REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS794/03

In the matter between:

NATIONAL UNION OF METAL WORKERS OF

SOUTH AFRICA **First Applicant**

obo

MOSES FOHLISA & 41 OTHERS **Second to Further Applicants**

and

HENDOR MINING SUPPLIES A DIVISION OF

MARSCHALK BELEGGINGS (PTY) LTD **Respondent**

Heard: **20 June 2013**

Delivered: **5 November 2013**

Summary: **The effect of an appeal or application for leave to appeal in respect of an order for reinstatement; the nature of retrospectivity of reinstatement orders in terms of section 193 of the LRA in the context of such appeals or applications for leave to appeal; accumulated financial risk associated with reinstatement orders that are subject to appeal processes.**

JUDGMENT

GAIBIE AJ

Background

[1] For the sake of convenience, the parties will be referred to as follows: the first applicant will be referred to as the 'union', the second to further applicants will be referred to as the 'employees', collectively the union and the employees will be referred to as the 'applicants' and the respondent will be referred to as the company.

[2] On 18 August 2003, the employees were dismissed by the company. Pursuant to unfair dismissal proceedings in the Labour Court, Cele AJ, handed down judgment in this matter on 16 April 2007 ('the LC judgment'). In terms of that judgment, the following was ordered:

> (a) The [company] is ordered to reinstate the [employees] in the same or not less favourable positions as they had at the time of their dismissal.
>
> (b) The reinstatement is to be with effect from 1 January 2007. Each [employee] is to report on duty on 23 April 2007 at 08h00.
>
> (c) No costs order is made.

[3] On 23 April 2007, the employees tendered their services to the company. That tender was rejected because the company elected to take the matter on appeal, first to the Labour Appeal Court ('LAC') and thereafter to the Supreme Court of Appeal ('SCA'). The company accepts that the order of the Labour Court was suspended by operation of law pending the appeals to the higher courts.[1]

[4] On 19 June 2009, the LAC dismissed the company's appeal against the LC judgment, and the same fate met its application for leave to appeal to the SCA on 15 September 2009. It was on that date, according to the company, that 'the order of Cele AJ, reinstating the applicants with effect from 1 January 2007, became immediately enforceable and so too any claim for wages which

[1] *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W) at pg 463 F – G.

had fallen due since 1 January 2007'.[2] Nevertheless, the company proceeded to re-employ the employees on 29 September 2009, save of course for those who were deceased by that date. The company however refused to reinstate their wages, or pay them any back pay, for the period 1 January 2007 to 28 September 2009 ('the back pay').

[5] Accordingly, on 4 February 2010 the employees' erstwhile attorneys directed a demand for the back pay to the company. The company refused to yield to this demand and its counsel indicated to me during the hearing of this matter that he did not know why the company had refused to do so. That indication from counsel, was to say the least, extremely perplexing given the legal contentions raised by him during the hearing of this matter.

[6] In any event, and in the context of the company's refusal to make payment of the back pay, the applicants issued a writ in order to enforce and execute the order of the Labour Court, supported by an affidavit which specified the amounts of back pay owing to each employee. The company brought an application to set aside the writ on the basis that the Labour Court judgment did not specify the amounts owing to the employees or on the basis that it did not 'sound in money'. On 23 June 2011, Van Voore AJ set aside the writ and granted the applicants leave to apply to this Court for a declaratory order setting out the amounts owing to the employees as back-pay in terms of the order granted by Cele AJ on 16 April 2007 for the period 1 January 2007 to 28 September 2009 ('the relevant period').

[7] Consequently, the applicants instituted a declaratory application on 19 September 2012 ('the declaratory application') in which they seek this Court to declare that the company owes each employee the amounts specified in the attached schedule. This schedule is an adaptation of the schedule that was prepared by the company and is a summary of the information contained in the applicants' application. It excludes the duplications but includes the details of those employees who have, since the labour court proceedings, passed on. It contains the names of the relevant employees who were dismissed by the company on 18 August 2003 and who were part of the labour court

[2] Para 11 of the respondent's heads of argument.

proceedings, and the details of amounts owing to them personally or in the case of deceased employees[3], to their estates as back-pay for the *relevant period*.

The company's contractual approach to back pay

[8] In its answering papers to the declaratory application, the company's refusal to pay the back pay for the *relevant period* is based on what appears to be a contractual defence to the claims coupled with its reliance on section 11 of the Prescription Act 68 of 1969 ('the Prescription Act'). In relation to the contractual defence, the deponent to the company's answering affidavit averred as follows:

> 23 I am advised and respectfully submit that it was incumbent on the applicants to plead and prove their contracts of employment, the wages and benefits to which they were entitled in terms thereof and the basis on which they calculate arrear remuneration sounding in money. This they have singularly failed to do.
>
> 24 The applicants have failed to make averments in the founding affidavit in accordance with the rules of this court, sufficient to establish the existence of a contract, the terms of the contract and their entitlement to any payment pursuant thereto either in the amounts claimed or at all.
>
> 25 On this basis alone, this application falls to be dismissed with costs.

[9] In amplification of the contractual defence, it was argued on behalf of the company that this court must make a distinction between the retrospective and prospective effect of the LC judgment. The retrospective part of the judgment, it was argued, relates to the period 1 January 2007 to 16 April 2007 which is the date of the LC judgment. The retrospective part, it was contended, constituted the judgment debt. The prospective part, so the submission continued, relates to the period after the 16th of April 2007 to 28 September 2009 when wages became due on a weekly basis. But that the claims in relation thereto were not enforceable and were effectively

[3] It excludes those employees who were deceased prior to the date of reinstatement, being 1 January 2007.

suspended pending the outcome of the appeals to the LAC and thereafter to the SCA. Consequently, the company contended, that the legal impediment to the enforcement of such claims was effectively removed on 15 September 2009, and the employees accordingly had a period of three years from that date within which to lodge claims of any arrear wages.

[10] According to the company, the applicants' declaratory application fell short of a proper pleaded contractual claim for arrear wages, and their claim for back pay in respect of the *relevant period* must therefore fail on that ground alone. In any event and irrespective of the irregularities contained in the declaratory application, that application according to the company was launched on 19 September 2012, that is four days after the three year period within which such an application should have been launched and their claims have effectively prescribed. The company articulated its special plea of prescription in its answering papers as follows:

> 15 The individual applicants claim wages and benefits sounding in money for the period 1 January 2007 to 28 September 2009 ('the debt').
>
> 16 The applicants have at all material times since no later than 15 September 2009[4] known of all material facts on which their present claims for payment are based, or could, by the exercise of reasonable care, have known of such facts.
>
> 17 The present application was instituted at the earliest on 19 September 2012.
>
> 18 It follows that in terms of Section 11 of the Prescription Act 68 of 1969, any amounts comprising the debt claimed which were due to any of the individual applicants up to and including 18 September 2009 have become prescribed.

[11] I might add, at this stage, that the company did not in its heads of argument or during the hearing of this matter rely on any authority or precedent for its approach. Given the approach adopted by the company in this matter, it is

[4] This is the date of the SCA order dismissing the company application for leave to appeal to that court.

apparent that three issues need to be dealt with: the effect of the company's appeals or applications for leave to appeal to higher courts; the nature of the retrospectivity of reinstatement orders in terms of section 193 of the LRA in the context of such appeals or applications for leave to appeal; and the debt owed to the employees including those who were dismissed by the company but have since deceased.

The effect of an application for leave to appeal or an appeal to a higher court

[12] As indicated earlier in this judgment, the company accepts that the order of the Labour Court was suspended by operation of law pending the appeals to the higher courts[5]. It however seeks to impose a contractual prescription period to any claims arising from that order. That approach is incongruous, if not illogical, for the reasons that follow.

[13] The suspension of court orders is dealt with in Rule 49(11) of the Uniform Rules of the High Court [rule 49(11)] and it provides that:

> 'Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.'

[14] The effect of rule 49(11) is that the LC judgment was suspended pending the outcome of the decision of the LAC, and thereafter the SCA. According to Harms,[6] this rule restates the accepted common law rule that the execution of a judgment is *ipso facto* suspended upon the noting of an appeal, and the judgment or order is also suspended whilst an application for leave to appeal is pending before the SCA or the Constitutional Court.

[15] In the ordinary course, an appeal from a final judgment of the Labour Court lies to the LAC, but only with leave of the Labour Court, or where such leave is refused, with the leave of the LAC.[7] The judgment of the LAC in this matter

[5] United Reflective Converters (Pty) Ltd v Levine 1988 (4) SA 460 (W) at pg 463 F – G.
[6] Harms pg B-353.
[7] Section 166(1) and (2) of the Labour Relations Act 66 of 1995.

therefore constituted the final judgment of that court. Thereafter the company applied for leave to appeal to the SCA. On 15 September 2009, that court dismissed the application for leave to appeal, and its order constituted the final order in this matter. It was in that context that the company happily contended that the judgment of the LC became fully enforceable on 15 September 2009 but sought to extricate its financial obligations emanating from that judgment with its obligations to physically re-employ the employees. It seems illogical to me to accept implicitly that the order of the Labour Court (reinforced by the order of the SCA) is effective and binding on the parties, but to contend that the financial part of that order cannot be executed upon unless a properly constituted contractual claim is instituted within three years of the SCA order.

[16] That approach doesn't absorb the principle that when an employer notes an appeal or lodges an application for leave to higher courts, it does so with full knowledge that such an approach carries with it the risk of additional financial obligations which become fully executable at the date of the order of the highest court that pronounces on it, as a judgment debt rather than a contractual claim.

[17] It was precisely because of that risk, that the employer in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile*,[8] sought to raise a constitutional argument about the onerous and cumulative effect of a reinstatement order in matters that may sometimes take up to eight years before the matter is finally determined by the Constitutional Court. The employer in that matter raised the issue of 'systemic delays' in the determination of labour disputes that commence with the arbitration process, is thereafter dealt with in review proceedings by the Labour Court, and thereafter in appeal proceedings in the LAC, the SCA and finally in the Constitutional Court. By the time the matter was heard by the Constitutional Court, eight years had passed, and it was contended by the employer before that court that the LAC is obliged to make orders that are just and equitable, and that confirmation of an award that had

[8] [2010] 5 BLLR 465 (CC).

the effect of backdating an employee's reinstatement for eight years was neither just nor equitable, and breached the employer's constitutional rights.

[18] Apart from the fact that the employer had raised this issue for the first time in the Constitutional Court, and that Court was disinclined to give it leave to appeal to that court on that basis, Froneman J made pertinent findings about an order of reinstatement, its effect and the risk of an appeal process on such an order.

The nature of the reinstatement order

[19] In articulating the nature of a reinstatement order, Froneman J cited the decision of the Constitutional Court in *Equity Aviation Services (Pty) Limited v Commission for Conciliation, Mediation and Arbitration and Others,*[9] and confirmed that the judgment in that matter achieved clarity about the nature and inter-relationship between the remedies of re-instatement, re-employment and compensation provided in section 193 of the LRA. He indicated that after the *Equity Aviation* judgment, there can be no doubt not only that reinstatement is the primary remedy in unfair dismissal disputes but quoted the following *dicta* from that judgment in support of the proposition that the remedy of reinstatement is granted by virtue of an arbitration award or an order of court:

> 'The ordinary meaning of the word re-instate 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. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the Court or arbitrator…The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of

[9] 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC).

> the discretion, given that the employees having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly.'[10]

[20] It is apparent, in citing the *dicta* in the *Equity Aviation* matter, that the Constitutional Court in the *Billiton* matter reinforced the notion that the reinstatement order arises from the confines of the Labour Relations Act and is reinforced in terms of an order of Court. To the extent that the employer or the company appeals that decision, it does so with the risk that the order of reinstatement continues pending a reversal, if any, of that order by a higher court.

Accumulated financial risk in appeal processes

[21] In dealing with the possibility of the reinstatement order carrying with it the accumulated financial burden in the event that such an order is upheld by the Supreme Court of Appeal or for that matter by the Constitutional Court, Froneman J expressly indicated that any appeal process, particularly in relation to reinstatement orders carries its own risk. In support of that view, Froneman J cited the decision of Goldstone JA in *Performing Arts Council of the Transvaal v Paper, Printing, Wood and Allied Workers Union*',[11] where the learned Judge had the following to say in relation to the same issue but which emanated from the previous Labour Relations Act:

> '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'[12].

[10] *Equity Aviation* at para 36.
[11] 1994(2) SA 204 (a).
[12] at 219 H-I of the *Performing Arts Council* judgment.

[22] But, Froneman J also indicated, that the implementation of reinstatement orders is:

> 'Often also caused by rich and powerful litigants who use their superior financial capabilities to take the review and appeal opportunities available to them to the very end in the hope of wearing out an opposing litigant who may be in a less advantageous financial position. Where that does not eventuate the 'appeal risk' is one way of dealing with this use (or abuse) of the legal system'[13].

[23] In other words, the possibility of paying additional back pay, pursuant to an appeal process to one or more of the higher courts, is a risk inherent in that process. The company's argument in this Court - that the 'prospective part' of the Labour Court order commencing from the period after 16 April 2007 and terminating on 28 September 2009 is subject to a properly pleaded contractual claim - is in light of the authorities quoted above not only odd but perverse. As at 15 September 2009, the effect of the SCA order, was to confirm the reinstatement order. In other words the effect of the Labour Court judgment as at 15 September 2009 is the following:

> The employees are entitled to back pay from the period 1 January 2007 to 28 September 2009 as a consequence of the SCA order and constitutes a judgment debt.

Deceased employees

[24] It is common cause that a number of the employees who were party to the proceedings in the Labour Court have since deceased. Some of them were deceased prior to the declaratory application and some prior to the judgment of the Labour Court.

[25] In its answering papers, the company contends that the only parties that have *locus standi* to claim any amounts for arrear remuneration and benefits would be the executors who would have to be cited *nomine officio* from the outset, and that substitution would only be competent in respect of any employee

[13] Para 52 of the *Biliton* judgment.

who passed away subsequent to the institution of the declaratory application.[14]

[26] Given the view taken in this matter about the nature of the reinstatement order, there is no basis upon which the deceased employees should be deprived of the benefits of the judgment handed down by the Labour Court simply because they pre-deceased the LC judgment or the institution of the declaratory application. The declaratory application emanates from and is directly linked to the original matter and the employees are therefore entitled to bring this application and to provide for substitution of the deceased applicants, and their executors and executrixes are rightfully entitled to substitute the deceased individual employees in these proceedings. They are clearly entitled to their remuneration from the date of reinstatement[15] until the date of their deaths, provided of course that they were party to the original dispute that was heard by the Labour Court.[16]

[27] Finally, in so far as the issue of costs is concerned, there is no reason why costs should not follow the result of the application.

[28] In the circumstances, I make the following order:

a) The respondent is ordered to pay the employees, excluding the deceased employees –

- back pay for the period 1 January 2007 to 28 September 2009, as indicated in the first part of the schedule attached hereto;
- interest thereon at the prescribed rate from 16 April 2007.

b) The respondent is ordered to pay the estates of the deceased employees - upon production of letters from the administrator or the Master of the High Court and provided that they were party to the Labour Court proceedings -

[14] Paragraphs 30.3 and 30.4 of the company's answering papers.
[15] That is from 1 January 2007.
[16] *National Union of Metalworkers of S.A. obo Maifo and Others v Ulrich Seats (Pty) Limited* (2012) 33 ILJ 2918 (LC).

- back pay for the period 1 January 2007 to 28 September 2009, in the case of employees who were deceased after this date, as indicated in the first part of the schedule attached hereto;

- back pay for the period 1 January 2007 to the date of their deaths, in the case of employees who were deceased prior to 28 September 2009, calculated on the basis of the information provided by the applicants (in annexure A to the founding papers), in relation to those employees who are indicated in the second part of the schedule attached hereto;

- interest thereon at the prescribed rate from 16 April 2007.

c) The respondent to pay the costs of this application, including the cost of counsel.

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Gaibie AJ

Acting Judge of the Labour Court of the South Africa

APPEARANCES:

FOR THE APPLICANTS: Adv G Malindi SC

Instructed by Ruth Edmonds Attorneys

FOR THE RESPONDENT: Adv C Watt-Pringle SC with Adv P Williams

Instructed John Dua Attorneys