



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA 04/2016

Labour Court Case no: C338/2015

In the matter between -

THE NATIONAL COMMISSIONER OF

THE SOUTH AFRICAN POLICE

First Appellant

THE PROVINCIAL COMMISSIONER OF

THE SOUTH AFRICAN POLICE: WESTERN CAPE

Second Appellant

and

IVAN MYERS

Respondent/Cross Appellant

Heard: 25 May 2017

Delivered: 25 May 2018

Summary: Interpretation of court's order – principles that the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents restated – employee's dismissal found by the SCA to be unfair and SCA ordering reinstatement - prior to the reinstatement order employee's position of Unit Commander: Maitland Dog Unit at salary level 10 restructured

and no longer existed and was merged with the Faure Dog Unit – a new position of the Cape Town K9 Unit was created and to be occupied by a Lieutenant-Colonel at salary level 12. Employer failing to comply with the SCA's order which led to the contempt application against it. Labour Court ordering compliance with the SCA's order – Labour Appeal Court upholding Labour Court's order - employer reinstating employee to the restructured position but at level 10 – employee contending that employer still not complying fully with the orders of the SCA, Labour Court, and LAC respectively as he alleged he was entitled to the position of Commander of the K9 Unit, at salary level 12 – this led to the second contempt application wherein the Labour Court ordered that the employee be placed at level 12 because the post had been upgraded at that level – Appeal

The employer contends that although the post was restructured and upgraded at level 12 with an increase of geographical area of responsibility, the upgrade was not yet implemented and was to be done in the second phase of the restructuring process -

Held that:

It is clear from the answering affidavit that the upgrade of the post to salary level 12 had not been implemented. Further evidence was that Col Du Plessis who occupied the restructured post from 1 March 2010 until May 2015 when the employee was reinstated was at salary level 10. The employee sought to achieve, in the second contempt application, a promotion ie in rank from Lieutenant-Colonel to Colonel – and salary level from 10 to 12.

Relief:

Court finding that relief of reinstatement at salary 12 ordered by Labour Court in the second contempt application non consonant with the *Equity Aviation's* judgment - reinstatement aims at putting the employee back in his old job on the terms and conditions of his contract of employment as it stood at the time of his dismissal unless those terms and conditions of employment attract a right from time to time to pay increases or promotion - at the time of his dismissal, employee had no contractual entitlement to be promoted to salary level 12. Nor did he have a statutory right to a promotion to this level. This is buttressed by the absence of a single allegation in the founding affidavit that it

was a term of his contract of employment, or a statutory right, that entitled him to be promoted to the higher salary level and rank. No basis existed in law and fact for the Labour Court to order reinstatement at salary level 12.

Held that

It was impermissible for the Labour Court to make an order directing the SAPS to appoint the employee to the upgraded post of Commander of the K9 Unit at salary level 12 retrospectively to 1 March 2011, as it fetters the discretion of the National Commissioner under regulation 30(8) to decide whether to continue to employ him on implementation of the upgraded post in the future. More so when the claim before the court ought to have failed on the basis that the orders of the SCA, the Labour Court, and the LAC did not order that the employee be reinstated at a salary level to which he had never previously had a legal entitlement.

Application to adduce new evidence and cross-appeal dismissed on the basis that there were no exceptional circumstances justifying the granting of such application. Moreover, employee seeking to cross-appeal the extent of the retrospectivity order based on evidence that was not before the Labour Court – Appeal upheld with costs- Labour Court’s judgment substituted with an order to the effect that the application is dismissed with costs. Cross-appeal and application to lead new evidence dismissed with costs.

Coram: Davis, Landman JJA et Kathree-Setiloane AJA

JUDGMENT

KATHREE-SETILOANE AJA:

- [1] The appellants are the National Commissioner of the South African Police Service (“National Commissioner”) and the Provincial Commissioner of the South African Police Service: Western Cape (“Provincial Commissioner”).¹

¹ The appellants are collectively referred to as “SAPS” in the judgment.

They appeal against the judgment and order of the Labour Court (Whitcher J) directing them to *inter alia* appoint the respondent, Lieutenant-Colonel Ivan Myers ("Lt.Col Myers"), to the upgraded salary level 12 post of Commander of the Cape Town K9 Dog Unit of the South African Police Service ("Police Service") at salary level 12, rank of Colonel. This post is at a higher salary level and rank than the post he occupied at the time of his dismissal.

- [2] Lt. Col Myers cross-appeals against the period of retrospectivity of the back pay ordered in paragraph 30(3) of the order of Whitcher J, which reads:

'The applicant must be paid the difference in salary between the lowest notch on salary level 12 and salary level 10, retrospective from the first day of the month following the upgrading of the post to level 12, that is 1 March 2011.'

- [3] The cross-appeal is contingent upon the admission of the new evidence which Lt. Col Myers seeks to adduce on appeal and cross-appeal. The SAPS oppose the cross-appeal and the application to adduce further evidence on appeal and cross-appeal.

Litigation History

- [4] Lt. Col Myers was dismissed from the SAPS' employ on 12 July 2007. At the time of his dismissal, he occupied the post of Commander of Maitland Dog Unit. He challenged his dismissal by referring an unfair dismissal dispute to arbitration under the auspices of the Safety and Security Sectoral Bargaining Council ("Bargaining Council"). On 3 September 2008, the Bargaining Council determined that Lt. Col Myers' dismissal was procedurally and substantively fair.

- [5] Dissatisfied, he instituted review proceedings in the Labour Court to set aside the arbitration award. In January 2009, the Labour Court set aside the arbitration award and remitted the dispute to the Bargaining Council for a hearing *de novo*. The SAPS appealed against this order to the Labour Appeal Court ("LAC"). The LAC upheld the appeal and replaced the order of the Labour Court with one which *among other things* dismissed Lt. Col Myers' review with costs.

[6] Lt. Col Meyers appealed against the order of the LAC to the Supreme Court of Appeal (“SCA”). On 29 November 2012, the SCA upheld the appeal ordering the SAPS “to reinstate [Lt. Col Myers] to the position he held before his dismissal” retrospective to the date of dismissal (“SCA order”).²

First contempt application

[7] At the time of his dismissal on 12 July 2007, Lt. Col Myers held the rank of Lieutenant-Colonel in the Police Service as Unit Commander: Maitland Dog Unit at salary level 10. After Lt. Col Myers’ dismissal and before the SCA ordered his reinstatement, specific developments occurred in the Police Service which impacted on his eventual reinstatement. First, a national restructuring of the Police Service had commenced on 4 September 2008. As a result of the implementation of the first phase of the restructuring, all posts were declared vacant.

[8] Second, the Maitland Dog Unit no longer existed on its establishment as it amalgamated with the Faure Dog Unit. The amalgamated unit became known as the Cape Town K9 Unit (“the K9 Unit”). The amalgamation resulted in an increased geographical area and responsibility. This led to the creation of a new post at salary level 10 on the establishment, i.e. Commander of the Cape Town K9 Unit to be occupied by a Lieutenant-Colonel (“the restructured post”). The National Commissioner took a decision to upgrade this post to salary level 12; to be occupied by a Colonel (Senior Superintendent). Although the upgrade of the post had been approved on the 2009/2010 Resource Allocation Guide (“RAG2009/2010”) in June 2009, it formed part of the second phase of the restructuring process to be implemented in that phase (“upgraded post”).

[9] Lastly, Lieutenant-Colonel Du Plessis (“Lt. Col Du Plessis”) was in occupation of the restructured post (at salary level 10) when the SCA ordered the SAPS to reinstate Lt. Col Myers to the post he occupied before his dismissal. It was

²² Reported sub nom *Myers v National Commissioner of the SA Police Service and Others* (2013) 34 ILJ 1729 (SCA).

the restructured post occupied by Lt. Col Du Plessis that most closely resembled the post which Lt. Col Myers occupied before his dismissal.

- [10] In the light of this, the SAPS formed the view that it could not, in compliance with the SCA order, simply remove Lt. Col Du Plessis from the restructured post and reinstate Lt. Col Myers to it. In an attempt to comply with the order of the SCA, the SAPS offered Lt. Col Myers several posts of equal rank and salary to the salary level 10 post he occupied in the Dog Unit at the time of his dismissal, so that he would be in the same type of post, and at the same salary level as at the date of his dismissal.
- [11] These posts were for “visible policing” and not the K9 Unit, but despite Lt. Col Myers’ protestations to the contrary, the Provincial Commissioner addressed a letter to him, on 21 January 2013, requiring him to report for duty, at Ravensmead Police Station as Visible Policing Commander. This was a salary level 10 post at rank Lieutenant-Colonel.
- [12] Aggrieved at the SAPS’ purported failure to comply with the order of the SCA, Lt. Col Myers applied to the Labour Court for an order holding the SAPS in contempt of court (“first contempt application”). On 28 January 2014, the Labour Court (Steenkamp J) dismissed this application, but deemed it in the interests of justice to grant an order directing the SAPS to comply with the SCA order by ordering them to “reinstate ... [Lt. Col Myers] into the position of Commander of the Cape Town Dog Unit (or K9 Unit) at Maitland with retrospective effect to the date of his dismissal” (“Steenkamp J order”).³
- [13] The SAPS only appealed against that part of Steenkamp J’s order that directed Lt. Col Myers’ reinstatement as Commander of the K9 Unit. Lt. Col Myers, in turn, cross-appealed against the order dismissing the contempt application. On 10 April 2015, the LAC dismissed both the appeal and cross-appeal, and ordered the SAPS to reinstate Lt. Col Myers to the position of Unit Commander of the K9 Dog Unit (“the LAC order”).⁴

³ Reported sub nom *Myers v National Commissioner of the SA Police Service and Another* (2014) 35 ILJ 1340 (LC) at para 14.

⁴⁴ *National Commissioner of the SA Police Service and Another v Myers* ([2015] ZALAC 31).

Second Contempt Application

[14] Just two weeks later, on 24 April 2015, the Provincial Commissioner wrote to a certain Colonel JP Visser (“Colonel Visser”) and the Provincial Commander: Emergency Services notifying them that “[t]he job description of Colonel Visser must be changed to a job description of Unit Commander K9 Services”. The letter indicates that Col. Visser was placed in the post of Unit Commander: Cape Town K9 years back, but continued to perform duties as K9 & Mounted Unit Co-ordinator in a post that did not exist in the current structure on that level. It was Colonel Visser’s purported placement as Unit Commander of the K9 Unit that seemingly triggered a further contempt application in the Labour Court.

[15] Hence, on 4 May 2015, Lt. Col Myers instituted a second application in the Labour Court for *among other things* an order:

- (a) compelling the SAPS to comply with the SCA order, the Steenkamp J order and the LAC order (“first order”);
- (b) holding the SAPS in contempt of court in the event of non-compliance with the first order; and
- (c) committing the SAPS to imprisonment for 15 days in the event of non-compliance with the first order (“second contempt application”).

[16] Lt.Col Myers alleged, in the second contempt application, that subsequent to the LAC’s dismissal of the appeal against the Steenkamp J order, he received no confirmation from the SAPS that they intended to comply with any of the court orders issued up to then, despite placing evidence before the Labour Appeal Court demonstrating that Lt. Col Du Plessis had been promoted to fill his post. He also alleged that on 24 April 2015, the SAPS had in violation of his rights appointed Colonel Visser as Unit Commander of the K9 Unit.

[17] However, on 5 May 2015, a day after the second contempt application was served on the State Attorney, but before he became aware of that application, the Provincial Commissioner, in a letter of the same date, withdrew Colonel

Vissers' placement on the basis that it was erroneously made. Colonel Visser was expressly notified in the letter that he was "not placed in the post of Commander: Cape Town K9 Unit" and that he "must continue in [his] duties at Provincial Emergency Services".

- [18] On the same day, the Acting Provincial Commissioner also wrote to Lt. Col Myers requiring him to *report* at the Cape Town K9 Unit as Commander with immediate effect. The letter confirmed his appointment to the post of Commander at salary level 10. This post was of equal rank and salary level to Lt. Col Myers post before his dismissal, and that of Lt. Col Du Plessis, the incumbent. On 6 May 2015, Lt. Col Myers took up his post as Commander of the K9 Unit and immediately took leave.
- [19] On 7 May 2015, Lt. Col Myers wrote to the Provincial Commissioner contending *among other things* that he was "still not complying fully" with the orders of the SCA, Labour Court, and LAC respectively. In paragraphs 6 and 7 of the letter, Lt. Col Myers claimed that he was entitled to the position of Commander of the K9 Unit, because the affidavits filed on behalf of the SAPS refer to the post as a level 12 post, and that the retrospective effect of the SCA order "also includes all promotions if such were due".

The judgment of Whitcher J

- [20] The Labour Court (per Whitcher J) accepted that Lt. Col Myers had occupied the post of Commander of the Maitland Dog Unit at salary level 10 at the time of his dismissal. It, however, granted an order directing the SAPS to:
- (a) comply fully with the SCA order, the Steenkamp J order and the LAC order.
 - (b) appoint Lt. Col Myers to the lowest notch at salary level 12 with the associated increment to rank of Colonel; and
 - (c) pay Lt. Col Myers the difference in salary between salary level 10 and the lowest notch on salary level 12, retrospective to 1 March 2011 (the first day following the upgrade of the post to level 12).

[21] In support of the order granted, the Labour Court's (Whitcher J) reasoned as follows:

'Since the SCA judgment and despite the subsequent Steenkamp J and LAC orders, the Provincial Commissioner "misunderstood the true scope of the relief of reinstatement" because, but for his unfair dismissal, Lt. Col Meyers would have, post the merger of the two dog units, occupied the regraded post (meaning at Salary Level 12 : Rank Commander⁵) as the National Commissioner "possessed the powers, in terms of regulation 30(8) of the South African Police Services Employment Regulations ("SAPS Employment Regulations"),⁶ to have enhanced [Lt.Col Myer's] grade. And [w]hile it is not a certainty the [National Commissioner] would have elected to continue to employ [Lt. Col Myers] in the upgraded post this was by no means unlikely'.

[22] Whitcher J rejected the SAPS' contentions that as regarding regulation 30(8) of the SAPS Employment Regulations, when the National Commissioner exercises his discretion to upgrade a post as provided for under sub-regulation (7), he may deal with it in a number of ways, only one of which includes continuing to employ the incumbent.⁷ And by interpreting the rein-

⁵ Own clarification.

⁶ South African Police Service Employment Regulations, 2008 GN973 in GG31412 of 12 September 2008, ("SAP Employment Regulations") promulgated under the SA Police Service Act 68 of 1995.

⁷ Section 30(7) to (9) of the SAPS Employment Regulations provide:

- (7) The National Commissioner may increase the salary of a post to a higher salary level in order to accord with the job *weight*, if —
 - (a) the job *weight* as measured by the job evaluation system indicates that the post was graded incorrectly; and
 - (b) the budget of the Service and the medium-term expenditure framework provide sufficient funds.
- (8) If the National Commissioner increases the salary of a post as provided under subregulation (7), he or she must transfer the incumbent *employee* to another post that accords with the salary level of the *employee* and advertise the vacant post at the higher salary level: Provided that the National Commissioner may continue to employ the incumbent *employee* in the higher-graded post without advertising the post if —
 - (a) the incumbent already performs the duties of the post;
 - (b) the incumbent has received a satisfactory rating in his or her most recent performance assessment; and
 - (c) it will be in the interest of the Service.
- (9) If the National Commissioner decides to continue to employ the incumbent *employee* in the higher-graded post without advertising the post, —
 - (a) the absorption of the incumbent *employee* in the higher-graded post as provided under sub-regulation (8), must take effect on the first day of the month following the month during which the National Commissioner approved that absorption; and
 - (b) the salary of the *employee* must be adjusted to the minimum notch of the higher salary level with effect from the date referred to in subparagraph (a).

statement order to promote Lt Col Myers to Colonel will effectively deprive the National Commissioner of this discretion.

- [23] The Labour Court (Whitcher J) imposed an *onus*, on the employer, to prove that the dismissed employee would not, but for his dismissal, have achieved a promotion which was “plausibly within his grasp”, had he not been dismissed. In so doing, Whitcher J held:

‘In this case, the very least, in fairness, that one could expect from an employer wishing to resist the restoration of the full *status quo ante* for an act of unfair dismissal, is a demonstration in the appropriate forum that the reinstated employee was unlikely to have achieved the contested benefits of advancement that his dismissal prevented him or her from seeking. In my view, to expect an employee to always demonstrate a contractual or statutory right to an entitlement, over and above being taken back into employ, could defeat fully restoring the *status quo ante*.

In a sense this is as much a question of evidence as legal doctrine. The [SAPS] has placed nothing before the SCA, and, indeed, this Court indicating that [Lt. Col Myers] would not have benefited, as a specialist incumbent, from the fact that his post was upgraded while he should have been in it. As Steenkamp J correctly ordered, the SCA judgment meant that [Lt. Col Myers] should be reinstated into the restructured position. This can only mean at grade 12.

...

I agree with Mr Nortje, counsel for [Lt.Col Myers], that *Equity Aviation Services (Pty) Ltd v CCMA and Others*⁸ is authority for the idea that reinstatement is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. Once an employee has established a particular benefit or promotion was plausibly within his grasp had he not been unfairly dismissed, and this is not rebutted, reinstatement, in fairness, should include these enhancements to his remuneration or rank.’

- [24] Despite the evidence of the SAPS that the upgraded post (level 12) had not yet been implemented, the Labour Court found that:

⁸ Footnote omitted.

[The SAPS] pleaded that the post in issue was formally upgraded to Level 12 from 1 July 2009. At the hearing of this application on 3 September 2015, [Lt. Col Myers'] counsel accepted the [SAPS'] plea that the upgrade of the post was only implemented in Phase 2 of the restructuring at the beginning of March 2011.⁹

[25] Having concluded that Lt. Col Myers had not made out a case for "non-compliance with the various court orders being wilful and *mala fide*", Whitcher J stated as follows:

'Nevertheless I do intend to place the [SAPS] under time frames to fully implement the court orders [of the SCA, Steenkamp J in the Labour Court and the LAC]. In addition, I believe the sword of a future contempt order hanging over their heads is in order as any further delay in fully 'reinstating' [Lt. Col Myers] would strongly suggest *mala fides* and thus require the court's more robust intervention. The issues have been fully ventilated and space for misinterpretation of the SCA's judgment as explained by Steenkamp J, is well and truly over.'

Issues for determination

[25] The questions for determination in the appeal and cross-appeal are these:

In the appeal:

- (a) Whether the reinstatement of Lt. Col Myers on 5 May 2015 as Commander of K9 Unit at salary level 10, i.e. the restructured post, was in breach of the reinstatement order granted by the SCA and elucidated by the Steenkamp J order; and

In the cross-appeal:

- (b) If these orders entitled Lt. Col Myers to be promoted to the rank of Colonel at salary level 12, i.e. the upgraded post (whether with effect from 1 March 2011, or at all), is he then entitled to that promotion with

⁹ Emphasis added.

retrospective effect merely to 4 September 2008 (or as belatedly asserted to 1 July 2009).¹⁰

The Appeal

[26] To reiterate, this appeal lies against the order of Whitcher J in the second contempt application. The primary relief sought by Lt. Col Myers in that application was for an order compelling the SAPS “to comply with” the reinstatement orders of the SCA, Steenkamp J in the Labour Court, and the LAC. In support of the relief sought, he alleged as follows in his founding affidavit:

- (a) Steenkamp J had, in the first contempt application in the Labour Court, ordered the SAPS to reinstate him to the position of Commander of K9 Unit (at Maitland) with retrospective effect to the date of his dismissal;
- (b) Lt. Col Du Plessis had been occupying his post, and he should have been reinstated into this post; and
- (c) Despite the orders of the SCA, Labour Court and the LAC, the SAPS had failed to appoint him to this post, but had instead “hastily” appointed Colonel Visser to his position on 24 April 2015.

[27] But reinstatement to his salary level 10 post (which is the relief ordered by the SCA and by Steenkamp J in the Labour Court) was not what Lt. Col Myers had in mind. Remarkably, what he sought to achieve in the second contempt application was to procure a promotion – in rank from Lieutenant-Colonel to Colonel – and salary level from 10 to 12.

[28] Lt. Col Myers contended in his founding affidavit, that the letter of the Acting Provincial Commissioner, dated 24 April 2015, directing that Colonel Visser’s job description be changed to “Unit Commander K9 services”, confirmed that the post of Commander of the K9 Unit had been a funded level 12 position since 29 June 2009, and that he would be entitled to be promoted to this post with retrospective effect from 29 June 2009, as “he had the requisite skills,

¹⁰ The claim as now reformulated in the notice of cross appeal is for relief retrospective to 4 September 2008 alternatively to 1 July 2009. The alternative claim is not asserted in an amendment to the notice of cross-appeal but rather in the supplementary heads of argument prepared on behalf of Lt. Col Myers.

academic qualifications and experience as required” and the SAPS has a legal duty to do so”.

- [29] At the hearing, two contentions were advanced on behalf of Lt. Col Myers in relation to the SAPS’ legal duty to promote him to the upgraded salary 12 post with retrospective effect from 29 June 2009. The first was that if, between the date of dismissal and reinstatement, there have been salary increases, payment of bonuses, post upgrades, an enlargement of the areas of operational responsibility attaching to the reinstated position, then the retrospectively reinstated employee would be entitled to these benefits.
- [30] And the second was that if the position to which the employee is to be retrospectively reinstated, has in the interim merged with another position, then the reinstatement must be to the merged position. These are the logical consequences, so it is contended, of the reinstatement remedy which is intended to afford protection to the dismissed employee by restoring the employment contract. And to deny the employee these benefits would amount to depriving him or her of the full benefit of the reinstatement remedy.
- [31] The contention that the reinstatement order of the SCA entitled Lt. Col Myers to a promotion, with retrospective effect to 29 June 2009 (*ie* approximately two years after his dismissal on 12 July 2007) is untenable, because it is clear from the allegations of the SAPS in the answering affidavit that the upgrade of the post to salary level 12 had not been implemented. Moreover, nowhere in his founding affidavit does Lt. Col Myers provide a basis in fact or law for the assertion that he was entitled to retrospective reinstatement at salary level 12 from 29 June 2009.
- [32] However, the SAPS assumed, correctly so, that Lt. Col Myers relied on this date because it was the date on which the 2009/2010 Resource Allocation Guide (“RAG2009/2010”) was issued. Concerning RAG2009/2010, the SAPS reiterated what it had said, in its answering affidavit, in the first contempt application, which is that:

‘Although the 2009/2010 Resource Allocation Guide approved the Commander post at the Cape Town K9 Unit as a Salary Level 12 post in

accordance with the restructuring, the post will only be implemented in the course of Phase 2 of the restructuring process. The implementation of Phase 2 has been delayed for various reasons, and it is uncertain at this stage when the implementation is likely to take place.'

- [33] Although the SAPS admitted that Colonel Visser had been appointed on 24 April 2015 as Commander of the K9 Unit, it explained that the appointment was made in error and once this was discovered, the appointment was retracted in writing on 5 May 2015. And, on the same day (*i.e.* after the second contempt application had been delivered) it appointed Lt. Col Myers as Commander of the K9 Unit at salary level 10 – the salary level at which Lt. Col Myers was appointed before his dismissal, and that of Lt Col Du Plessis, the incumbent. This is common cause.

Meaning and Scope of the SCA's Order

- [34] As indicated, the relief sought by Lt. Col Myers in the second contempt application, was for an order compelling compliance with the existing reinstatement order of the SCA (as elucidated by Steenkamp J and the LAC's orders). Crucially for Lt. Col Myers' success in that application, he had to show that his reinstatement by the SAPS, on 5 May 2015, did not constitute compliance with the reinstatement orders of the SCA, Steenkamp J, and the LAC.

- [35] Although the Steenkamp J order relates to the question of SAPS' non-compliance with the SCA's order independently of Witcher J's order in the second contempt application, it is dispositive of the issue for determination in this appeal. This is because the Steenkamp J order which was upheld on appeal by the LAC, definitively determined, as between the parties, the meaning and scope of SAPS' compliance with the order of the SCA. Accordingly, the order still stands.

- [36] In *Eke v Parsons*,¹¹ the Constitutional Court clarified the principles that apply to the interpretation of court orders and confirmed the well-established test on the interpretation of court orders as follows:

¹¹ *Eke v Parsons* 2016 (3) SA 37 (CC) at para 59.

'The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention...'

[37] The purpose of the Steenkamp J order was to clarify the SCA's order which ordered the SAPS to reinstate Lt. Col Myers to the position he held before his dismissal. The interpretation contended for by the SAPS, is that properly construed, the Steenkamp J order does not direct the SAPS to reinstate Lt. Col Myers as Commander of the K9 Unit at salary level 12, whether with retrospective effect to the date of dismissal or at all. What it does, they contend, is to direct the SAPS to reinstate Lt. Col Myers "into the position of Commander of the Cape Town Dog Unit (or K9 Unit) at Maitland with retrospective effect to the date of his dismissal". This, they submit, must be interpreted to mean the restructured post of Commander of the Unit at salary level 10: rank Lieutenant-Colonel.

[38] Lt. Colonel Myers, on the other hand, seems to understand "restructured post" and "upgraded post" to be synonymous. He accordingly urges the Court to interpret "restructured post" to mean "the upgraded post at salary level 12". He makes no distinction between the two posts and contends for an interpretation of the order that "reinstates Lt. Col Myers to the post of Commander of the K9 Unit at salary level 12.

[39] In interpreting the SCA's order, Steenkamp J posed and considered a pivotal question: "What would [Lt. Col Myers'] current position have been, had the SAPS not unfairly dismissed him?" In answer, Steenkamp J observed:

'The dog unit was restructured in 2009. The amalgamated Cape Town Dog Unit (or "K9 Unit"), still operating from Maitland, was established as a single unit. It was headed by a Superintendent at salary level 10. On 1 March 2010 a new commander was appointed after the post became vacant and was advertised. The new incumbent, a Captain at the time, was promoted to Superintendent (Lt. Col at salary level 10) at the time of her appointment.

SAPS points out that that post was upgraded to that of Colonel at salary level 12 and, according to SAPS, “will be implemented during the second phase of the restructuring process. Yet it is common cause that the incumbent of the post, [Lt. Col Du Plessis], is still employed at salary level 10.’

[40] Having highlighted the difference between a “job” or a “position” and the salary level or grade that the position attracts, Steenkamp J stated:

‘There can be little doubt that, had Myers not been unfairly dismissed, he would have continued in the post of commander of the Cape Town Dog Unit at Maitland, albeit in the guise of the restructured unit. His post may have been upgraded in terms of the SAPS Resource Allocation Guide”; but he would have remained the incumbent. In those circumstances, the SCA order must be interpreted to mean that he must be reinstated into the restructured post of commander of the Cape Town Dog Unit at Maitland at the current salary that the post attracts, coupled with retrospective backpay.¹²

[41] Steenkamp J makes the important distinction between Lt. Col Myers’ former post on the one hand, and the “restructured post” and “upgraded post” on the other. On a proper construction, the words “restructured post” must be interpreted to mean “the newly established post of Commander of the Cape Town Dog(K9) Unit” (at salary level 10) established under the restructuring – by the amalgamation of the Maitland and Faure Dog Units. “Upgraded post”, properly construed would mean the upgrade of the restructured post *from* level 10 to level 12.

[42] Steenkamp J accepted the evidence of the SAPS that the upgraded post was yet to be implemented during the contemplated second phase of the restructuring process. And by that position deemed it “in the interests of justice” to order the SAPS to comply with the order of the SCA reinstating Lt. Col Myers to the position he held before his dismissal. Steenkamp J interpreted the words “position he held before his dismissal” to mean “Commander of the amalgamated Cape Town Unit (or K9 Unit) at Maitland”. Although the salary level of the post is not expressly stated in the order, it refers to the “restruc-

¹² Emphasis added.

tured post” at salary level 10. This is implicit from reading the order and the judgment as a whole.

- [43] Steenkamp J’s finding on whether the failure of the SAPS to reinstate Lt. Col Myers into the position of commander of the K9 Dog Unit was wilful or *mala fide* bears this out. Steenkamp J held:

‘I cannot find, on the facts before me, that it was either [wilful or *mala fides*. SAPS believed that it had to “place” Meyers in a position that attracted the same salary – i.e., at level 10 – as Meyers earned at the time of his dismissal. The position of commander of the Maitland Dog Unit attracted that salary at the time of dismissal; the post of commander of the amalgamated Cape Town Dog Unit, on SAPS’ understanding, now apparently attracts a higher salary at level 12 (although the incumbent is still paid at level 10). Hence SAPS offered Myers alternative positions at salary level 10. The stance adopted by SAPS appears to me to be a *bona fide* one, although I do not agree that it is in compliance with the SCA order....’

In my view, SAPS has not complied with the order of the SCA. That order contemplated that Myers be reinstated into the post he would have occupied had he not been unfairly dismissed. That post, as presently restructured, is that of commander of the Cape Town Dog Unit (or K9 Unit) at Maitland.’

- [43] This interpretation is also consistent with Steenkamp J’s finding that “the SCA order must be interpreted to mean that he must be reinstated into the restructured post of commander of the K9 Unit at the current salary that the post attracts, coupled with retrospective back pay.’ The use of the phrase “current salary that the post attracts” must be given its ordinary meaning, i.e. the salary level of the restructured post current to, or at the time of, the reinstatement.

- [44] Lt. Col Du Plessis occupied the restructured post from 1 March 2010 until May 2015, when Lt. Col Myers was reinstated. Although the restructuring resulted in an increased geographical area and responsibility, the post remained a salary level 10 post at the rank of Lieutenant-Colonel. When the salary and rank of the post were upgraded to level 12 in June 2010 under RAG2009/2010, Lt. Col Du Plessis was the incumbent. But because the upgrade of the post had

not yet been implemented, the post remained a salary level 10 one (i.e. the restructured post).

[45] It was the restructured post that Lt. Col Myers was entitled to be reinstated to, and was indeed reinstated to in May 2015 – a post equivalent in rank and salary level to the post that he occupied before his dismissal. Put differently, had Lt. Col Meyers not been unfairly dismissed in 2009, he would have been the incumbent when the restructured post was upgraded to salary level 12 in June 2010.

[46] This finding is consistent with what Lt. Col Myers deposed to in his founding affidavit in the application before Steenkamp J. There he said:

‘The Maitland Dog Unit still exists and has been renamed the Cape Town Dog Unit which has a Commander. My post had been advertised as a promotional post in 2010 and was filled in March 2010 by a Lieutenant Colonel PJ Du Plessis...She is the Unit Commander of the Dog Unit situated at Maitland.’

[47] In a supplementary affidavit deposed to by Lt. Col Myers in the same application, he said this about the post:

‘I was then informed that my position at the Dog Unit no longer existed due to what was termed “reorganization and restructuring that had occurred in September 2008”. This is disingenuous as:

“The Dog Unit still exists as such;

It recently came to my attention that my post was declared vacant in December 2009, and advertised internally as follows

Status: Vacant

Post description: Commander Dog Unit Maitland...”

[48] In his replying affidavit to a supplementary affidavit filed by the SAPS in the same application, Lt. Col Myers unwaveringly asserted that Lt. Col Du Plessis, the incumbent in the post, “was promoted into my post and would not have enjoyed such a privilege had I not been unfairly dismissed...”.

[49] Read in context, Steenkamp J's order that Lt. Col Myers be "reinstated to the position of Commander of the Cape Town Dog Unit (or K9 Unit) at Maitland" required no more than he be reinstated into the post held at the time by the incumbent – Lt. Col Du Plessis. There can, therefore, be no question that the SAPS had fully complied with the SCA's order, by reinstating Lt. Col Myers to the restructured post of Commander of the K9 Unit (Maitland) (at salary level 10; rank Lieutenant-Colonel) with retrospective effect to the date of his dismissal.

[50] The LAC's observations in its judgment confirm the correctness of Steenkamp J's order:

'When the [SAPS] restructured the organization of the South African Police Service and abolished the Maitland Dog Unit and replaced it with the Cape Town Dog Unit they must have known that, were [Lt. Col Myers] to have been successful in his litigation, [SAPS] would have been required to place him in his former position or one of a similar nature. That someone was appointed to be the Commander of the Cape Town Dog Unit illustrates, firstly, that there was such a post and, secondly, that it was the [SAPS] who risked the possibility that successful litigation by [Lt. Col Myer] would place them in a difficult position regarding reinstatement.

...

In the circumstances, the [SAPS] are obliged to reinstate [Lt. Col Myers]. It is a legal duty that flows from a clear and unequivocal order of the Supreme Court of Appeal.'

Whitcher J's Order inconsistent with Equity Aviation

[51] Thus once clarity on the meaning and scope of the SCA's order was established by the Labour Court (Steenkamp J) and the Labour Appeal Court, that ought to have been the end of the matter – but as we know – it was not. Following on the LAC's order was that of Whitcher J's in the second contempt application directing the SAPS to appoint Lt. Col Myers to the upgraded post at salary level 12 and to promote him to Colonel.

- [52] Whitcher J's order is inconsistent with the meaning of "reinstatement" as articulated by the Constitutional Court in *Equity Aviation Services (Pty) Limited v Commission for Conciliation, Mediation and Arbitration*,¹³ which is "to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions". *Equity Aviation* established the principle that where an employee is reinstated by the employer, he or she resumes employment on the same terms and conditions that prevailed at the time of the dismissal of the employee. This means that the employer does not conclude a new contract when reinstating a dismissed employee. It merely restores the employment relationship to what it was before the dismissal.¹⁴
- [53] The Labour Court erroneously imposed an *onus*, on the SAPS, to prove that the dismissed employee would not, but for his dismissal, have achieved a promotion which was "*plausibly within his grasp*", had he not been dismissed. A reinstatement order imposes no such burden on the employer. It is directed at putting the employee back in the position he or she was before the dismissal. Although a claim by a reinstated employee that, but for his dismissal, he would have achieved a promotion might give rise to a plausible unfair labour practice claim, this does not mean that reinstatement at the salary level and rank at the time of the dismissal would amount to a breach of the reinstatement order. The Labour Court, therefore, erred in arriving at a contrary finding.
- [54] The Steenkamp J order correctly reflects the finding of the Constitutional Court in *Equity Aviation*, which requires no more of the employer than that it put back the employee in the same job or position that he or she occupied before the dismissal "*on the same terms and conditions*". A reinstatement order restores the previous contract of employment between the dismissed employee and the employer. The right of the employee to be remunerated arises from the restoration of the contract of employment on reinstatement, and not

¹³ *Equity Aviation Services (Pty) Limited v Commission for Conciliation, Mediation and Arbitration* 2009 (1) SA 390 CC at para 36; *Nel v Oudtshoorn Municipality and Another* (2013) 34 ILJ 1737 (SCA) at para 8; *Themba v Mintroad Sawmills (Pty) Limited* (2015) 36 ILJ 1355 (LC) at para 22 (*Themba*).

from the reinstatement award itself.¹⁵ This would mean that any remuneration payable to the employee arising from the contract of employment becomes due to that employee.¹⁶

[55] Thus, as held by the Labour Court in *Themba v Mint Road Sawmills (Pty) Ltd*,¹⁷ a reinstated employee is, “as a matter of general principle...entitled to be paid his contractually agreed remuneration, as it existed in terms of his contract of employment when he was dismissed”.¹⁸ However, as relating to the question of a salary increase on reinstatement, the Labour Court in *Themba* held that the employee must demonstrate that:

‘[H]e has the right to such increase in terms of his contract of employment ... Any right he has to payment must be founded on his contract of employment in turn, or on the applicable collective agreement, or finally on applicable statutory instruments (such as the BCEA). This means that the applicant has to show a contractual or statutory right to an increase, in order to be able to claim [a salary increase]’.¹⁹

...

Accordingly, and simply put, if the applicant cannot show an actual contractual or statutory right to an increase ... he simply cannot claim it. The fact that other employees may have received increases pursuant to an agreement concluded between the employer and other individual employees, in particular, cannot assist the applicant in establishing a right to an increase’.²⁰

[56] The question relating to the remuneration the employee would, but for his dismissal, probably have received is irrelevant. The only relevant question relating to this aspect is what his legal rights are, arising either from his contract of employment or any applicable statute?

¹⁵ *Themba* at para 31.

¹⁶ *Themba* at para 22, *Republic Press v CEPPWAWU* (2016) 28 ILJ 2503 (SCA) at para 19 and *Kroukam v SA Airlink* 2005 (26) ILJ 2153 (LAC) at para 59.

¹⁷ *Themba* at para 31.

¹⁸ *Themba* at para 33.

¹⁹ *Themba* at para 34.

²⁰ *Themba* at para 36.

- [57] What then are Lt. Col Myers' rights arising either from his contract of employment with the SAPS or from statute?
- [58] Lt. Col Myers' case in support of a right to the salary level 12 post, is that the employer was obliged to promote him to that level with effect from 4 September 2008, alternatively June 2009 being the purported date of the upgrade to level 12 of the K9 Unit Commander post.
- [59] Reinstatement with retrospective effect means putting the employee back in his old job on the terms and conditions of his contract of employment as it stood at the time of his dismissal. If those terms and conditions of employment attract a right from time to time to pay increases, such increases will fall to be paid as part of the retrospective reinstatement order. But where absent the reinstatement order itself, the employee has no contractual or statutory right to a pay increase or to a promotion to a higher salary level or rank, a reinstatement order does not confer such right.
- [60] Crucially, at the time of his dismissal, Lt. Col Myers had no contractual entitlement to be promoted to salary level 12. Nor did he have a statutory right to a promotion to this level. This is buttressed by the absence of a single allegation in Lt. Col Myers' founding affidavit that it was a term of his contract of employment, or a statutory right, that entitled him to be promoted to the higher salary level and rank.
- [61] Lt. Col Myers simply alleged a right to have been promoted to Level 12 with effect from 29 June 2009 (or is it 4 September 2008), without providing any factual allegations in support of such a right. He furthermore failed to give a reason in his founding affidavit for selecting 29 June 2009, as the date from which his alleged entitlement to a promotion would have retrospective effect, although this was probably based on the date of the SAPS' approved RAG2009/2010 which was 29 June 2009. The RAG2009/2010 provided for a level 12 post to be occupied by a Senior Superintendent (Colonel) at the K9 Unit.

[62] When challenged during argument to demonstrate where reliance on 29 June 2009 was pleaded in the founding affidavit, Lt. Col Myers pointed to the allegation in his founding affidavit, where he states that:

‘[T]he answering affidavits filed by the SAPS opposing the contempt application in the Labour Court in 2013 [referring to the first contempt application], claimed for the very first time that the post of Unit Commander was upgraded on 29 June 2009 to a level 12 post, whilst it was a post level 10 at the time of my dismissal.’

[63] As correctly submitted on behalf of the SAPS, this allegation is a secondary fact or inference for which no primary facts are alleged which support Lt. Col Myers case that the salary level 12 post was implemented by 29 June 2009 or at all.²¹ Nor do the allegations in his founding affidavit referencing the placement letter addressed to Visser, on 24 April 2015, confirm that the upgraded post was implemented on 29 June 2009. You will recall that the placement letter was erroneously issued by the Acting Commissioner and subsequently retracted, when the error was discovered.

[64] It is not disputed by the SAPS that since 29 June 2009, approval in principle has existed for a level 12 post for the Commander of K9 Unit. SAPS have, nevertheless, repeatedly asserted on affidavit that the upgrade of the post has not yet been implemented, and will only be implemented at some unknown future date, as part of a “phase two” restructuring.

[65] Lt. Col Myers contends that this is a bare denial that can be robustly rejected as it does not give rise to a dispute of fact. I disagree. In the light of a complete absence of any factual assertions in Lt. Col Myers’ founding affidavit calling for a more complete answer, his call for this evidence to be disbelieved must be rejected out of hand. In particular, because he was fully aware from the stance adopted by the SAPS in the first contempt application, that they have consistently contended that the upgrade to level 12 had not yet been implemented. There is nothing in the founding affidavit that vaguely suggests otherwise.

²¹ *Swissborough Diamond Mines v Government of the RSA* 1999 (2) SA 279 (T) at 324D-F.

- [66] Steenkamp J, in his judgment in the first contempt application, also accepted the evidence of the SAPS that the upgraded post at salary level 12 will be implemented during the second phase of the restructuring process. Steenkamp J's order was upheld on appeal to the LAC, and the LAC's order was not appealed against to the Constitutional Court. It is a definitive finding that ought to have been followed by Whitcher J.
- [67] Accordingly, on the basis of the rule in *Plascon-Evans*²² (and on the basis that this fact was accepted by Steenkamp J in his judgment in the first contempt application), the Labour Court (Whitcher J) ought to have accepted that the upgraded post at salary level 12 had not yet been implemented and would only be implemented at some unknown future date.
- [68] Whitcher J's failure to accept this fact caused her to make her order retrospective to 1 March 2011, on the erroneous basis that the upgrade of the post was implemented in phase two of the SAPS restructuring at the beginning of March 2011. She did this in spite of the uncontested evidence of the SAPS that the upgrade of the post to salary level 12 would be implemented during the second phase of the restructuring which had not yet occurred.
- [69] There was, accordingly, no basis in law and fact for the Labour Court (Whitcher J) to find, in the face of the SAPS's denials and Steenkamp J's judgment in the Labour Court, that the salary level 12 post had been implemented on 1 March 2011.

SAPS Employment Regulations

- [70] In terms of regulation 30(7) of the SAPS Employment Regulations, the National Commissioner may in the exercise of his discretion increase the salary of a post to a higher salary level to accord with its job weight. Regulation 30(8) provides, *inter alia*, that if the National Commissioner "*increases the salary of a post*" (as contemplated in sub-regulation (7)), the National Commissioner must either transfer the incumbent employee to another post which accords with his salary level and advertise the vacant post at the higher salary level or,

²² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634E-G.

in the exercise of his or her discretion, may retain the employee in the higher graded post without advertising it, if the incumbent employee already performs the duties of the posts; the incumbent has received a satisfactory rating in his or her most recent performance assessment; and it will be in the interests of the Service.

[71] Regulation 30(9), in turn, provides that if the National Commissioner retains the incumbent employee, the latter must be absorbed in the higher graded post from the first day of the month following the month in which the incumbent employee's absorption is approved. And, the incumbent's salary will be adjusted to the lowest notch of the higher salary with effect from the aforesaid date.

[72] Having acknowledged the discretion which the SAPS Employment Regulations confer upon the National Commissioner, Whitcher J held that the National Commissioner exercised this discretion "albeit spurred by the recent rulings of the Labour Court and LAC, to place the applicant in the upgraded post of the Cape Town Dog Unit without advertising the position". This finding is wrong because the SAPS reinstated Lt. Col Myers in compliance with the orders of the SCA, Labour Court and the LAC, which are binding on the SAPS. The National Commissioner had no discretion to exercise as relating to the implementation of these orders as the SAPS was obliged to reinstate Lt.Col Meyers "to the position he held before his dismissal" because, as held by the LAC, "it is a legal duty which flows from a clear and unequivocal order of the Supreme Court of Appeal".²³

[73] The Labour Court was also wrong in concluding that the National Commissioner's discretion is limited by order of reinstatement to the restructured post of Commander K9 Unit with salary level 12. This was not an issue considered or determined by the SCA or by Steenkamp J in the first contempt application. In other words, neither the order of the SCA nor that of Steenkamp J directed the SAPS to place Lt. Col Myers in a salary level 12 post at rank Colonel. All that was required of the SAPS was to reinstate him to

²³ LAC Judgment at para 10.

the post then occupied by Lt. Col Du Plessis (at salary level 10). That is unquestionably what the National Commissioner did on 5 May 2015.

[74] Since the upgraded post to Level 12 will only be implemented at some future date when Phase 2 is implemented, it will only be open to the National Commissioner to exercise his discretion under regulation 30(8) of the SAPS Employment Regulations at that stage. In *South African Police Service v Public Servant's Association*,²⁴ the Constitutional Court considered the meaning of the word “may” in regulation 30(8) of the SAPS Employment Regulations, and held as follows:

‘It follows from the above that the regulation must be read in such a way as best to harmonize two major considerations that could collide with each other. The first is the need to give the Commissioner the necessary flexibility to strengthen the leadership capacity of the service in a transparent manner. The second is the requirement that incumbents whose work is satisfactory should not be subjected to the anxiety of possibly losing their jobs simply because their posts are being upgraded.

...

[35] It follows then, that subject to the qualification mentioned below, “may” in the context of this case does not mean “must”. The Commissioner has a discretion and is accordingly entitled to make a declaration that although he is authorised without advertising to promote an incumbent whose job is upgraded, he is not obliged to do so. The declaration should, however, be qualified by a further declaration that the Commissioner’s discretion must be exercised in a manner which does not place an incumbent who is performing satisfactorily in jeopardy of losing his job in the service simply because his or her post is being upgraded.”

[75] Regulation 30(8) of the SAPS Employment Regulations confers a discretion upon the National Commissioner to decide whether to employ the incumbent employee in a post where he increases the salary in terms of regulation 30(7) thereof. Salary level 12 carries a substantially bigger salary than what Lt. Col

²⁴ In *South African Police Service v Public Servant's Association* [2007] 5 BLR 383 (CC) at paras 32 and 34.

Myers receives in his current position. The post once implemented will require an officer at the rank of Colonel. Significantly, in this regard, even if Lt. Col Myers were not dismissed, and remained in the post as the incumbent, it would not have automatically followed that he would have been appointed to the upgraded post at salary level 12.

[76] Lt. Col Myers is the incumbent of the upgraded post. It is only on implementation of this post at some date in the future, that the National Commissioner's discretion to decide whether to continue to employ him in the upgraded post will be triggered. In the absence of having exercised his discretion in terms of regulation 30(8) on this question, there can be no duty on the National Commissioner to present evidence to show that Lt. Col Myers would not have qualified to meet the requirement of the post. Whitcher J, therefore, erred in finding that there was such a duty.

[77] Accordingly, it was impermissible for the Labour Court to make an order directing the SAPS to appoint Lt.Col Myers to the upgraded post of Commander of the K9 Unit at salary level 12 retrospectively to 1 March 2011, as it fetters the discretion of the National Commissioner under regulation 30(8) to decide whether to continue to employ him on implementation of the upgraded post in the future.

[78] The orders granted by the SCA, the Labour Court (per Steenkamp J) and the LAC do not purport to fetter the exercise of the National Commissioner's discretion. They do no more than direct the SAPS to reinstate Lt. Col Myers to the post, salary level and rank that he held prior to his dismissal, with retrospective effect to the date of his dismissal. An application to enforce these orders, as we have in the second application before Whitcher J, does not authorize that court to over-ride the SAPS Employment Regulations or deem them to be applied when this is not factually the case.

[79] Accordingly, on the evidence that served before Whitcher J in the Labour Court, Lt. Col Myers had failed to establish any legal right to be appointed at salary level 12, retrospective to his dismissal. The claim before her ought to have failed on the basis that the orders of the SCA, Labour Court (Steenkamp

J), and the LAC did not order that Lt. Col Myers be reinstated at a salary level to which he had never previously had a legal entitlement.

Application to adduce new evidence on appeal/cross-appeal

[80] There is, however, the new evidence which Lt. Col Myers seeks to adduce on appeal and on cross-appeal. The new evidence consists of duty lists and pay-rolls for the Dog Unit for the period during his absence, which he allegedly had no access to or knowledge of. He contends that the new evidence is germane to the appeal and cross-appeal as it shows that the upgraded post of Unit Commander of the K9 Unit had already been implemented, funded and occupied as early as September 2008. He claims that the new evidence only came to his attention after the hearing of the second contempt application before Witcher J in the Labour Court.

[81] Although section 174(a) of the LRA²⁵ confers a wide discretion on the Labour Appeal Court to receive further evidence on appeal, it is the practice of appeal courts generally to grant leave to do so sparingly.²⁶ An appeal court will generally grant such leave only where special grounds exist; there will be no prejudice to the other side; and further evidence is necessary to do justice between the parties.²⁷ Our courts have formulated a set of requirements that an applicant seeking to adduce new evidence on appeal must meet. These are:

- (a) There should be finality in litigation. The litigant who elects to stand by the evidence he adduces, should not be permitted to adduce further evidence unless the circumstances are exceptional.

²⁵ Section 174 of the LRA which deals with the powers of the Labour Appeal Court on hearing appeals provides:

The Labour Appeal Court has the power –

- (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by the Labour Appeal Court, or to remit the case to the Labour Court for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Labour Appeal Court considers necessary; and
- (b) to confirm, amend or set aside the judgment or order that is the subject of the appeal and to give any judgment or make any order that the circumstances may require.

²⁶ *Prince v President, Cape Law Society and Others* 2001 (2) SA 388 CC at para 21.

²⁷ *De Aguiar v Real People Housing (Pty) Ltd* 2011 (1) SA 16 SCA at paras 9-11; *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* [2017] ZASCA 23 (24 March 2017 at paras 22-23.

- (b) The litigant seeking to adduce further evidence must not have been remiss in adducing the evidence earlier and must satisfy the court that he could not have procured the evidence in question by the exercise of reasonable diligence.
- (c) The evidence tendered must be weighty, material and presumably worthy of belief, and must be such that if adduced, it would be practically conclusive.
- (d) The delay in adducing the new evidence must not prejudice the opposite party. For instance, if the opposite party cannot now produce evidence which would originally have been available to rebut the fresh evidence, leave to adduce the fresh evidence will be refused.²⁸

[82] A key feature of the case that Lt. Col Myers now belatedly seeks to advance on appeal for the first time, is the contention that Colonel Visser was not the Provincial Commander: K9 and Mounted Services; and that Lt.Col Du Plessis was not the Unit Commander of the K9 Unit as he contended before the Labour Court in the second contempt application. On the contrary, he now contends that Colonel Visser was the Commander of the K9 Unit and Lt. Col Du Plessis the Operational Commander; a subordinate post to the Commander of the K9 Unit.

[83] However, in his founding affidavit in the second contempt application, Lt. Col Myers accepted and asserted that Colonel Visser had not been the Unit Commander of the K9 Unit. Furthermore, although he has previously maintained that he should have been reinstated into the position occupied by Lt. Col Du Plessis, he now disputes this and contends that Lt. Col Du Plessis occupied a post subordinate to the post which he claims he ought now to be reinstated to.

[84] This, as rightly contended for by the SAPS, is untenable as Lt. Col Myers stated, in no uncertain terms, in the first contempt application, that his post was advertised as a promotional post in 2010 and was filled in March 2010 by

²⁸ *De Aguiar v Real People Housing (supra)* at para 12; see also *Colman v Dunbar* 1933 AD 141 at 160-162.

Lt. Col Du Plessis as the Unit Commander of the K9 Unit situated in Maitland. This evidence was accepted by Steenkamp J and formed the basis of his order. And it is that order which Lt. Col Myers seeks to enforce in the present application. It is, therefore, impermissible for him to seek (belatedly, on appeal) to pursue a case which conflicts with the case he has previously pursued (including before Steenkamp J), namely that he is entitled to reinstatement to Lt. Col Du Plessis' position.

Finality in the litigation

[85] Lt. Col Myers has failed to demonstrate any exceptional circumstances which would justify the admission, at this late stage, of the evidence he seeks to adduce on appeal. He has been reinstated at salary level 10, which was his salary level at the time of his dismissal. It is simply impermissible for him to now seek, merely through relief sought in the notice of motion (unsupported by evidence) to claim a higher salary. Lt. Col Meyers has been reinstated, and if he contends as he does, that he is entitled to a higher salary, he should pursue this claim in the appropriate forum.

Remissness on the part of the applicant

[86] The evidence that Lt. Col Myers seeks to adduce on appeal, consists of duty lists and payrolls in respect of the Dog Unit. Although these documents related to the period when he was dismissed from the SAPS' employ, he fails to disclose, in his founding affidavit to this application, that he had already attached similar duty lists (also relating to periods during his dismissal), to his replying affidavit in the first contempt application.

[87] It is evident from this, that Lt. Col Myers would have had access to these documents, alternatively could have obtained access to them. He does not dispute that as an experienced police officer in charge of the Maitland Dog Unit for many years, he would know that the documents in question are archived, and could easily have been requested from the relevant functionaries.

The evidence is not weighty, material and worthy of belief?

- [88] Lt. Col Myers' application to adduce new evidence rests upon the allegation that he was misled as to the positions occupied by Colonel Visser and Lt. Col Du Plessis. There is simply no substance to this allegation as the evidence indicates that Lt. Col Myers was not misled by anybody. His affidavits indicate that he was fully aware of the positions occupied by Colonel Visser and Lt. Col Du Plessis. On his version, Colonel Visser was the Provincial Commander K9 and Mounted Services, while Du Plessis occupied the amalgamated post i.e. the restructured post at salary level 10.
- [89] Significantly, Lt. Col Myers deposed to an affidavit referring to evidence which he obtained from Lt. Col Du Plessis indicating that she was promoted to his post. The SAPS does not dispute that the duty list proves that Lt. Col Du Plessis occupied the post which Lt. Col Myers claimed he ought to be reinstated to. Nor do the SAPS dispute that she remained in the post until Lt. Col Myers' reinstatement in May 2015 in accordance with the Steenkamp J order.
- [90] Colonel Visser did not permanently occupy the post contended for by Lt. Col Myers. This is clear from his both his affidavits and from Colonel Visser's career trajectory. In 1993, Colonel Visser was appointed as the Provincial Commander of the Dog Units for the Western Cape Province, which later became known as the Provincial Commander: K9 and Mounted Services, Western Cape. This post is a higher ranking post (at salary level 12) than the salary level 10 post which Lt. Col Myers originally claimed reinstatement to. Colonel Visser has, therefore, been occupying a higher post at a higher salary level since 1993.
- [91] Colonel Visser was, from time to time, required to assume the responsibility for the Dog Unit for specific reasons. However, this was always of a temporary nature and, in addition to his primary responsibilities as Provincial Commander K9 and Mounted Services, Western Cape. His job descriptions from 1 April 2011 to the present time show, for this entire period, that he had never served as Commander of the K9 Unit, but has served, since 1993, as Provin-

cial Commander of the K9 and Mounted Services, Western Cape, a salary level 12 post. It is clear from this, that the funding for the salary level 12 post that Colonel Visser has been occupying for the past 24 years, is not even vaguely linked to the post of Commander of the K9 Unit, which Lt. Col Myers claimed reinstatement to.

[92] As already alluded to earlier in this judgment, the letter of 24 April 2015, stating that Colonel Visser had been placed in the post of Commander K9 Unit years back, was revoked in the letter dated 5 May 2015. This confirmed not only that Colonel Visser was not to be placed in the post of Commander of the K9 Unit, but also that he must continue his duties at Provincial Emergency Services.

[93] The payrolls (annexures IM23 to IM36) similarly do not demonstrate that Colonel Visser was appointed into Lt. Col Myers' post. As pointed out on behalf of the SAPS, the payrolls serve two primary functions, *i.e.* identifying the physical pay point for salary purposes of the relevant police officers, and as a checklist to verify the employees at the unit.

[94] The duty lists too do not prove that Colonel Visser was appointed to Lt. Col Myers' claimed post. The post in question was occupied by one Lt. Col Dyanti, followed by Lt. Col Du Plessis. Colonel Visser assumed responsibility for the K9 Unit as the overall commander of all the dog units and for specific reasons. Lt. Col Myers' contention that Colonel Visser has, from 2009, occupied the post he now claims to be reinstated to, is manifestly unfounded.

[95] In his final replying affidavit, Lt. Col Myers accepts that since October 2010 Colonel Visser has not served as Unit Commander of the Combined Unit. This is approximately two years before the SCA handed down its judgment of 29 November 2012, and approximately between four and eight years before Steenkamp J, LAC and Whitcher J judgments were each handed down.

[96] It is common cause that by the time the reinstatement orders of the SCA, Labour Court, and LAC were implemented, Colonel Visser had long ceased to occupy any role as Commander of the Unit (whether as his sole function or together with other responsibilities). It is, therefore, untenable for Lt. Col My-

ers to now belatedly seek to advance a case that he should be reinstated to the position he accepts Colonel Visser ceased to occupy years before the reinstatement order was made and implemented.

Prejudice

[97] The SAPS contends that Lt. Col Myers' piecemeal litigation prejudices them because given the time which has elapsed, in some cases up to eight years, it has been extremely difficult and time-consuming for them to locate the necessary documents to address all the allegations contained in Lt. Col Myers' founding affidavit.

[98] I am accordingly not satisfied that Lt. Col Myers' application to adduce new evidence meets the requirements for adducing new evidence on appeal. Accordingly, the application to adduce further evidence on appeal and cross-appeal falls to be dismissed.

Cross-Appeal

[99] The cross-appeal is against the period of retrospectivity of the increase to salary level 12. Witcher J, in the exercise of her discretion under section 193(1)(a) of the Labour Relations Act ("LRA")²⁹ deemed it appropriate that her order of reinstatement should be retrospective to 1 March 2011. Lt. Col Myers seeks to vary this in his cross-appeal with an order retrospective to 4 September 2008 which purportedly marked the commencement of the restructuring process in the Western Cape.

[100] Lt. Col Myers' case as originally formulated in his founding affidavit, in the second contempt application, was that the post was upgraded to salary level 12 with effect from 29 June 2009. In his replying affidavit, the date of the purported upgrade changed to 9 March 2011. The case he seeks to advance in the cross-appeal – is that he should be appointed at salary level 12 with effect from 4 September 2008. However, in argument and in his heads of argument, this date changed to 1 December 2007. Finally, in his supplement-

²⁹ No. 66 of 1995.

tary heads of argument filed with leave of the Court, he reverted to 4 September 2008 alternatively 29 June 2009.

[101] The contention advanced by Lt. Col Myers in relation to the former date, is that the documents which he seeks to adduce as evidence in the cross-appeal, namely duty lists and payroll sheets, prove that the upgraded post (salary level 12) was implemented, funded and occupied as part of phase 1 of the restructuring process, which commenced on 4 September 2008.

[102] Lt. Col Myers, however, presented no evidence in the Labour Court (Whitcher J) which could conceivably have justified an order retrospective to 4 September 2008, as now sought in the cross-appeal. It is, therefore, not surprising that Lt. Col Myers' case on cross-appeal is based squarely on new evidence he wishes to adduce, which he contends will show that the salary level 12 post was implemented, funded and occupied on 4 September 2008.

[103] In principle, a cross-appeal (like an appeal) lies against the correctness of the judgment of the court below, based on the evidence before it. It is not competent for a cross-appeal to lie against a judgment based on new evidence adduced on appeal, and a case that was never made out in the court of first instance. As is evident from Lt. Col Meyer's application to adduce new evidence on appeal, his case has mutated from the relief that he originally sought in his founding affidavit, to what he now seeks in this application to adduce new evidence on cross-appeal.

[104] The success of the cross-appeal is, however, contingent upon the success of the application to adduce new evidence on appeal. Given the outcome of that application, the cross-appeal also falls to be dismissed.

[105] For these reasons, the appeal succeeds and the cross-appeal fails.

Costs

[106] On 5 May 2015, the SAPS reinstated Lt. Col Myers to the post he occupied prior to his dismissal. He took up the post the next morning. That ought to have put an end to the litigation between the parties. But, in an effort to se-

cure a promotion to which he was not entitled in either law or fact, Lt. Col Myers launched the second contempt application in the Labour Court, when it was clear that the SAPS were not in contempt.

[107] To confound matters further, Lt. Col Myers cross-appealed against the order of the Labour Court (per Witcher J) in the second contempt application. Though impermissible, the cross-appeal was based on a reformulated case – on new evidence to be adduced on appeal – that was never made out in the court of first instance.

[108] For these reasons, I consider it to be fair and just that Lt. Col Myers be ordered to pay the costs of the appeal, cross-appeal and application to adduce new evidence on appeal.

Order

[109] In the result, I order that:

- 1 The appeal succeeds with costs, including the costs of two counsel.
- 2 The order of the Labour Court is set aside and replaced with the following order:

“The application is dismissed with costs, including the costs of two counsel.”
- 3 The cross-appeal is dismissed with costs including the costs of two counsel.
- 4 The application to adduce new evidence on appeal is dismissed with costs.

Kathree-Setiloane AJA

Labour Appeal Court

Cape Town

Davis JA and Landman JA concurring.

APPEARANCES:

FOR THE APPELLANTS: Mr A. Freund SC with Mr EA De Villiers-Jansen
Instructed by The State Attorney

FOR THE RESPONDENT: Mr A Oosthuizen SC with Mr JA Nortje
Instructed by Heidi Van Muelen Attorneys

LABOUR APPEAL COURT