

SOUTH AFRICA / JUDGMENT

Govind v AC Nielsen Marketing and Media (Pty) Ltd (P 95/2020) [2020] ZALCPE 12 (6 October 2020)

[2020] ZALCPE 12

COURT

Labour Court Port Elizabeth

BEFORE

Tlhotlhamajie

CASE / FILE NUMBER

P 95/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG / PORT ELIZABETH

Not reportable

Case No: P 95/2020

In the matter between:

MAYA

GOVIND

Applicant

and

AC

NIelsen MARKETING AND MEDIA (PTY) LTD

Respondent

Heard: 25 September 2020

(via Zoom)

Delivered: This

judgment was handed down electronically by circulation to the parties' legal representatives by email, and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 6 October 2020 at 12:00

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] This application was brought before the Court under the provisions of section 189A(13) of the Labour Relations Act (LRA)[1]. The applicant seeks a rule nisi, pending the final determination of this application;
- (i) declaring that the respondent has not complied with a fair procedures preceding her dismissal on 31 August 2020 on account of its operational requirements.
- (ii) ordering her reinstatement into her previous position of Human Resource Director: Sub-Saharan and Southern Africa with effect from 1 September 2020.
- (iii) authorising her to submit an LRA Form 7.20 to the CCMA within 48 hours of the granting of the order, for the appointment of a Senior Commissioner in terms of section 189A(3)(b) of the LRA to facilitate the consultation process in terms of section 189A.

Background:

- [2] The respondent's parent company (The Nielsen Company (US) LLC) (Nielsen), is a global measurement and data analytics' company with operations around the globe. It provides market research, insights and data to its clients related to what consumers generally watch, listen to and purchase. Its main role is to assist clients in understanding consumers and to enable them grow their own businesses. Nielsen is divided into two sectors, viz, the media business, which serves the media, telecom and tech industries, and connect business, which serves the consumer goods, retail and financial services.
- [3] The structure of Nielsen in South Africa is such that it has two entities, viz, AC Nielsen Marketing and Media (Pty) Ltd (The respondent), and AGB Nielsen Media Research (South Africa) Pty Ltd, which were supported
- by one functional support team consisting of Human Resources, IT and Finance, and comprised of shared services employed by Nielsen. A restructuring and split of these entities took effect from January 2019 and in November 2019.
- [4] The applicant was employed with effect from October 2018 in the position of HR Director: Sub-Saharan and Southern Africa. Until her dismissal on 31 August 2020, she had reported directly to the respondent's HR Lead: Asia and Middle East (Ms Shradha Bhagchandani, who is also the deponent to the answering affidavit). She was part of the shared services and had four other employees reporting to her. The applicant and her team served both the South Africa Media and Connect business units in East and West Africa comprising of about 770 employees.

- [5] The first indication of restructuring in Nielsen was made on 30 April 2020 when a global communication was issued to all employees. On 26 May 2020, a global announcement was made by Nielsen's Chief Executive Officer to overhaul the entire business and organisational structure as a consequence of the need to reduce and control costs arising from the impact of COVID-19 pandemic.
- [6] This was followed by another announcement in June 2020 that Nielsen would be exiting the West African market. Flowing from these announcements, team leaders were then tasked with a review of their structures, overall functions and budgets. As a result of various splits and restructuring of the individual entities, and the decision to exit the West African market, this had according to the respondent, impacted on the functions and responsibilities of the applicant, and thus reduced the number of employees required to report to her. This had also according to the respondent, rendered her remaining duties to be no longer in line with those of her position at band 4, and consequently affected company costs.
- [7] On 11 June 2020, the applicant was invited to a 'courtesy' meeting to be informed that her role had been impacted by the restructuring process. The meeting was also attended by other senior HR employees within Nielsen. The applicant was furnished with a copy of the proposed new structure, which did not reflect her position. In terms of the new structure, the applicant's team was now to report directly to the HR Lead Africa and Middle East Connect. She was further advised that the new structure was to take effect from 31 July 2020
- [8] The applicant's contention is that flowing from that meeting and subsequent correspondence of 11 and 18 June 2020 received from Ms Bhagchandani, a conclusion ought to be made that the decision to make her position redundant and her ultimate retrenchment was taken prior to there being a need to do so, and prior to any consultations with her. She further contends that the respondent was simply endeavouring to 'tick the block' of procedural compliance with section 189 of the LRA.
- [9] In the correspondence of 11 June 2020, Bhagchandani advised the applicant that due to the impact of COVID-19 on Nielsen business, the HR structure was looked at across the business units and functions, and that reductions were to be put in place in order to reduce costs and enable the company to maintain business continuity. She was advised that HR roles in Nielsen across the globe were affected, and had specifically impacted on three HR roles, inclusive of her own.
- [10] On 19 June 2020, the applicant was issued with a notice in terms of section 189(3) of the LRA inviting her to a first consultation meeting scheduled for 24 June 2020. The applicant was the only employee affected by the restructuring in the respondent's Port Elizabeth branch, and the proposed date of termination was set as 19 August 2020. It was however not seriously disputed that the redundancies took place across the whole of HR in the Nielsen business.

[11] On 20 June 2020, the applicant addressed correspondence to Bhagchandani, stating that she was comfortable to consult without internal representation, and further suggesting that there should be 'conciliation of the matter through consultations'. She further stated that she reserved her rights should agreement not be reached.

[12] At the first consultation meeting held on 24 June 2020 via video conferencing, the applicant objected to the process being facilitated by Bhagchandani, and questioned the objectivity and

capability of the panel which also consisted of other senior personnel. She also questioned the rationale behind her position being declared redundant and requested the disclosure of certain information. The applicant further stated in that meeting that she did not intend to 'force her presence' on the company and was happy to conciliate through a negotiated severance.

[13] In the same meeting, and following her questions and concerns, the applicant was also asked to put these in writing. In her written submissions, the applicant requested information related to minutes of the first consultations, the HR organogram, minutes of the meeting in which the rationale for the redundancy of her role and decision were made, and a Form 7.20 that would have been submitted to the CCMA requesting facilitation.

[14] Bhagchandani's response on 30 June 2020 was to advise her that the minutes of the first consultations were made available to her; that she was provided with an organogram in June 2020; that there were no minutes of the meeting in which a decision was taken pertaining to her redundancy; and that no facilitation by the CCMA was requested. Bhagchandani further stated that part of the reasons for her redundancy was the impact of COVID-19 on the business.

[15] On 7 July 2020, the applicant had responded to Bhagchandani, reiterating the need for facilitation of the consultation process by the CCMA, as her (Bhagchandani's) involvement in the internal facilitation was questioned. She also complained about the insufficiency of the information disclosed to her for the purposes of making representations. Bhagchandani's response followed on 15 July 2020 in which she invited the applicant to make further submissions regarding the rationale for the

decision to declare her position redundant, and reiterated that a facilitator would not be appointed as the consultations would be held internally.

[16] The applicant sent further correspondence to Bhagchandani on 17 July 2020, again complaining about the inadequacy of the information provided to enable her to make representations, and the fact the consulting panel was not objective in view of the fact that one of the panel members was a potential candidate for her existing role.

[17] A second consultation meeting took place on 20 July 2020 during which the applicant was informed that a final decision was taken to declare her post redundant following the adoption of the new structure. Alternatives to a dismissal were then looked at, and the applicant was offered a position as HR Lead: South Africa Connect, which position was at band 5 with a reduced

salary package. The position also required her to relocate to Johannesburg from Port Elizabeth.

[18] The applicant's response on 29 July 2020 was to complain that only one consultation was held before confirmation of her redundancy; that she had not been furnished with the information she required, and that the alternative position was offered to her without being afforded an opportunity to consider other alternative positions at her existing level.

[19] Bhagchandani responded on 4 August 2020 and provided the applicant with a variety of information inclusive of the detailed job description of the alternative post that was offered. According to the respondent, the exact timing for relocation was not set albeit it was envisaged that she would need to relocate by 1 October 2020. It was further indicated in correspondence of 4 August 2020

that the applicant would be financially assisted in relocating, inclusive of a one way flight ticket with her immediate family, and payment of removal of household goods. In regards to this sole alternative position, the respondent's contention was that opportunities for other alternatives were limited in that even if there were other posts internationally, these required the incumbent to have knowledge of the local HR practices and legislation, which disqualified the applicant. Furthermore, resulting from the global pandemic, it would have been difficult to transfer the applicant to other international offices.

[20] The respondent had also on or about 3 August 2020, referred a dispute to the CCMA in terms of section 198A(8)(a) of the LRA and requested conciliation since it had become apparent to it that the parties had reached a stalemate. The respondent further held the view that consultations with the applicant had taken place over 45 days without any resolution. In correspondence sent on the same date with the referral attached, the applicant was informed also that internal consultations should continue despite the referral of the dispute.

[21] The applicant's response on 4 August 2020 was that she was going to consult with her attorneys and would give a full response thereafter. As at 14 August 2020, the applicant had consulted with her attorneys of record who had then addressed correspondence to the respondent, raising issues surrounding lack of proper consultations and failure to disclose information required, and further alleging that the applicant was victimised and discriminated against. The attorneys further raised concerns about the referral of the dispute to the CCMA, contending that the forum lacked jurisdiction, and further implored the respondent to agree to external facilitation to resolve the dispute.

- [22] On 17 August 2020, Bhagchandani sent further correspondence to the applicant, again enquiring about her final decision on the offer of the alternative position. On 18 August 2020, the respondent's attorneys of record responded to the applicant's attorneys' correspondence of 14 August 2020, in which a variety of allegations made on behalf of the applicant were denied. It was further pointed out that any concerns raised by the applicant concerning the consultation process were to be addressed before the CCMA.
- [23] On 20 August 2020 and at a meeting before the CCMA held via video conferencing, the appointed Commissioner could not resolve the dispute, and a certificate of outcome was issued on 31 August 2020.

On 31 August 2020, the applicant's attorneys of record sent correspondence to respondent's attorneys, advising

that this application would be brought before the Court. On the same date, and after receipt of a copy of the certificate of outcome, the applicant was provided with a letter of termination and paid her severance package.

Urgency:

- [24] It was submitted on behalf of the applicant that the application deserves the urgent attention of the Court in view of the principle

set out in *Steenkamp and Others v Edcon Limited*[2], that where procedural irregularities arise, the process provided for in section 189A(13) of the LRA allows for the urgent intervention of this 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[3].

- [25] It is my view that it is not necessary to dwell much into whether this application deserves the urgent attention of this Court in view of the statutory provisions applicable in instituting such proceedings. The first consideration is the prohibitive provisions of section 189A(18) of the LRA[4], in terms of which procedural issues are excluded from the determination of fairness where the employees have opted for adjudication rather than industrial action. This implies therefore that the applicant has no other alternative remedy where she seeks to challenge the procedural fairness of her retrenchment.

- [26] The second consideration is that section 189A(17) contains its own time limit and requires only that the application be filed within 30 days of any notice of termination of employment[5]. The applicant was notified of the termination of her services on 31 August 2020 and this application was brought before the Court on 14 September 2020. Clearly the application was brought within the timeframes stipulated, and there is no reason why it should not be treated with urgency.

The legal framework:

[27] The nature, purpose and functioning of the provisions of section 189A(13) of the LRA as explained by Basson AJ in *Steenkamp and Others v Edcon Limited*[6] and the authorities referred to therein can be summarised as follows;

- (a) 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.
- (b) The intention of section 189A(13) read with section 189A(1) is to exclude procedural issues from the determination of fairness where the employees have opted for adjudication rather than industrial action, providing instead for a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication or industrial action.
- (c) 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.

[28] Further arising from *National Union of Mineworkers v Anglo American Platinum Ltd and Others*[7] and other cases referred to therein, it can be accepted that; a consulting party may not come to court to complain about matters that are defined in section 189A(19) to be matters of substantive fairness; and, that it is not generally open to employees or their representatives to rely on the remedies afforded by section 189A of the LRA in circumstances where they have frustrated the consultation process, or where procedural issues are raised ex post facto, or worst still, on the basis only that the employer consulting party has rejected proposals made.

[29] The proper approach as stated in *National Union of Mineworkers v Anglo American Platinum Ltd and Others* is to judge procedural fairness holistically, and to avoid the approach of a mechanical checklist in relation to each sub-section of section 189 of the LRA. Ultimately, an assessment must be made to ascertain whether the overall purpose of the joint consensus-seeking

process required by the LRA has been achieved[8]

Analysis:

[30] In this case, even though it has been concluded that the application should be dealt with as one of urgency, this does not necessarily equate to the relief sought being granted, as the principal issue remains whether on the papers, it can be concluded that the retrenchment of the applicant was procedurally flawed.

- [31] Since the primary function of this Court in its proactive role under section 189A(13) of the LRA is to assess whether the procedural requirements were met rather than being concerned with the substantive fairness of the retrenchment, I agree with the submissions made on behalf of the respondent that this application is faced with numerous insurmountable hurdles.
- [32] The first hurdle faced by the applicant is that from the date that the notice in terms of section 189(3) of the LRA was issued, she had held a firm belief that she was essentially confronted with a *fait accompli*. This view is also evident from the contents of her attorneys of record's correspondence of 14 August 2020. Furthermore, with the first consultation of 24 June 2020, she held the view that the consultation process would not be fair by virtue of Ms Bhagchandani's involvement, or the alleged failure to disclose the information she required. Notwithstanding these concerns early in the process, and for reasons that are not clear, the applicant had waited until the termination of her services prior to approaching this Court.
- [33] As at 20 July 2020, the applicant was further informed of the final decision to declare her post redundant. Again, she did nothing. To the extent that she sought a reversal of the entire process and relief in the form of reinstatement, the Court's proactive role has clearly been eroded by her dilatoriness, and I agree with the submissions made on behalf of the respondent that any order of reinstatement and a re-start of the entire process, or an order granting the applicant an opportunity to seek facilitation by the CCMA would be inappropriate, even if it were to be found that the procedural requirements were not adhered to.
- [34] A further hurdle faced by the applicant is that it is common cause that between the first and second consultation meetings, there were various correspondence exchanged between the applicant and Bhagchandani related to a variety of issues inclusive of the disclosure of certain information. In fact, central to the applicant's pleaded case is the alleged refusal to provide information related to processes leading to her position being declared redundant.
- [35] The applicant conceded that the provisions of section 16 of the LRA read together with those of section 189(4) of the LRA were at her disposal if she required certain information to be disclosed. She nonetheless contended that at the time, she was unaware of those provisions as the respondent did not also bring them to her attention.
- [36] The applicant's contention that she was not aware of these provisions can however hardly be sustainable. The respondent correctly pointed out that she was employed as a senior HR person who had previously dealt with retrenchments at the workplace. Furthermore, it is inconceivable that she would not have known of these provisions when at the same time, she could as far back as 24 June 2020, request certain information, inclusive of Form 7.20 requesting facilitation by the CCMA.
- [37] It has been held that consultation is a two way street, and that if the employee party to the consultations does not assert its rights at the appropriate time, the employer cannot be entirely blamed for shortcomings in the process[9]. To this end, the complaint that the

consultation process was flawed because of the alleged failure to disclose certain information, in circumstances where the applicant could have taken other steps to secure the information she sought, is indeed without merit. In any event, the respondent's principal response in this regard was that all the necessary information the applicant required or requested was made available to her.

- [38] Equally problematic with the applicant's complaints is her conflation of the substantive and procedural issues when claiming relief. Other than the alleged failure to disclose the required information, the applicant also complained about the rationale and the process embarked upon in declaring her position redundant, and the reasoning behind her selection. In this regard, and in claiming a *prima facie* right, she referred to an instance on 11 June 2020, after the announcement on global restructuring was made, and when

Bhagchandani advised her that her position was to be impacted; the fact that she was provided with an organogram which did not reflect her position in the proposed structure; the fact that a specific date was set on which her position would be impacted; and being generally confronted with a *fait accompli* from the inception of the process.

- [39] It has already been stated that when dealing with matters under section 189A(13) of the LRA, this Court is not concerned with the substantive fairness of the retrenchment. Thus, as it was stated in *SASBO The Finance Union obo Fourie v Nedbank Limited*[10], the court's intervention is limited to instances of a refusal or failure by the consulting employer to comply with a fair

procedure, and it is not its task to micro-manage the consultation process.

- [40] As further reiterated in *Banks and Another v Coca-Cola South Africa, A division of Coca-Cola Africa (Pty) Ltd*,[11] disputes about substantive unfairness which are not amenable to adjudication under section 189A(13) proceedings include whether a dismissal was effected on the grounds of operational requirements, whether any dismissal effected on those grounds was operationally justifiable, whether there was a proper consideration of alternatives to dismissal, whether selection criteria were fair and objective, and the fairness of the severance package that was offered[12].

- [41] Inasmuch as there is an obvious link between the rationale for retrenchment and any other issues that need consultation under section 189(3) of the LRA, in *South African Communication Union and Another v Telkom SA SOC Ltd*,

- [13] it was held that a failure to agree on the rationale for retrenchment does not mean that the consultation process must come to an end at that point, as section 189(2) does not impose an obligation on the parties to attempt to reach consensus on the reason or need for retrenchment. Furthermore, even if there is no agreement on the rationale, parties must nonetheless still be prepared to engage in consultations on alternatives, as nothing prevents a party from engaging on a provisional basis, by making it clear upfront that its consent to the adoption of certain alternative measures is subject to it being persuaded that

retrenchments would otherwise be required.

- [42] In this case therefore, even if there were only formal three consultations (including the process before the CCMA), I am satisfied that the respondent discharged its obligation to consult with the applicant on the issues as set out in section 189(3) of the LRA. Thus, in circumstances where the parties could not agree on issues in dispute during consultations and before the CCMA, the respondent was entitled to bring the process to an end when it did. To reiterate, where the applicant held the view that there was no rationale for the retrenchment, or that the selection criteria adopted by the respondent was not fair and objective, or where the applicant was aggrieved by the alternative post offered to her, these are matters of substantive fairness, which she is entitled to raise

when she decides to refer a dispute under the provisions of section 191(1) of the LRA.

- [43] In the end, a holistic assessment of the consultations held with the applicant in my view reveals that the process, albeit brief, achieved the overall purpose of the joint consensus-seeking process required by the LRA. My conclusions in this regard are based on the events that took place after the global announcement of the restructuring within Nielsen; the issuing of the section 189(3) notice; the two consultation meetings, the meeting before the CCMA, and numerous correspondence exchanged between the parties between those consultations. At the consultation held on 20 July 2020, the applicant was advised that a final decision was taken to declare her post redundant, and thereafter she was informed of the one available and suitable alternative post. After the consultation meeting, the applicant was thereafter informed to make written submissions and a decision on the alternative offered. It is common cause that she did not specifically address the issue of alternative position offered despite being furnished with a variety of information related to that post.

- [44] I agree with the submissions made on behalf of the respondent that the applicant was afforded several opportunities to respond to and make submissions in respect of the commercial rationale and the alternatives. Rather than making representations, she was more consumed about who was present in the process, and whether it was objective. She did not appear inclined to meaningfully participate in that process, and accordingly, the respondent cannot be accused of acting unfairly.

- [45] Further to the extent that the applicant had refused to attend a third consultation meeting that was scheduled for 19 August 2020,

any complaint of a lack of proper consultations cannot be sustainable. This is in line with what was stated in *South African Airways v Bogopa and Others*[14] that when an employer invites employees or their trade union to consult, and such an invitation is either rejected or ignored, or where the employees or the union initially participated but later abandoned the process due to no fault of the employer, the dismissal cannot be said to be procedurally unfair, if the employees are subsequently dismissed without consultation or without a completed consultation process.

[46] In similar fashion, the number of actual consultations held with the applicant in this case do not determine the fairness of the procedure. What is of importance is that given the circumstances of this case and the nature of issues that were addressed in those consultations, coupled with those addressed in an exchange of submissions and correspondence between the parties, it cannot be said that the respondent has acted in such a way that fundamentally prevented or obstructed a fair consultation process in keeping with the intentions of section 189 of the LRA.

[47] The respondent sought a costs order should the applicant's application fail. Having had regard to the facts and circumstances of this case, I am of the view that the requirements of law and fairness dictate that no order as to costs should be made.

Order:

[48] In the premises, the following order is made;

1. The Applicants' non-compliance with the Rules of this Court in respect of the time frames and manner of service is condoned and this matter is heard as one of urgency.
2. The applicant's application is dismissed
3. There is no order as to costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearances

For the Applicant: K Allen, instructed by Amith Luckan & Company

For the Respondent: FA Boda SC, instructed by Norton Rose Fulbright South Africa Inc

[1] Act 66 of 1995 (as amended). 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 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.'

[1] Act 66 of 1995 (as amended). 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 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.’

[2] 2019

(7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC)

[3] At para 52

[4] Which provides: “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).”

[4] Which provides:

“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).”

[5] Section 189A (17) provides: (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).’

[5] Section 189A (17) provides:

- (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).’

[6] At paragraphs 45 – 56; See also *Retail and Associated Workers Union of South Africa v Schuurman Metal Pressing (Pty) Ltd* (C 458/2004) [2004] ZALC 74 (13 October 2004) (Unreported, where it was held; “... the aim of section 189A(13) is to provide a remedy to employees to approach the Labour Court to set their employer on the right track where there is a genuine and clear cut procedural unfairness which goes to the core of the process. The section is aimed at securing the process in the interests of a fair outcome. It follows that not every minor transgression of a procedural nature will invite the benefit of the court’s discretionary power to grant a remedy. To hold otherwise would be to open the door to excessive litigation, abuse and unnecessary delay in the process of consultation...” And also

Edcon v Steenkamp [2018] 3 BLLR 230 (LAC); (2018) 39 ILJ 531 (LAC), where it was held; “[25] In summary, section 189A(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 intervention before actual dismissal impossible, and to reverse the dismissals.” Also, Banks and another v Coca-Cola SA - A Division of Coca-Cola Africa (Pty) Ltd (2007) 28 ILJ 2748 (LC), where at para 18 it was held that; “In short, the conclusion to be drawn from the wording of s 189A is that this court appears to have been accorded a proactive and supervisory role in relation to the procedural obligations that attach to operational requirements dismissals. Where the remedy sought requires intervention in the consultation process prior to dismissal, the court ought necessarily to afford a remedy that

accounts for the stage that the consultation has reached, the prospect of any joint consensus-seeking engagement being resumed,

the attitude of both parties, the nature and extent of the procedural shortcomings that are alleged and the like. If it appears to the court that little or no purpose would be served by intervention in the consultation process in one of the forms contemplated by s 189A(13)(a), (b) and (c), then compensation as provided by para (d) is the more apposite remedy”

[6] At paragraphs 45 – 56; See also Retail and Associated Workers Union of South Africa v Schuurman Metal Pressing (Pty) Ltd (C 458/2004) [2004] ZALC 74 (13 October 2004) (Unreported, where it was held;

“... the aim of section 189A(13) is to provide a remedy to employees to approach the Labour Court to set their employer on the right track where there is a genuine and clear cut procedural unfairness which goes to the core of the process. The section is aimed at securing the process in the interests of a fair outcome. It follows that not every minor transgression of a procedural nature will invite the benefit of the court’s discretionary power to grant a remedy. To hold otherwise would be to open the door to excessive litigation, abuse and unnecessary delay in the process of consultation...”

And also Edcon v Steenkamp [2018] 3 BLLR 230 (LAC); (2018) 39 ILJ 531 (LAC), where it was held;

“[25] In summary, section 189A(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 intervention before actual dismissal impossible, and to reverse the dismissals.”

Also, *Banks and another v Coca-Cola SA - A Division of Coca-Cola Africa (Pty) Ltd* (2007) 28 ILJ 2748 (LC), where at para 18 it was held that;

“In short, the conclusion to be drawn from the wording of s 189A is that this court appears to have been accorded a proactive and supervisory role in relation to the procedural obligations that attach to operational requirements dismissals. Where the remedy sought requires intervention in the consultation process prior to dismissal, the court ought necessarily to afford a remedy that

accounts for the stage that the consultation has reached, the prospect of any joint consensus-seeking engagement being resumed,

the attitude of both parties, the nature and extent of the procedural shortcomings that are alleged and the like. If it appears to the court that little or no purpose would be served by intervention in the consultation process in one of the forms contemplated by s 189A(13)(a), (b) and (c), then compensation as provided by para (d) is the more apposite remedy”

[7] (2014) 35 ILJ 1024 (LC); [2013] 12 BLLR 1253 (LC) at paras 20 - 25

[8] At para 25

[9] *SASBO v Standard Bank of South Africa*

(2011) 32 ILJ 1236 (LC) at para 25

[10] (2020) 41 ILJ 500 (LC) at para 14

[11] *Supra*

[12] At paras 7 and 9

[13] (J203/2020)

[2020] ZALCJHB 56; (2020) 41 ILJ 1425 (LC) (5 March 2020) at para 39 – 40

[14] (JA 36/05) [2007] ZALAC 10; [2007] 11 BLLR 1065 (LAC) at para 48; See also FAWU v SAB (Pty) Ltd Case number J435/20, (Reportable) delivered on 28 May 2020; Association of Mineworkers and Construction Union and Others v Tanker Services (JS148/16)

[2018] ZALCJHB 226; Ketse v Telkom SA Soc Ltd and Others

[2015] 4 BLLR 436 (LC); Visser v Sanlam (2001) 22 ILJ 666(LAC)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCPE/2020/12.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/govind-v-ac-unknown-topic-alcpe-2020>

Prepared on 9 October 2026 · Esheria