a costs order is an order that a court grants in the exercise of a true discretion and such orders can only be interfered with on appeal on certain limited grounds such as where there is a misdirection. In the absence of one or more of those limited grounds, such an order must stand. There is no discussion in the judgment of the Labour Appeal Court as to why that order was set aside nor did the Labour Appeal Court give any reasons for setting that order aside and replacing it with a different order.

Costs

[241] In my view, this is an appropriate case in which the Court should order Regenesys to pay the employees' costs. The reasons are the same as those given earlier in this judgment in regard to the dismissal of the appeal.

Order

[242] In the result the following order is made:

1. Leave to appeal and to cross-appeal is granted.
2. The appeal is dismissed with costs including the costs of two Counsel where two Counsel were employed.
3. The cross-appeal is upheld with costs including the costs consequent upon the employment of two Counsel where two Counsel were employed.
4. Save in respect of the sixth and ninth respondents in the Labour Appeal Court (Ms Wendy Mary Malleson and Ms Ariadne David):

    (a) the decision of the Labour Appeal Court that the Labour Court had no jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements is set aside.

    (b) the order of the Labour Appeal Court on costs in that Court is hereby set aside and replaced with the following:

"The appellant is to pay the costs of the appeal including the costs of two Counsel where two Counsel were employed."

(c) the order of the Labour Appeal Court setting aside the order of the Labour Court on costs is hereby set aside.

(d) the order of the Labour Court is reinstated.

ROGERS J:

Introduction

[243] I have had the pleasure of reading the Chief Justice's judgment (first judgment). I agree with the first judgment's proposed disposition of the case. I write separately because there are aspects of the first judgment with which I do not agree. I accept that our jurisdiction is engaged and that leave to appeal and cross-appeal should be granted. There is nothing I wish to add to the first judgment's reasons for rejecting Regenesys' appeal on the substantive unfairness of the retrenchments of Ms Ilunga, Dr Dos Santos, Ms Nkodi and Ms Mahlangu.

[244] The cross-appeal raises the question whether the Labour Court was right to award compensation to Ms Nortjé, Ms Mann and Ms Chalklen in terms of section 189A(13)(d) because their retrenchments were procedurally unfair. Although in principle the same issue arises in relation to the four persons mentioned in the preceding paragraph, it is academic in their case because of the finding that their retrenchments were substantively unfair.

Compensation under section 189A(13)(d) as stand-alone relief

[245] Paragraphs 72 to 97 of the first judgment deal with the question whether compensation in terms of section 189A(13)(d) may be claimed as stand-alone relief. That question does not strictly arise in this case. The retrenched employees sought reinstatement in terms of subsection (13)(c), with compensation in terms of

subsection (13)(d) as an alternative. Although the subsection (13) application was brought slightly late, it was launched at a time when – as the first judgment rightly holds – reinstatement in order to get consultation back on track was feasible. The Labour Court condoned the delay in launching the subsection (13) application, but evidently considered that reinstatement in terms of subsection (13)(c) was no longer appropriate.

[246] In those circumstances there was no urgency in adjudicating the alternative claim for compensation in terms of subsection (13)(d). The Labour Court could thus competently adjudicate the claim on a more leisurely basis, simultaneously with the claim based on substantive unfairness. The case is on all fours with *SA Five Engineering*.[97] I agree with the first judgment that *SA Five Engineering* was correctly decided.

[247] We thus do not have to decide whether the retrenched employees could have brought a claim for compensation under subsection (13)(d) as their primary relief. Nevertheless, and although what we say on that question may be an *obiter dictum* (a non-binding observation made in passing), I agree with the first judgment that there may be circumstances in which a claim for compensation alone under subsection (13)(d) will be permissible. If the circumstances are such that an order in terms of subsection (13)(a), (b) or (c) is very unlikely to be granted, the affected employees should not be forced to seek such an order as their primary relief, just so as to be able to make a subsection (13)(d) claim for compensation in the alternative.

[248] However, it is important that the existence of this possibility should not be misunderstood. As the first judgment states, the lawmaker's preferred remedy is to ensure procedural fairness through proper consultation.[98] Relief in terms of subsection (13)(a), (b) or (c) is thus the lawmaker's preferred outcome. Although

[97] *SA Five Engineering* above n 21.

[98] See the first judgment at [93].

compensation in terms of subsection (13)(d) exists as a fallback possibility, it cannot be divorced from subsection (13) as a whole read with subsections (17) and (18).

[249] If, in the case of large employers to whom section 189A applies, the lawmaker had intended there to be what I may call an ordinary claim for compensation for procedurally unfair retrenchment, the lawmaker would not have needed to include compensation as part of subsection (13) or to have made a claim for compensation under subsection (13) subject to the 30-day time-limit set in subsection (17) or to have enacted the exclusion in subsection (18). Claims for compensation for procedurally unfair retrenchments could have been left to the ordinary unfair-dismissal machinery of the Act.

[250] What this shows is that employees to whom section 189A applies are expected to move promptly with a view to achieving the primary object of subsection (13). If they fail to do so, and then bring a leisurely claim for compensation under subsection (13)(d) on the basis that such a claim, unlike the relief in subsections (13)(a), (b) and (c), is not inherently urgent, a request for condonation for non-compliance with the 30-day time-limit is unlikely to be granted. Affected employees must strive to achieve the primary object of subsection (13). Similarly, if employees bring a prompt application but seek only compensation under subsection (13)(d), the Labour Court may interrogate why the preferred relief under subsection (13) is not being claimed. It must be borne in mind that compensation for a large number of employees – the typical scenario in which section 189A applies – may be ruinous for the employer.

[251] Nevertheless, there may be circumstances where even vigilant employees could not plausibly be expected to claim relief under subsection (13)(a), (b) or (c). I prefer not to speculate about what those circumstances might be, since we do not have a concrete case before us. In principle, however, I accept that in such cases the employees may claim compensation as stand-alone relief, subject to satisfying the Labour Court that the primary relief contemplated in subsection (13) is not appropriate. Even if the employees have claimed compensation only in the alternative, the granting of

compensation instead of the primary relief may be justified, including by changed circumstances as a result of a delay in adjudicating a timeous or near-timeous application.

[252] The failure of the retrenched employees' applications in *Parkinson*[99] and *Clinix*[100] was almost certainly justified. The applications were brought between seven and nine months late, at a time when achieving the primary object of subsection (13) had long since passed. The Labour Court in both cases refused condonation. In doing so, the Labour Court could properly have taken into account the special features of section 189A that I have mentioned. These special features are superimposed on the more conventional aspects of an explanation for failure to meet a time-limit.

[253] In *Steenkamp II*[101] the application for compensation in terms of subsection (13) was two years late. The decision of the Labour Appeal Court, confirmed in this Court, that the delay could not be condoned was undoubtedly right. It is true that the Labour Appeal Court and this Court made statements to the effect that compensation could not be claimed as stand-alone relief. I think those judgments can be read, however, as meaning no more than that compensation in terms of subsection (13) is not the primary relief contemplated by the lawmaker and that this has to loom large in any application for condonation.

[254] As this Court said in *Steenkamp II*, the remedy provided for in subsection (13)(d) cannot be "divorced from the remainder of this section and given self-standing meaning".[102] It is a fallback remedy only available when the primary remedy is not appropriate, and condonation has to be assessed on the basis that employees are expected to bring their application in sufficient time to make the granting of the primary

[99] *Parkinson* above n 20.

[100] *Clinix* above n 20.

[101] *Steenkamp II* above n 6.

[102] Id at para 61.

remedy feasible. If, however, the Labour Court concludes that the granting of the primary relief is not appropriate, it may defer a claim for compensation for later adjudication.[103]

[255] However, if anything said by the Labour Appeal Court or this Court in *Steenkamp II* were to be understood as meaning that under no circumstances can affected employees claim compensation under subsection (13)(d) without co-joining it to a primary claim for relief under subsections (13)(a), (b) or (c), that statement would be wrong, even if the circumstances under which that would be permissible might be unusual, even rare.

Exclusion of jurisdiction in all cases of procedurally unfair retrenchment

[256] Paragraphs 149 to 219 of the first judgment address and criticise cases in which, according to the first judgment, the Labour Court, Labour Appeal Court and this Court have held or implied that subsection (18) excludes the jurisdiction of the Labour Court to adjudicate claims for compensation for procedurally unfair retrenchments, whether or not the retrenchments fall within the scope of section 189A and whether or not the claim is brought in terms of section 189A(13).

[257] Since it is common cause that the present case falls within the scope of section 189A, the question whether section 189A(18) applies to other retrenchments as well does not arise. Unsurprisingly, in the circumstances, it was not the subject of any argument, and anything we say on that subject is again *obiter*. Nevertheless, since the matter is discussed at length in the first judgment, I have no difficulty saying, in agreement with the first judgment, that the exclusion in section 189A(18) clearly applies only to retrenchments falling within the scope of section 189A. This is clear from the opening words of section 189A(1): "This section applies to employers employing more than 50 employees if—".

[103] Id at paras 63-4.

[258] However, and unlike the first judgment, I do not believe that any of the cases discussed therein, all of which were cases governed by section 189A, reflect an understanding by any of the courts concerned that subsection (18) ousts the Labour Court's jurisdiction in cases of procedurally unfair retrenchments falling outside the scope of section 189A. I do not think that one should attribute such a fundamental error to those courts. The context of cases dealing with the exclusion in subsection (18) have been cases governed by section 189A. The Labour Court and the Labour Appeal Court (including the three Judges of Appeal who sat in the present case) have without question adjudicated cases involving procedurally unfair retrenchments falling outside the scope of section 189A.[104]

[259] Statements in judgments, perhaps even more so than the provisions of contracts and statutes, must be read with due regard to the context of the judgment as a whole. Where the courts have spoken of an exclusion of jurisdiction under subsection (18), they have been talking about retrenchments by large employers falling under section 189A. Often this is explicit. In *Steenkamp II*,[105] for example, this Court began its discussion of subsection (13) by highlighting that section 189A applies to retrenchments involving a "large number of employees".[106] The Court said that the exclusion of jurisdiction in subsection (18) had to be viewed in the broader context and purpose of section 189A as a whole – namely "large-scale retrenchments" and getting the consultation process back on track.[107]

[260] In *Barloworld*[108] this Court concluded its discussion of the scope of subsection (13) by stating, among other things, that the relevant provisions of

[104] For a few recent examples of successful claims in the Labour Appeal Court, see *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van Dyk* [2020] ZALAC 4; [2020] 6 BLLR 549 (LAC); (2020) 41 ILJ 1360 (LAC), *Total SA (Pty) Ltd v Meyer* [2021] ZALAC 12; [2021] 8 BLLR 795 (LAC); (2021) 42 ILJ 1696 (LAC), *Mbekela v Airvantage (Pty) Ltd* [2021] ZALAC 47 and *Reeflords Property Development (Pty) Ltd v Almeida* [2022] ZALAC 8; [2022] 6 BLLR 530 (LAC); (2022) 43 ILJ 1648 (LAC).

[105] *Steenkamp II* above n 6.

[106] Id at para 46.

[107] Id at paras 51-2.

[108] *Barloworld* above n 11.

section 189A, including subsection (13), were enacted to serve the interests of expediency and efficiency in cases of "large-scale retrenchment" and to avoid the courts having to adjudicate alleged procedural unfairness "in the aftermath of mass retrenchments".[109]

[261] Likewise, I do not read any of the cases reviewed in the first judgment as holding that, in the case of retrenchments by large employers to which section 189A applies, the Labour Court cannot assess procedural fairness in a claim brought under subsection (13). Subsection (13) expressly states that the Labour Court can do so, and the Labour Court has often done so.

[262] In my respectful view, therefore, paragraphs 149 to 219 set up and knock down a proposition which has not been adopted in past cases. There has been no uncertainty in our jurisprudence on these matters. There is no case of which I am aware where the Labour Court or Labour Appeal Court has refused to consider the procedural fairness of an ordinary retrenchment falling outside the scope of section 189A. And for these reasons, I cannot associate myself with the criticisms made in the first judgment of the Labour Appeal Court in the present case. In regard to the first major topic of the first judgment, namely the legitimacy of a claim for compensation under subsection (13)(d) as "stand-alone" relief, I agree with the first judgment that the Labour Appeal Court erred. It was perhaps led astray by statements made in *Steenkamp II*, either because the Labour Appeal Court misunderstood the import of *Steenkamp II* (as I think) or because *Steenkamp II* was wrong, albeit *obiter* (as the first judgment holds). But the Labour Appeal Court merely erred – no more, no less.

[263] In regard to the second major topic of the first judgment, namely the scope of the exclusion in subsection (18), the criticism of the Labour Appeal Court in the first judgment is simply not justified, in my view. The Labour Appeal Court did not find

[109] Id at para 71. See also at para 69 with reference to *Association of Mineworkers and Constructions Union v Piet Wes Civils CC* (2017) 38 ILJ 1128 (LC).

that the exclusion in section 189A(18) applied to retrenchments falling outside the scope of section 189A or that the Labour Court could not adjudicate claims for procedural unfairness brought in terms of section 189A(13). The Labour Appeal Court expressly recognised that subsection (18) applied only to retrenchments by large employers falling within the scope of section 189A.[110] The Labour Appeal Court's sole error was to hold that a claim for compensation under subsection (13)(d) could not competently have been adjudicated by the Labour Court as stand-alone relief. That is the error forming the subject of the first major topic of the first judgment.

[110] See at para 15, where the reference to the exclusion of jurisdiction in terms of subsection (18) in "such cases" is a reference to the cases mentioned in the earlier part of the same sentence, namely retrenchments by employers who employ 50 or more people.

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