IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT DURBAN

REPORTABLE
CASE NO. DA12/10

In the matter between:

MEDITERRANEAN TEXTILE MILLS (PTY) LTD Appellant

and

SOUTH AFRICAN CLOTHING & TEXTILE WORKERS UNION ("SACTWU") First Respondent

THOSE INDIVIDUALS IDENTIFIED IN ANNEXURE 'A' Second and Further Respondents

Date of hearing: 10 May 2011

Date of Judgment: 25 October 2011

J U D G M E N T

NDLOVU JA

Introduction

[1] This is an appeal against the judgment of the Labour Court (Cele J) handed down on 30 March 2010. The appeal, with the leave of the Labour Court, is against that part of the judgment granting relief to the employees and the extent thereof.

[2] The appellant carries on business as a textile manufacturing company and is the

former employer of the second and further respondents ("the employees").

[3] The first respondent, the South African Clothing and Textile Workers Union ("the union") is a trade union within the meaning of the Labour Relations Act[1] ("the LRA") and was the recognised collective bargaining representative of the employees. The union was acting in this capacity when it sued the appellant in the Labour Court for the alleged unfair dismissal of the employees on 4 December 2007 and wherein it sought an order, amongst others, reinstating the employees retrospectively to the appellant's employ.

[4] The union had earlier, on behalf of the employees, referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration for resolution through conciliation, which failed. Hence, the further referral of the dispute to the Labour Court for adjudication.

[5] After its finding that the dismissal of the employees was procedurally and substantively unfair, the Labour Court proceeded and issued an order in the following terms:

> "1. The respondent is ordered to reinstate each of the applicants listed from pages 40 to 43 of the pleading bundle, which list is attached to the order hereof, with effect from the date of dismissal (4 December 2007), with no loss of income and benefits.
>
> 2. Each such applicant is to report for duty on 4 April

1 Act No 66 of 1995, as amended.

> 2010 and at 07h00.
>
> 3. The payment of the outstanding salary is to be made within 14 days from the date hereof. Interest is thereafter payable for any outstanding salary.
>
> 4. No costs order is made."

Factual Background

[6] It was common cause that the National Textile Bargaining Council ("the bargaining council"), to which the union was a party, concluded a collective agreement, known as the Main Collective Agreement for the Textile Industry of the Republic of South Africa ("the collective agreement"). In terms of the collective agreement, the relevant employer was required to pay those of its employees, whose terms and conditions of employment were regulated by the collective agreement, an annual bonus equivalent to four weeks' actual basic wages as at 31 December of each year, pro rated if the employee had less than one calendar year's service as at that date. The employees fell in this category. However, an employer could submit a motivated application to the exemption board of the bargaining council for exemption from compliance with the collective agreement in respect of a particular period or request that it be allowed to defer the payment of the annual bonuses to a specified future time. Although the appellant was not a party to the collective agreement, the application thereof was extended to non-parties whose business operations fell within the registered scope of the bargaining council, hence the appellant was also obliged to comply with the collective agreement aforesaid.

[7] The employees were dismissed by the appellant on 4 December 2007, as stated,

for staging an unprotected work stoppage. In doing so, they were protesting against the appellant's decision to seek an exemption from the bargaining council from paying the employees their annual bonuses for the period ending 31 December 2007. The appellant's motivation for seeking the exemption, which it reiterated and relied upon at the trial, was that due to dire financial straits that the appellant was going through, it was impossible for it to comply with the collective agreement regarding the payment of bonuses. Indeed, in 2006, the appellant had successfully applied to the bargaining council for the deferment of the payment of the bonuses for that year which, as a result, the employees were only paid in or about July 2007.

[8] It was common cause that the appellant had not raised the issue of the 2007 bonuses with the employees or the union until, for the first time, when it responded to the union's letter dated 23 November 2007. In that letter, the union had brought to the attention of the appellant that the International Trade Administration Commission ("the ITAC") had published a notice in the Government Gazette on 9 November 2007 whereby the ITAC indicated its intention to review and possibly remove or reduce import duties on textile products. The union expressed its concern that if the ITAC's intention was implemented and the import duties on textile products were removed or reduced, that could possibly lead to job losses for its members. On this basis, the union sought clarity from the appellant as to what possible impact the ITAC's proposed measure would have on the textile industry and more particularly on its operations. The letter also included a list of the products in respect of which import duties could be removed or reduced in terms of ITAC's notice which was gazetted.

On the face of it, the union's enquiry was a matter somewhat unrelated to the issue of bonuses.

[9] In its written response, the appellant expressed dismay at ITAC's intentions which it indicated would have a huge impact on the industry generally and on its operations in particular. To the extent relevant, the appellant's response dated 27 November 2007 reads as follows:

> "Referring to your letter, I make brief comments on each of the points:
>
> 1. Flax -- Linen
>
> The removal of the duties will certainly close 30% of our business and no doubt the fledgling Herdsman linen plant in Atlantis will probably find it extremely difficult.
>
> 2. The opening of synthetic filament fabrics will certainly substitute spun synthetics and that will take care of another 60% of our business.
>
> 3. Woven pile fabrics, include wool, so we can assume that customers who bring in brushed pile Melton could declare it under this heading. This would account of another 30% of our business and Mediterranean Textile Mills will certainly be history.
>
> 4. With regard to embroidered fabrics, of course people can have all types of embroidered motifs, however small, put onto the fabric, and this will yet again open another avenue for duty free fabrics.
>
> 5. Warp knit fabrics. We have no comment as we do not make this, but surely the warp knitters will have an issue.
>
> 6. Knitted and Crocheted. Again here new avenues are opened to confuse and abuse what's left of any form of protection.

> 7. With regard to all the other points, fine weaves, cotton rich, fine wools etc. these will directly replace fabrics that we currently produce.
>
> In summary, I do hear people say that it is not fair that they should be paying duties on fabrics not produced in SA, however, is it fair that we should be competing on unlevel playing fields? Quite frankly if the authorities concede to any of these requests, it will soon follow that protection for clothing imports and other inputs will eventually be waivered.
>
> Now that this Gazette has been published all our customers are holding back on orders to await the outcome of the decision of Government. This has meant that we have received no orders recently and are faced with a very lean first three months of 2008.
>
> Unfortunately this is compelling us to seek exemption from paying a mandatory bonus and we will shortly be advising your members of our situation.[2]
>
> Yours sincerely
>
> MEDITERRANEAN TEXTILE MILLS (PTY) LTD
>
> MARCUS VAROLI
>
> MANAGING DIRECTOR."

[10] Pursuant to its letter of 27 November 2007, the appellant posted a notice on the workplace notice board advising employees at large of the appellant's intention to apply to the bargaining council for exemption to pay bonuses and stating the reasons therefor. In this regard, the appellant sought to obtain the employees' support which, of course, would help motivate the appellant's application to the bargaining council. The employees were unanimously against the appellant being exempted from paying them bonuses. They conveyed their attitude in this regard to the union on 3 December 2007 for urgent onward transmission to the appellant.

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2 This was the message which triggered the dissatisfaction among the employees.

The Labour Court

[11] At the trial, three witnesses who were all in the appellant's top and medium management gave evidence for the appellant, namely, Mr Martin Lotter ("Lotter"), the financial director; Mr Norman Thompson ("Thompson"), the industrial manager and Mr Leslie Ronald Meintjies ("Meintjies"), the financial manager. Mr Sbu Ndawonde ("Ndawonde"), the union's official, testified on behalf of the union and the employees.

[12] Both Lotter and Meintjies reiterated that the appellant's financial situation was in such dire straits that it was simply impossible for the appellant to afford paying the bonuses. Meintjies said the appellant was even struggling to pay its creditors on a monthly basis to such an extent that there were then constant threats by the appellant's suppliers that raw materials would no longer be delivered unless the current accounts were paid. The applicant had secured a working capital loan of R20 million from the Industrial Development Corporation ("the IDC") which loan was, as he described it, "used to try and get the accounts up to date". Meintjies further pointed out that the appellant's debt to the IDC had then accumulated to a total of some R36 million.

[13] These witnesses testified that the dire financial situation in the appellant's business was occasioned by a number of factors, including the prevailing global economic crisis; the cheap Chinese textile imports; the stronger Rand and, of course, the constant Government threat of reducing or removing duties on imported goods. Meintjies also stated that the removal of duties was in fact no longer just a threat

because earlier in the year 2009 import duties had actually been removed in respect of the "yarn-dyed shirting", which was part of the appellant's products. He also sought to record that the execution of the reinstatement order would cost the appellant an amount of approximately R10 million which the appellant could not afford. Put alternatively, the payment of such an amount would almost certainly mean the closure of the appellant's business operation and the loss of jobs to its current workforce constituted of some 183 employees.

[14] The dismissal of the employees on 4 December 2007 was preceded by a series of events within the space of a few hours, which can be summarised as follows (approximate times given during evidence):

At 07h00:

This was the break-off time between night and day shifts. The outgoing night shift and incoming day shift employees gathered on the premises outside the workplace and demanded to speak to management about their bonuses. Thompson came to listen to the employees' complaint which was essentially the appellant's decision to seek an exemption from paying annual bonuses that year. His response to their complaint was merely to refer them to the management's message on the notice board. He reiterated that the message was and remained the appellant's position in the matter. He then urged the employees to return to work, but the employees would not.

At 07h30:

Lotter arrived and having considered the situation, he issued a notice which was described as constituting a "final written warning" and handed it out to the employees. At the same time a letter was sent by the appellant's management to the shop stewards and to the union's offices, calling upon the employees and the union to show cause why a "final ultimatum" should not be issued to and against the employees.

At 07h50:

The shop stewards requested a meeting with management to discuss the issue of the annual bonuses. Despite that meeting, the impasse was not resolved. Lotter simply referred to the notice on the notice board and the "final written warning" referred to above. He further stated that there was nothing that management could negotiate with employees as long as they remained engaged in the unprotected work stoppage. The shop stewards informed management that they were unable to persuade the employees to return to work under the circumstances. They further advised management that the employees were extremely unhappy about the appellant's intention not to pay their bonuses and particularly the fact that this announcement was made at such short notice. Indeed, it was a matter of a few weeks before the December closure of the appellant's business for the Christmas break and which would have been the time when the payment of bonuses would have been made.

At 08h40:

Ndawonde arrived. However, his arrival made no difference. Lotter made it clear that the appellant would proceed with its application for exemption. The employees were so adamant and steadfast on their demand for the bonuses that

they even said they would rather have the appellant shut down than their bonuses not being paid.

At 09h30:

The management attempted to serve the employees with the "ultimatum", which service, however, the employees refused to accept. The ultimatum was then read out to them ordering that they must return to work by 11h00, failing which they would face dismissal. The employees did not heed the ultimatum.

At 11h15:

The employees were summarily dismissed. Notwithstanding the dismissal, they remained on the appellant's premises until 16h15 when they then dispersed.

[15] On the basis of the abovementioned time lines it was not in dispute that the employees were given only about 1½ hours to consider their position (i.e. the ultimatum was given at 09h30 requiring them to be back at work by 11h00).

The Appeal

[16] As indicated, the finding by the Labour Court that the dismissal of the employees was unfair was not a matter at issue in this appeal. At issue was whether the order of retrospective reinstatement of the employees was the appropriate sanction in the circumstances of this case.

Appellant's submissions

[17] In his criticism of the judgment of the Labour Court, Mr *Van Niekerk*, for the appellant, submitted that much was said in the judgment about the unfairness of the

employees' dismissal yet very little was said about the sanction which the Labour Court imposed. He argued that, in the circumstances of this case, the Labour Court ought not to have ordered the reinstatement of the employees and that, in any event, even if the Court did so it ought not to have ordered the reinstatement to run retrospectively. He argued that besides the appellant's problematic financial situation it had then been some 27 months since the employees were dismissed. Relying on section 193(2)(c) of the LRA, counsel contended that this was a situation where it was "*not reasonably practicable*" for the appellant to reinstate the employees. However, on the issue of the lapse of time (i.e. 27 months) Mr *Van Niekerk* conceded that the blame for the delay could not be attributed to anyone. In fact, counsel further pointed out, this was one appeal which had been relatively expeditiously treated.

[18] Mr *Van Niekerk* also recalled that the amount of R10 million referred to by Meintjies in his evidence as being the approximate cost of reinstating the employees was the estimation as at December 2009 when the matter was before the Labour Court. It followed, therefore, that this figure would increase considerably if the reinstatement order was to be confirmed by this Court.

[19] Counsel further pointed out that the working capital loan of R20 million which the appellant had acquired from IDC was for a specific operational purpose, namely, to purchase knitting equipment for the appellant, as the appellant had sought to diversify its business. Therefore, counsel submitted, the appellant could not have used that money for some other purpose, such as paying bonuses for the employees.

[20] However, considering the manner in which the appellant had conducted and operated its business from the financial perspective, Mr *Van Niekerk* reluctantly conceded that there had been no proper budgeting on the part of the appellant in this regard. Be that as it might, he pointed out that the effect of the appellant having been in dire financial straits was acknowledged both by Ndawonde in his evidence and the Labour Court in its judgment.

[21] Therefore, given the financial situation of the appellant, Mr *Van Niekerk* submitted that the order of reinstatement should not be upheld at all or, alternatively, if it was to be upheld, it should not have a retrospective effect entitling the employees to full back pay. In his submission, the appropriate sanction ought to have been one of compensation.

Respondent's submissions

[22] Mr *Schumann*, for the union and the employees, submitted that when the appellant failed to comply with the reinstatement order in the first place, it thereby took a chance and should not blame anyone else but itself if things subsequently turned out not to be in its favour. He pointed out that the amount payable to the employees in terms of the reinstatement order had since increased (as from the date of judgment of the Labour Court) due to the fact that the appellant had chosen not to comply with the order.

[23] Counsel further submitted that it was not the responsibility of the Court, but that of the Government, to bail out companies that were in financial difficulties. In the present instance the payment of annual bonuses to the employees was in accordance with the legally enforceable collective agreement. The appellant had, therefore, a legal obligation to comply with the collective agreement accordingly.

[24] However, Mr *Schumann* conceded that the question of "back pay" was a matter within the discretion of the Court, which discretion had to be exercised "equitably". He submitted that it would be unjust to reinstate the employees without back pay, given the fact that there was no misconduct on their part. The submission by the appellant that it could not afford payment of back pay did not *per se* render such payment unjust. He submitted that the Court should not treat the appellant sympathetically in a situation, such as the present, where the appellant clearly mistreated the employees.

Analysis and Evaluation

[25] The question of what remedies are available for unfair dismissal is governed by section 193 of the LRA which, to the extent relevant, provides as follows:

> "(1) If the Labour Court or an arbitrator appointed in terms of *this* Act finds that a *dismissal* is unfair, the Court or the arbitrator may –
>
> (a) order the employer to re-instate the *employee* from any date not earlier than the date of *dismissal*;
>
> (b) order the employer to re-employ the *employee*, either in the work in which the *employee* was employed

> before the *dismissal* or in other reasonably suitable work on any terms and from any date not earlier than the date of *dismissal*; or
>
> (c) order the employer to pay compensation to the *employee*.
>
> (2) The Labour Court or the arbitrator must require the employer to re-instate or re-employ the *employee* unless –
>
> (a) the *employee* does not wish to be reinstated or re-employed;
>
> (b) the circumstances surrounding the *dismissal* are such that a continued employment relationship would be intolerable;
>
> (c) it is not reasonably practicable for the employer to reinstate or re-employ the *employee*; or
>
> (d) the *dismissal* is unfair only because the employer did not follow a fair procedure."

[26] The term "*reinstatement"* within the context of section 193(1)(a) of the LRA entails placing a dismissed employee back to his or her former position in employment as if he or she was never dismissed in the first place. This is the essence of retrospective reinstatement envisaged in section 193(1)(a) which, according to a recent Constitutional Court decision, *Equity Aviation Services Ltd v Commission for Conciliation Mediation and Arbitration and Others,* is -

> "the primary statutory remedy in unfair dismissal disputes (in that) [i]t is aimed at placing an employee in the position he or she would have been but for the unfair dismissal."[3]

[27] It is on this basis that a dismissed employee who is ordered to be reinstated should ordinarily be entitled to his or her full arrear remuneration (the so-called "back

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3 *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2008] 29 ILJ 2507; Also reported as [2008] 12 BLLR 1129 (CC) at para 36.

pay") as if the dismissal never took place. However, the court or the arbitrator has the discretion in terms of determining the extent of the retrospective effect of the reinstatement,[4] which the court or the arbitrator may fix "*from any date not earlier than the date of dismissal*".[5]

[28] By its use of the word "must" in section 193(1)(a) of the LRA, the Legislature clearly intended that upon the finding in a given case that the employee concerned was substantively unfairly dismissed, such employee *must* be reinstated, if the employee so wished, unless either or both of the conditions referred to in paragraphs (b) and (c) of subsection (2) of the said section (hereinafter, for the present purpose, referred to as "the *non-reinstatable conditions*") are present.[6] It was common cause that the appellant sought to rely only on the second-mentioned condition, namely, that it was *"not reasonably practicable"* for the appellant to reinstate the employees. It is notable that in terms of the earlier decisions, section 193(2) was construed as placing an *onus* on the employer to establish the existence of any of the non-reinstatable conditions,[7] but since *Equity Aviation* there has been a constitutional paradigm shift in this regard. Rather than departing from the premise of a legal *onus*, the focal point and overriding consideration in this enquiry should be the underlying notion of fairness between the parties and that "[f]airness ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment."[8] In further amplification, the Constitutional Court, in *Billiton*

4 *Equity Aviation,* above*,* at para 36.
5 Section 193(1)(a) of the LRA.
6 *Equity Aviation,* above, at para 33.
7 *Kroukam v SA Airlink* (Pty) Ltd [2005] 12 BLLR 1172 (LAC) at 1203 para 94; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and others* [2006] 11 BLLR 1021 (SCA) at para 45.
8 *Equity Aviation,* above, at para 39.

Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others,[9] stated:

> "The remedies awarded in terms of section 193 of the LRA must be made in accordance with the approach set out in *Equity Aviation* (*supra*). That approach is based on underlying fairness to both employee and employer. It would introduce unwanted and unnecessary rigidity to saddle an inquiry into fairness with notions of a legal onus."[10]

[29] As pointed out, no evidence was specifically canvassed on behalf of the appellant, at the trial, as to the reasonable impracticability of the reinstatement of the employees. We have now been implored to accept that this issue was virtually covered in the evidence of Mentjies when he testified about the serious nature and extent of the appellant's financial problems. However, I thought it was time that an employer party, in such an instance, realised the need and importance, for the sake of its own case, to put forth during a trial or arbitration, as the case may be, evidence or submissions which specifically seek, in advance, to persuade the court or the arbitrator that, in the event of an employee's dismissal being found to be substantively unfair, the reinstatement order of the employee should not be issued on the ground(s) set out by the employer party. This part of the proceedings should not, as it tends to be the general practice, be relegated for mentioning by the employer party only *ex post facto* the order of reinstatement, a stage when the court or the arbitrator is *functus officio* to reconsider the matter. It also seems to me that the practice has the potential of attracting the risk, on the part of the employer party, of unnecessarily finding itself in

9 2010 (5) BCLR 422 (CC)

10 *Billiton Aluminium*, above, at para 43.

a difficult situation where it has to request the court to receive further evidence[11] on the issue of the existence or otherwise of *non-reinstatable* conditions in terms of section 193(2)(b) or (c) of the LRA. Needless to mention that the Appeal Court is not a forum to consider issues which were not raised in the pleadings or dealt with by the trial court, save in exceptional circumstances such as those involving legal issues, where this is found to be appropriate and not unfair to the other party. In *Road Accident Fund v Mothupi,*[12] the Supreme Court of Appeal stated:

> "Subject to what is said below, a Court will not allow a new point to be raised for the first time on appeal unless it was covered by the pleadings… A party will not be permitted to do so if it would be unfair to his opponent (cf *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-H; *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 290E-H). It would be unfair to the other party if the new point was not fully canvassed or investigated at the trial."[13]

[30] Be that as it may, at the conclusion of each case it remains the responsibility of the court or the arbitrator to determine whether or not, on the evidentiary material properly presented and in the light of the *Equity Aviation* principle, it can be said that the reinstatement order is justified. In other words, even in a situation, such as the present, where no specific evidence was canvassed or submissions made during the trial on the issue of the *non-reinstatable* condition*s*, the court or the arbitrator is not only entitled but, in my view, is obliged to take into account any factor which in the opinion of the court or the arbitrator is relevant in the determination of whether or not

11 See section 174 (a) of the LRA
12 2000 (4) SA 38 (SCA).
13 *Mothupi,* above, at p. 54, para 30.

such conditions exist.

[31] In *Equity Aviation* the Constitutional Court pointed out that in exercising its discretion in terms of determining the extent of retrospectivity of the reinstatement under section 193(2)(c), a court or arbitrator should take into account all the relevant factors, including

> "the period between the dismissal and the trial as well as the fact that the dismissed employee was without income during the period of dismissal, ensuring, however, that an employer is not unjustly financially burdened if the retrospective reinstatement is ordered or awarded."[14] (My underlining.)

[32] The evidence of Meintjies, in the present instance, which graphically demonstrated the serious nature and extent of the appellant's financial condition, did not only remain unchallenged but, to a significant and material degree, was confirmed by Ndawonde, the union's official. Indeed, the Labour Court (at par 51) also acknowledged this position when it made the following observation:

> "Throughout the hearing of this matter, it was never in dispute that the respondent was facing a decline in its trade. Mr Ndawonde conceded to the financial challenges of the company. Mr Meintjies' evidence on the performance of the company basically stood unchallenged. During 2007, the company had received orders for about four million metres of apparel fabric which translated into an annual turnover for 2007 of R90 million. That was down from R98 million

14 *Equity Aviation*, above, at para. 43. The underlined portion of the quotation was relied upon by the appellant in its contention that the execution or implementation of the Labour Court's retrospective reinstatement order involving 125 dismissed employees would unjustly financially burden the appellant in its business operation. (See also *Republican Press (Pty) Ltd v Chemical Energy Printing Paper Wood & Allied Workers Union & Others* [2007] 28 ILJ 2503 (SCA) at 2514, para. 20).

> in 2006. The decline in trade took place long before the publication of the Government Gazette of ITAC dated 9 November 2007."

[33] Indeed, the appellant's unchallenged evidence showed that the appellant had operated under severe financial stress since about 2003. In other words, this defence was not a new invention or afterthought on the part of the appellant, occasioned by the publication of the Government Gazette on the proposed removal or reduction of import duty on certain textile products and the appellant's stated intention to apply to the bargaining council for exemption to pay the compulsory annual bonuses to the employees for the year ending 2007.

[34] In any event, it seems to me that the appellant acted overhastily in summarily dismissing the employees without giving them a chance to reflect on their situation. As was stated by the Appellate Division in *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others,*[15] the employees involved in a labour dispute must be given, as the Court put it, "time to cool down, reflect and take a rational decision with regard to their continued employment, and for that purpose to seek advice from their trade union."[16] In the present instance, the employees embarked on the unprotected work stoppage at 07h00; they were issued with the ultimatum at 09h30 to return to work; and at 11h15 they were all dismissed. In other words, they were dismissed in less than two hours after they were issued with the ultimatum.

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15 1994 (2) SA 204 (A).
16 *Performing Arts Council*, above, at 217 C.

[35] Even if the union and the employees were aware of the appellant's precarious financial situation, as it would appear they were, it was incumbent on the appellant to have attended to the bonus issue timeously, which would include engaging in constructive and meaningful consultations and negotiations with the union and the employees on the matter. The appellant did absolutely nothing about it until the eleventh hour when it was only a few weeks before the Christmas break, being the time when the bonuses should have been paid out.

[36] I have noted that there was evidence before the Labour Court regarding all 125 employees and their personal employment particulars with the appellant. The date of employment with the appellant and the rate of pay in respect of each employee was part of the information contained in the schedule. On the basis of this information it would indeed appear that, on average, each employee's four week's pay (the equivalent of the bonus pay) would be about R2800, which confirmed the employees' claim during the trial. It seems therefore that the employees were not wrong to consider this amount as insignificant from the perspective of the bigger picture. Clearly, failure to pay the bonuses entailed even worse financial implications for the appellant. I briefly deal with this aspect next.

[37] It was submitted on behalf of the appellant that the cost implication of the reinstatement order as at the time of trial (i.e. December 2009) was approximately R10 million, which was said to be impossible for the appellant to afford, without

closing down the business. Further, that every six months that went by meant an additional expense of R2 million in terms of the reinstatement order. However, the appellant seemingly conveniently forgets the fact that this dilemma which it now finds itself in is mainly of its own making. Firstly, if the appellant simply paid out the bonuses (at the average of R2800 per employee) this would have cost the appellant less than half a million rand. In particular, the appellant would have paid only about R350 000 (i.e. R2800 x 125). Secondly, the payment of the bonuses would have avoided the strike, the dismissal of the employees and this presumably costly litigation.

[38] The appellant's apparent overhasty reaction towards the employees' legitimate and lawful demand on the day in question could, in my view, be justifiably described as disdainful, uncompassionate and insensitive. Despite what appeared to be generally meagre wages that the employees were earning, there were many of them who had individually rendered a very long and loyal service to the appellant. Regardless, they were all summarily dismissed. I can refer to a few of these instances:

No. on List	Name of employee	Date of employment	Years service
11	JC Mazibuko	17.01.1979	28
12	MP Dlangalala	10.08.1983	24
82	GP Mazibuko	24.07.1978	29
110	MD Ndlovu	13.02.1972	35
111	MM Molefe	22.10.1980	27
112	EM Gwala	02.04.1980	27

113	M Ngcobo	06.02.1981	26
120	P Linda	01.07.1985	22

[39] It was pathetic and shameful, in my opinion, for the appellant to state that the loan of R20 million it had acquired was intended only for other operational requirements, including the updating of its creditors' accounts which were seriously in arrears. The employees' entitlement to the bonuses was based on the actual service the employees had rendered to the appellant for the year. On this basis, they were like all other creditors of the appellant. It is the mistreatment of employees by their employers such as these which the Constitution,[17] read with the other relevant labour legislation, sought to prevent by according every employee a right to fair labour practices.[18]

[40] The fact that it had been some 27 months since the employees were dismissed was, in my view, not an essential factor in determining whether or not retrospective reinstatement was the appropriate sanction in this case. Indeed, Mr *Van Niekerk* conceded that no systemic delays played any role up to the point that the matter served before us.[19] In any event, the period of delay since the dismissals is considered not as at the time the matter appeared before this Court but as when it appeared before the Labour Court. In *Performing Arts Council of the Transvaal*, above, the Appellate Division (Goldstone JA) observed:

17 The Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").
18 Section 23(1) of the Constitution
19 Compare: *Billiton Aluminium*, above, at para.30

> "Whether or not reinstatement is the appropriate relief, in my opinion, must be judged as at the time the matter came before the industrial court. If at that time it was appropriate, it would be unjust and illogical to allow delays caused by unsuccessful appeals to the Labour Appeal Court and to this Court to render reinstatement inappropriate. Where an order for reinstatement has been granted by the industrial court, an employer who appeals from such an order knowingly runs the risk of any prejudice which may be the consequence of delaying the implementation of the order."[20]

[41] It may be that a retrospective order of reinstatement is perceived to be unduly harsh on the employer's business, not least as the employer (the appellant in this case) has not benefitted from employees' services in the interim period. However, as long as an employee makes himself or herself available to perform his or her contractual obligation in terms of the contract of employment, he or she is entitled to payment despite the fact that the employer did not use his or her services.[21] Therefore, the employees cannot, in the circumstances, be prejudiced by reason of the manner in which the employer exercised its election not to allow them to perform their duties.

[42] Having considered the matter, there is nothing in this case which, in my view, militates against according to the employees "the primary statutory remedy" occasioned by their unfair dismissal, namely, the order for their reinstatement.[22] Therefore, the Labour Court was correct, in my view, in according the employees this legal and constitutional remedy.

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20 *Performing Arts Council*, above, at 219H-I.
21 See in general *Johannesburg Municipality v O' Sullivan* 1923 AD 201.
22 *Equity Aviation*, above, at para 36.

[43] However, the only issue for critical consideration is the extent of retrospectivity of the employees' reinstatement. This is a matter in respect of which I am not convinced that the Labour Court gave due and sufficient regard to, particularly given, amongst others, the above-quoted observation made by the Labour Court itself on the obvious and objective dire financial straits of the appellant currently, as well as at the time of the dismissals. On this basis, therefore, the pronouncement by the Labour Court (at par 57) that "[w]*hatever challenges come the way of the respondent, it should be able to comply with the order of re-instatement which the applicants have shown an entitlement to*" is, with respect, neither consistent with the Court's own factual finding aforesaid on the appellant's financial capacity nor the principle that *"fairness ought to be assessed objectively on the facts of each case*."[23] In *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others*,[24] the Appellate Division (as it was then known) stated as follows:

> "Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances (*NUM v Free State Cons* at 446I). And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act."[25]

[44] Besides, the facts of this case indicated that the employees' conduct in the

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23 *Equity Aviation*, above, at para. 39. See also *CWIU and others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC); also reported as [2003] 11 BLLR 1081 (LAC) at para. 69

241996 (4) SA 577 (A); also reported as (1996) 17 ILJ 455 (A).

25 *National Union of Metalworkers,* above, at 589B-D; 476D-E. See also *CWIU and Others v Algorax*, above, at para.69. See also *Equity Aviation*, above, at para 39; *Billiton Aluminium*, above, at para43

entire affair was also not without the slightest blame or reproach. The remark by the learned trial Judge that "[t]*he respondent was mainly responsible for the grievance of the employees and was therefore partly responsible for the cause of the strike*" clearly suggested that there was contributory fault on either side. Indeed, it was common cause that the employees did engage in the unprotected strike or work stoppage. However, given the fact that there was a degree of provocation which informed their decision to strike and that the work stoppage was for a short duration, this rendered their moral blameworthiness relatively far less. [26] These circumstances served, in my view, to mitigate strongly in their favour and, hence, to militate strongly against any decision not to reinstate them.

[45] I am accordingly inclined to agree with the appellant's counsel that the retrospective reinstatement order issued by the Labour Court entitling the employees to full back pay had the effect of 'unjustly financially burdening' the appellant and was not objectively fair on the facts of this case. The order did not take cognisance of the employees' conduct which deserved some form of censure as a mark of this Court's disapproval thereof. In my view, an order granting the employees 12 months' back pay would be just and equitable in the circumstances.

The Order

[46] In the event, the following order is made:

1. The appeal succeeds in part, to the extent that paragraph 1 of the order of the Labour Court is set aside and substituted with the following order:

26 See *Performing Arts Counci*l, above

> "1. The respondent is ordered to reinstate each of the applicants listed from pages 40 to 43 of the pleadings bundle, which list is attached to this order, with effect from the date of dismissal (i.e. 4 December 2007) subject to the condition that each of the applicants shall be entitled only to 12 months' back pay."

2. There is no order as to costs on appeal.

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NDLOVU JA

Mlambo JP and Mocumie AJA concur in the judgment of Ndlovu JA

Appearances:

For the appellant	:	Adv G van Niekerk SC
Instructed by	:	Shepstone & Wylie, Durban
For the respondents	:	Adv P Schumann
Instructed by	:	Brett Purdon Attorneys