



CONSTITUTIONAL COURT OF SOUTH AFRICA

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

CCT 220/22

Date of hearing: 14 September 2023

Date of judgment: 21 May 2024

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 21 May 2024, the Constitutional Court handed down judgment in an application for leave to appeal, and, an application for leave to cross-appeal, against certain orders of the Labour Appeal Court (“LAC”), hearing an appeal from the Labour Court (“LC”).

The leave to appeal application was brought by Regenesys Management (Pty) Ltd (“Regenesys”) which operates a business school that provides advanced business education in South Africa and several other countries. The respondents were employees of Regenesys (“the former employees”). The former employees had applied for leave to cross-appeal. The LAC had upheld in part a judgment of the LC that the dismissal of certain employees of Regenesys had been substantively unfair. The LAC had also upheld an order of retrospective reinstatement of the employees that had been made by the LC. Whereas the LC had found the dismissals of the employees to be procedurally unfair, the LAC held that the LC had no jurisdiction to deal with the procedural fairness or otherwise of the dismissal.

The dispute between Regenesys and the former employees arose as a result of the retrenchment of certain employees by Regenesys in 2015. The former employees were notified that Regenesys would undergo restructuring and were invited to apply for the vacant positions. Their applications were unsuccessful, resulting in their retrenchment. Following their retrenchment, the former employees filed an application in terms of section

189A(13) of the Labour Relations Act, 1995 (“LRA”) seeking reinstatement until Regenesys adhered to a fair procedure. The former employees contended that their dismissals were both substantively and procedurally unfair. Section 189A(13) provides for such relief. It provides that:

- “(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.”

The LC found the dismissals of the former employees substantively and procedurally unfair and ordered Regenesys to reinstate them with retrospective effect, awarding compensation to one employee. Regenesys appealed to the LAC, which upheld the LC’s decision regarding substantive unfairness and reinstatement.

In the Constitutional Court, Regenesys sought to overturn the LAC’s finding of substantive unfairness. The former employees argued that the Constitutional Court lacked jurisdiction, asserting that the LAC correctly upheld the LC’s ruling and that Regenesys failed to prove the fairness of the dismissals under section 185 of the LRA. They maintained that there was no valid reason for their dismissals and disputed the fairness of the assessment criteria used by Regenesys. In the cross-appeal, the former employees argued that the LAC erred by only finding their dismissals substantively unfair and not also procedurally unfair. The former employees claimed that the LAC misinterpreted the Constitutional Court’s judgment in *Steenkamp v Edcon*. Regenesys contended that the LAC correctly ruled that the LC lacked jurisdiction over procedural fairness and requested the Constitutional Court to overturn the finding of substantive unfairness, replacing it with a finding of substantive fairness. Alternatively, Regenesys sought a revision of the relief granted by the LC and requested the dismissal of the former employees’ application in the cross-appeal.

The former employees, in the appeal, requested that the Constitutional Court either dismisses the appeal or upholds the LAC’s finding that their dismissals were substantively unfair. In the cross-appeal, the former employees requested that the Constitutional Court confirms the LC’s finding that their dismissals were also procedurally unfair in addition to finding that the LC’s jurisdiction to make a ruling on the issue is not ousted in terms of section 189A(18) of the LRA. Section 189A(13) of the LRA 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).”

The first judgment, which held the majority, was prepared by the Chief Justice (Maya DCJ, Kollapen J, Mathopo J, Schippers AJ, Theron J, Tshiqi J and Van Zyl AJ concurring). It held that, on the question of jurisdiction, there has been confusion about whether the LC's general jurisdiction with regard to disputes about the procedural fairness of dismissals for operational requirements generally or those in terms of section 189A(13) engages the jurisdiction of the LC. The Chief Justice points out several cases from the LC, LAC and the CC which have statements that suggest that the jurisdiction of the LC in regard to such disputes has been ousted by section 189A(18) of the LRA or suggest that the LC no longer has jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements referred to the LC in terms of section 191(5)(b)(ii) of the LRA. The first judgment brought finality to the issue and held quite correctly that, the LC's jurisdiction in respect of such disputes has not been ousted by subsection 18.

On appeal, the first issue Regenesys raised was that 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 contended that, what the LC accepted as the selection criteria, focused on the assessment of skills, knowledge, and behaviour to fill the vacant positions. It was clear to everyone involved that employees who were not appointed to these positions based on these selection criteria would be dismissed due to operational requirements. Consequently, the LC determined that the dismissal of some employees was substantively unfair, a conclusion that the LAC upheld. This Court also upheld this decision.

The second issue concerned whether Regenesys can contest an adverse finding or conclusion made by the court of first instance in a second or subsequent appeal, if it did not raise this challenge in the first appeal. This court held that an appeal to a second or further appellate court is against the judgment, order, or conclusion of the first appellate court, not the court of first instance. Therefore, any finding, conclusion, or order from the court of first instance that was not contested in the first appeal cannot be challenged in a subsequent appeal.

The first judgment analysed section 189A(13) and determined that the orders contemplated in paragraphs (a) to (c) share a common feature. It refers to these orders as the primary purpose of subsection 13. Whereas, an order contemplated in paragraph (d) does not share a common feature with the primary purpose order and rather refers to a claim for compensation where an order contemplated in paragraphs (a) to (c) is no longer appropriate. The question before this Court related to the secondary purpose of subsection 13, which was whether the compensation under paragraph (d) can be claimed as a standalone remedy. The first judgment concluded that compensation under section 189A(13)(d) can be claimed and be granted as a standalone remedy even long after a time has lapsed since dismissal.

The first judgment dismissed Regenesys' appeal with costs. It held that this case warranted a costs order against Regenesys. The former employees' success, Regenesys' handling of the restructuring and retrenchment, and its failure to conduct proper consultations with the former employees all justified awarding costs against it.

The LAC upheld Regenesys' appeal against the Labour Court's conclusion that it had jurisdiction to adjudicate a dispute regarding the procedural fairness of a dismissal for operational requirements. In the cross-appeal, the cross-appeal applicants challenged the LAC's decision that, under the provisions of section 189A(18) of the LRA, the LC did not have jurisdiction to adjudicate such a dispute. The issue for determination in the cross-appeal was whether, given the provisions of section 189A(18), the LC has jurisdiction to adjudicate a dispute about the procedural fairness of a dismissal for operational requirements, including one brought to the LC under section 189A(13). Regenesys contends that the LC lacks such jurisdiction because it has been ousted by section 189A(18). The former employees argued that the LC does have jurisdiction over disputes regarding the procedural fairness of dismissals for operational requirements, as long as they are brought by way of applications under section 189A(13). The first judgment having considered section 189A(13),(18) and other provisions of the LRA held that, correctly, the LC adjudicated the dispute between the parties under subsection (13) and, that 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).

The second judgment, penned by Rogers J, agreed with the first judgment's finding that this Court's jurisdiction is engaged and that leave to appeal and cross-appeal should be granted. The second judgment also agreed with the order made in the first judgment.

The second judgment found that the question whether compensation in terms of section 189A(13)(d) may be claimed as stand-alone relief does not strictly arise in this case. The retrenched employees sought reinstatement in terms of subsection (13)(c), with compensation in terms of section (13)(d) as an alternative. The relief was sought at a time when reinstatement in order to get consultation back on track was feasible. As a result, there was no urgency for the Labour Court to adjudicate on the compensation claim and this Court does not need to decide whether the retrenched employees could have brought the compensation claim as their primary relief.

The lawmaker's preferred remedy is to ensure procedural fairness through proper consultation. If employees only claim compensation, the Labour Court may interrogate why the primary relief is not being claimed. This is because compensation cannot be divorced from subsection (13) read as a whole with subsections (17) and (18). This Court in Steenkamp II made statements to the effect that compensation is not the primary relief

contemplated by the lawmaker. It did not necessarily state that compensation cannot be claimed as primary relief.

The second judgment disagreed with the first judgment's review of cases dealing with the exclusion of the Labour Court's jurisdiction in terms of subsection (18). The wording of section 189A(1) indicates that this section only applies to employers employing more than 50 employees. The cases reviewed in the first judgment adjudicated instances of procedurally unfair retrenchments falling within the scope of section 189A. The second judgment does not read those cases as holding that the Labour Court cannot, in such cases, assess procedural fairness in a claim brought under subsection (13) or as holding that subsection (18) applies to retrenchments falling outside the scope of section 189A. The Labour Appeal Court in the present case recognised that subsection (18) only applied to instances of retrenchment falling within the scope of section 189A. The Labour Appeal Court's sole error was to hold that a claim for compensation could not have been adjudicated as stand-alone relief.