REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D914/12

In the matter between:

THULISILE LYNETTE ZUMA	**FIRST APPLICANT**
PHUMZILE REVIVAL BEKWA	**SECOND APPLICANT**

and

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL (PHSDSBC)	**FIRST RESPONDENT**
ANAND DORSAMY N.O.	**SECOND RESPONDENT**
MAHATMA GANDI MEMORIAL HOSPITAL	**THIRD RESPONDENT**
DEPARTMENT OF HEALTH	**FOURTH RESPONDENT**

Heard: **13 MAY 2015**

Delivered: **08 SEPTEMBER 2015**

Summary: review – arbitrator dealing with the matter purely on written argument - long delay may be factor affecting the practicability of reinstatement

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JUDGMENT

WHITCHER J

Introduction

[1] This is an opposed application to review and cross-review an arbitration award made by the second respondent ("the arbitrator") on 10 August 2012 under case number PSHS 557-09/10.

[2] The First Applicant was employed as a senior supply management officer, stationed at Mahatma Gandhi Memorial Hospital. The Second Applicant was similarly employed as the Finance and Systems Manager. In May 2009, the Applicants were charged with fifty-two counts of fraud and corruption arising from the processing of tenders at the hospital. The majority of these charges related to procurement irregularities that took place between 10 and 14 September 2007.

[3] On the first day of their disciplinary hearing, the Applicants pleaded not guilty but changed their plea to guilty on all counts at a subsequent sitting. In October 2009, the internal chairperson issued the sanction of dismissal. Their internal appeal was unsuccessful. They then referred an unfair dismissal case to the PHSDSBC. The first date on which the arbitration sat was only on 4 June 2012 and the award was issued on 10 August 2012.

[4] The dismissal of the Applicants was found to be substantively unfair but the remedy ordered was two months compensation for each Applicant. The Applicants timeously instituted review proceedings, limited to an attack on the remedy and seeking retrospective reinstatement, with costs. The Third and

Fourth Respondents ("the Respondent"), very belatedly, instituted a cross-review challenging the manner in which proceedings were conducted and the assessment of evidence and seeking that the award be said aside, and the matter be remitted to the PHSDSBC for consideration by another commissioner.

The arbitration hearing

[5] The parties concluded a pre-arbitration minute, which included a list of common cause facts. The legal representatives of the parties also agreed that the format proceedings would take would be an exchange of written submissions. The Respondent provided a founding submission, the Applicants answered, the Respondent replied and the Applicants provided a further submission.

[6] In the arbitration, the Applicants submitted that they were not guilty on all charges.

[7] In its founding submission, the Respondent referred to the charges the Applicants faced in the internal hearing. It averred that the Applicants were broadly responsible for processing the bids that formed the subject of the charges in the absence of bid specifications, awarding certain tenders to a more expensive bidder and processing the decisions of bid committees that were not quorate. This all resulted in a loss to the Respondent. They put this number at over R300,000.

[8] The Respondent also pointed out the inconsistency of the Applicants' guilty plea in the internal hearing and their guilty plea at the PHSDSBC as a factor discrediting their present version.

[9] In making its initial submissions, the Respondent relied to a large extent on deconstructing the Applicants' submissions at the internal appeal stage. Chief among these submissions was that the Applicants were operating under Delegation 701 of the Supply Chain Management policy. They claimed that

this delegation was recorded in a letter of 6 September 2007 from the hospital's former chief executive officer, Dr. W.L. Ndlovu. Their argument on appeal was that such a delegation provided for deviations from normal supply chain processes. This was necessary as the hospital wanted to spruce itself up before a visit by eminent persons. At the PHSDSBC, the Respondent sought to discredit these submissions. It argued that clause 7 of a 701 Delegation could only be invoked if urgent service delivery was required, or there was a natural disaster or life-threatening circumstances. A 701 Delegation could not be used to rush work to impress visitors. The Applicants were senior employees who admitted being trained in supply chain management and thus could not have been under any mistaken impression to the contrary.

[10] The approach the Applicants pursued in answer was to concede that the bids at issue occurred but not any of the inculpatory facts the Respondent alleged attached to these bids, such as an absence of bid specifications, violation of procurement policy, irregularly constitution of bid committees and financial loss.

[11] The Applicant's first line of defense was thus to point out that it had no case to answer on corruption and fraud. Other than referring to the charges the Applicants faced in the internal hearing and the documents submitted in their appeal, the Respondent placed no evidence, oral or documentary, before the PHSDSBC. This was a significant failure, the Applicants argued, as the PHSDSBC's job was to consider the case *de novo*. Since the Respondent, who bore the onus, failed to establish any of its charges, the Applicants did not need to rely on the 701 Delegation, which they raised during their appeal as a defense.

[12] The Applicants' second line of defense was to say that, if answers to the charges were required, the Applicants defense was then that they were operating under Delegation 701 of the Supply Chain Management policy. This delegation permitted the deviations of which they were accused. Separately, the Applicants also disputed the factual basis upon which the

Respondent claimed that certain bid committees made decisions when they did not have quorum.

[13] A third line of defense was that, if it were found that the Applicants acted outside the boundaries of a proper 701 delegation, all that this established was their failure to follow procedures and not the charges for which they were actually dismissed, fraud and corruption.

[14] On the change of the plea from guilty to not guilty, the Applicants stated that they were pressurized by their union representative to plead guilty when this was not the true position. Had the internal hearing chairperson probed their guilty plea, it would have been apparent that they were not admitting to fraud or corruption.

[15] In support of their contention that they were pressurized into pleading guilty, the Applicants submitted affidavits deposed to in the early morning of the day on which they were to change their plea in the internal hearing to guilty. The content of the affidavits do not establish duress on the part of the union representative. In essence, the Applicants recorded that their union representative expected a lesser sanction to flow from a plea of guilt, they were persuaded by and relied upon this advice, although they had misgivings that a show of remorse might not be sufficient to escape dismissal as a sanction.

[16] In reply, the Respondent repeated that a 701 Delegation could not conceivably provide cover for supply chain deviations merely to impress important visitors. The Applicants ought to have known this. In any event the Respondent did not admit the authenticity of the letter relied upon by the Applicants in which the existence of a 701 Delegation was recorded.

[17] The Respondent also disputed the Applicants' explanation about a date on a document. I will not spend time describing this issue because, even assuming the Applicants gave the wrong date, the inference that this constituted *fraud or corruption* is not securely drawn on the facts of this case.

[18] In their supplementary submissions the Applicants again took refuge in the point that no evidence, even in the form of written statements, had been placed before the arbitrator to support the allegation that the bids were wrongfully handled by the Applicants. The Respondent had thus failed to discharge the onus.

[19] In the event that it was shown that the Applicants deviated from set procedures (as opposed to merely being accused of this), the Applicants repeated their defense that they were operating under a 701 Delegation. In the further event that the commissioner found that the 701 Delegation ought not to have been resorted to, the worst that could be inferred was the Applicants' negligent failure to follow procedures. In that case, if negligence be the fault, then fraud be the outcast.

[20] The Applicants sought retrospective reinstatement at the arbitration.

The arbitration award

[21] The commissioner did not find in the Applicants' favour on the basis that they had no case to answer. The commissioner found in the Applicants' favour utilizing their secondary defense that they were operating under a lawful 701 Delegation. However, this was not to excuse their conduct but rather mitigate the sanction. The commissioner found that Dr. Ndlovu's 'instruction' contained in the letter of 6 September 2007 was likely cascaded to them. He took into consideration the pressure the Applicants would have been under to 'impress a delegation' of important visitors. In these circumstances, with a superior's sword hanging over their heads, he noted that shortfalls in their compliance with policy were to be expected. The commissioner described the Applicants as being caught in the cross-fire of the wishes of their superiors.

[23] Reading paragraphs 27 – 33 of his award as a whole, it is implicit that the charges of fraud and corruption were, so to speak, off the table.

Nevertheless, the formal basis for his finding that the dismissal was substantively unfair was that the sanction of dismissal was too harsh.

[24] The remedy the commissioner provided was two months' salary. He departed from the default relief of retrospective reinstatement because of "the delay in finalization of the matter" and the absence of an explanation for this delay by the parties.

Condonation for cross-review

[25] On 3 June 2014, the matter was set down for hearing before, Gush, J. He was, quite correctly, of the view that the application for the late filing of the Respondent's Counter-Review application did not contain a proper explanation for the delay of approximately 12 months. As such there was no proper condonation application before him and the Respondent's submissions regarding the review of the arbitration award would not be considered.

[26] The Respondent sought the indulgence of the court that the matter be adjourned with the Respondent given leave to file supplementary affidavits explaining the delay in instituting a counter-review, the Respondents tendering wasted costs. Leave was granted.

[28] The law on condonation is trite. It may be granted on good cause in terms of Labour Court Rule 12 (3). The requirement of good cause involves an assessment of the extent of the delay, the explanation for it and the prospects of success in the main application. A late application for the review of an award may be granted if the reason for non-compliance is compelling, the grounds of attack on the award are cogent and the defect would result in the miscarriage of justice. A good explanation might compensate for a long delay.

[29] Turning to the facts of this case, the delay of one year was obviously extensive. However, the explanation as contained in the supplementary

affidavit, although attesting to grave inefficiency in record management in the Respondent's legal department, was convincing.

[30] The prospects of success are fair to good in the sense that the format adopted by the commissioner for the conduct of the arbitration was unusual. The Respondent's attack on this deserves ventilation.

[31] The prejudice to the Applicants is also limited in the sense that the late application is a cross-review. The Applicants' own case was already in process of being decided and any delay in adjudication will be caused mainly by the extra work needed to adjudicate the Respondent's submissions. I also take note of Gush, J's ruling on wasted costs attendant upon the last adjournment. The delays caused by the condonation application however may be relevant to the final relief sought by the Applicants.

[32] Considering all of the above, condonation for the late filing of the cross-review is granted.

Reviews: the law

[33] The Labour Appeal Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine v CCMA & Others* provided a useful summation of the law which is relevant to this case. In a review application under section 145 of the LRA, the court must ask the following questions: (1) In terms of his or her duty to deal with the dispute with the minimum of legal formalities, did the process used by the commissioner give the parties a full opportunity to have their say? (2) Did the commissioner identify the dispute he or she was required to arbitrate? (3) Did the commissioner understand the nature of the dispute he or she was required to arbitrate? (4) Did the commissioner deal with the substantial merits of the dispute? (5) Is the commissioner's decision one that another decision-maker could reasonably have arrived at based on the totality of the evidence? [1]

[1] (2014) 35 ILJ 943 (LAC) at para 20.

The grounds of review.

[35] It is convenient to deal with the grounds of counter-review first.

The format of arbitration proceedings

[36] The first ground is that, the commissioner committed a gross irregularity in dealing with the matter purely on written argument.

[37] The Respondents submit that disposing of an application on the basis of written representations *per se* does not constitute arbitration proceedings; and although the commissioner had the option available to set the matter down for oral evidence, he failed to do so.

[38] The Respondents admit that 'at the arbitration hearing it was agreed that the matter would be dealt with purely on the written argument submitted by the parties. The Applicants in turn emphasize that the parties were legally represented when this format was agreed.

[39] The Respondents claim that it was further agreed that should any evidentiary gaps be identified, the commissioner would set the matter down for oral evidence. The Applicants dispute that this additional term was part of the format agreement. They add that even if such a term existed it was not for the commissioner to decide what evidence should or ought to be led; and if the Respondents were of the view that evidence ought to be led, it was for them to raise this issue

[40] The essence of the Respondents' attack is that the format adopted for the conduct of the hearing prevented factual disputes being properly resolved. Permitting the arbitration to proceed in this way was a material misdirection and thus constituted a gross irregularity. In the language of *Sidumo,* it is a decision no reasonable decision-maker would have taken.

[41] The format the arbitration took resembles that of application proceedings. A difference is that, instead of evidence being adduced by way of affidavit, it came in the form of written submissions. Perusing the arbitration award, it is apparent that neither party had difficulty analyzing the credibility of claims and the probability of versions when these submissions were based on common cause facts. For example, the Respondents argued that the Applicants' change of plea from the 'guilty' at the internal hearing to 'not guilty' in the hearing *de novo* constituted a discrediting inconsistency. The Respondents also contended that the seniority of the Applicants rendered their claim of ignorance of 701 Delegations improbable. The commissioner was able to weigh and critically analyse the extent to which the admitted facts supported the versions of either party.

[42] There is merit in the Respondents' submission that the application format does not readily allow for the determination of disputes of fact. It is by no means an ideal method of adjudication in cases rich in disputes of fact. Having said that, it is not simply that the party bearing the onus loses the case whenever a dispute of fact arises. It is possible in application proceedings to rationally prefer one factual submission over its polar opposite by attention to the pleadings, although this is not always the case.

[43] The crisp question before this court is whether, in the circumstances of this case, the commissioner's decision to adopt an application format constituted a gross-irregularity. Was it a decision that no reasonable decision-maker would have made?

[44] The Respondents provided me with no authority for their argument that conducting a hearing in an application format *per se* cannot constitute arbitration proceedings. Section 138 (1) of the LRA and Rule 16 (7) of the PHSDSBC are, in my view, wide enough in scope to encompass the adoption of the procedure the commissioner did.

[45] In ***Oakfields Thoroughbred & Leisure Industries Ltd v McGahey***[2]**,** this court found that an arbitrator's discretion as to how proceedings are conducted still imposed a duty to ensure a semblance of order reminiscent of a trial. The court also faulted the commissioner for not advising an unrepresented party of the implication of his not leading crucial pieces of evidence. In that case, the commissioner's rough-shod manner as well as his failure to assist an unrepresented party constituted a disordered manner of conducting a hearing; a reviewable irregularity.

[46] In contrast, the arbitration under review took place in an orderly manner. Unlike ***Oakfields***, the trial format was result of two agreements between legal representatives. First, by way of a pre-arbitration minute, the parties agreed a list of common cause facts to be placed before the commissioner. They further agreed that the rest of the evidence would be tendered by way of founding, answering, replying and supplementary submissions. This format was furthermore not imposed by the commissioner. According to the Respondents, an express facility even existed to fill in any evidentiary gaps through oral evidence, if the need existed.

[47] My attention was directed to ***NUMSA & Another v Voltex (Pty) Ltd***[3]**.** I am not sure how this case assists the Respondent. In ***Voltex,*** an arbitrator imposed the application format upon the parties, depriving an applicant of the participation it sought at the time to advance its case. In the present matter, the parties themselves chose and agreed that their participation in the proceedings would be by way of written submissions. Another distinguishing feature is that, in ***Voltex***, participation by the parties by way of written submissions was far more limited as there was no facility for replying or supplementary submissions. The 'pleadings', as it were, in the present case are richer in material to contrast and assess.

[48] It is presumably because the Respondent's legal representative believed that he could discharge the onus of proof that lay against his client by way of

[2] [2001] 10 BLLR 1147)LC) at para 25
[3] [2000] 5 BLLR 619 (LC) at 623.

admitted facts, documentary evidence and written submissions that he agreed to the application format of tendering evidence. Not only did he agree at the outset to this format but, even after perusing the Applicants' answering submissions, he persisted in it, without complaint. If the ground shifted in the sense that new disputes of fact arose which could only be settled in his client's favour through hearing oral evidence, it was open to the Respondent's representative to make the necessary application. This was not done.

[49] Indeed, in their answering submissions during the hearing, the Applicants alerted the Respondent that it had 'placed no evidence before this tribunal, either in the form of oral or statement, to support any of its arguments'.

[50] The true complaint of the Respondent is thus clear. It is that the commissioner did not, realising the evidentiary difficulty the Respondent was in, *meru motu* call for oral evidence. I am not able to find that the parties agreed that the commissioner must play this expanded role. The remaining question is whether his failure to exercise his discretion to do so constitutes a gross irregularity.

[51] The fact that the commissioner did not set the matter down for oral evidence does not strike me as gross irregularity in the circumstances of this case. Setting the matter down for oral evidence would have been contrary to the express agreement among legal representatives as to the format of proceedings; a format I have found is permissible under section 138 of the LRA. While the commissioner certainly had the power to intervene in the flow of the case by setting the matter down for oral evidence, his exercise of discretion not to do so is understandable where the parties, who were both legally represented, made no moves to do so themselves.

[52] When parties are legally represented, it is safe to assume that the procedural elections made on their behalf have a strategic basis. Indeed, unless there is a patent misunderstanding of legal principle or process, or an obvious incapacity in representing a client's interests, interfering with a trial strategy may well give rise to separate complaints of bias or over-reach.

Misconstrued Evidence

[53] The Respondent contends that the commissioner misconstrued the evidence about a letter from Dr Ndlovu, a hospital manager, to Dr Nkosi, the Chief Operating Officer. The letter of 6 September 2007 seems to confirm that a delegation was given to deviate from normal supply chain polices in order to ready a hospital for a visit by eminent persons.

[54] It is true that in the award, the commissioner incorrectly characterizes the letter as being an instruction from Dr. Ndlovu to Dr. Nkosi when the lines of authority in reality flow the other way. However, this error does little to affect the evidentiary import of the letter. It is information that supports the Applicants' version that they were operating under a 701 delegation when they dealt with the bids that form the basis of the charges against them.

[55] The reasonableness of the outcome of the award is not disturbed by the fact that the 701 Delegation was not lawfully issued by Dr. Nkosi to Dr. Ndlovu, either. The commissioner correctly noted that the probabilities favour the existence of a (purported) delegation having being 'cascaded' to the Applicants. If such a 701 Delegation was issued, but improperly, this alone does not make those operating under it guilty of fraud and corruption, if anything at all.

[56] The Respondent's further attack is that it never admitted the authenticity of this Dr. Ndlovu delegation letter and that the reliance placed on it by the commissioner was thus misplaced for this reason too. The letter may not constitute irrefutable evidence of the existence of a delegation but within the agreed format of proceedings, it constitutes some proof. Against this evidence, the Respondent does not even place a bare denial, only a non-denial.

[57] In the circumstances, the commissioner's reliance on this document as some sort of corroboration for the Applicant's defence that they were operating under what they took to be a section 701 delegation is not unreasonable.

[58] The last ground of counter review is that the commissioner failed to assess the Respondent's argument that a 701 Delegation ought not to have been invoked to impress important visitors and they should have known this. The commissioner, in my view, did not have to specifically discount this argument. Assuming it held, it would have been a stretch to infer that the Applicants were thereby guilty of the fraud and corruption. At worst it would have established a failure to resist pressure and a knowing violation of proper procedure. The line of argument is irrelevant to the issue in dispute, the substantive fairness of dismissal *for fraud and corruption*.

Relief flowing from a finding of substantive unfairness

[59] The Applicants submit that the failure to apply the primary remedy of reinstatement with backpay attendant upon a finding that their dismissal was substantively unfair is contrary to Section 193 (1) (a) and (b) read with section 193 (2) of the LRA. As a result it is a decision a reasonable decision-maker would not make.

[60] They correctly argue that the primary remedy can only be departed from if the Applicants did not seek reinstatement, circumstances rendered the continued employment relationship intolerable, it was not reasonably practicable to reinstate, or the dismissal was only procedurally unfair.

[61] The Applicants submit that, on the evidence, none of the above apply.

[62] They argue that the delay in time cited by the commissioner as his reason for departing from the primary remedy should be no bar to the primary remedy.

[63] It is important to qualify immediately that delay in finalization of a matter is not *on its own* a bar reinstatement. To find otherwise is to ignore the statutory

provisions cited above. However, a long delay may very well be factor affecting the practicability of reinstatement.

[64] The Supreme Court of Appeal considered the circumstances under which reinstatement may be departed from as relief for a substantively unfair dismissal. In ***Republican Press (Pty) Ltd v Ceppwawu and Others***[4] the SCA found:

> 'While the Act requires an order for reinstatement or re-employment generally to be made a court or an arbitrator may decline to make such an order where it is 'not reasonably practicable' for the employer to take the worker back into employment. Whether that will be so will naturally depend on the particular circumstances, but in many cases the impracticability of resuming the relationship of employment will increase with the passage of time. In my view the present case illustrates the point."

[65] The ***Republican Press*** case dealt with the selection criteria in the retrenchment of numerous employees. The court pointed out:

> "Had a court made a finding immediately after the dismissal had occurred that the workers concerned in this case were unfairly chosen and ordered their reinstatement the company would have been entitled to revisit its selection process and select others to dismiss instead. In the ordinary course it will clearly be progressively prejudicial with the passage of time for an order to be made that has that effect, both to the employer who must arrange its affairs, and to other workers who are prone to being selected for dismissal. In the present case the problem is exacerbated by the fact that by the time the Labour Court made its order there had been further retrenchments and some of the company's operations had been restructured. By the time the case was ripe for hearing in the Labour Court, even further retrenchments had occurred."

[66] The court continued:

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[4] 2008 (1) SA 404 (SCA)

> "That is not to suggest that an order for reinstatement or re-employment may not be made whenever there has been delay, nor that such an order may not be made more than 12 months after the dismissal. It means only that the remedies were probably provided for in the Act in the belief that they would be applied soon after the dismissals had occurred, and that is a material fact to be borne in mind in assessing whether any alleged impracticality of implementing such an order is reasonable or not. In the present case the passage of six years from the time the workers were dismissed, all of which followed consequentially upon the failure of the union to pursue the claim expeditiously, was sufficient in itself to find that it was not reasonably practicable to reinstate or re-employ the workers".

[67] It strikes me that notwithstanding a similar delay in finalizing the matters, important differences exist in the cases. The first is that only two posts are at issue in *casu*. The disruption to the employer's business caused by the Applicants reinstatement is logically far less than in the circumstances of ***Republican Press***. This is especially if the alternative order sought by the Applicants is given effect to, in terms of which they are not reinstated to the same positions they held at the Third Respondent but to any other reasonably suitable work on the same or similar terms and conditions.

[68] The most important distinction between this matter and ***Republican Press***, is that in the latter there was evidence before the court about the impracticability of reinstatement. In this case, the best the Respondent had to say on re-instatement was: "The Applicants cannot be reinstated to their former posts as they were correctly found guilty and dismissed after they pleaded guilty to all the charges which were very serious and which had an element of dishonesty". This fails to address the practicability of reinstatement within the context of delay.

[69] While delay may impact upon the practicability of reinstatement in the circumstances of a particular case, I do not read ***Republican Press*** to suggest that delay may be accepted *without evidence of the impracticability* to deny reinstatement.

[70] It is not as if the Respondent was taken by surprise in the relief the Applicants sought in this matter. In the Applicants' answering submissions they also very pertinently alerted the Respondent that it had "not established any grounds as to why the positions of the Applicants ought not to be returned to them or why it would be unreasonable to do so.

[71] The Respondent also had the opportunity at the arbitration to argue against reinstatement on a ground of other than impracticability, but failed to exercise same. There was evidence before the commissioner that the Applicants pleaded guilty to fraud and corruption at the internal hearing and had a weak explanation for not honestly pleading their case. When such employees later successfully convinces a commissioner that they were in fact not guilty of corruption, despite having pleaded guilty at the internal hearing, it is possible to argue that their conduct during the internal hearing has made a continued employment relationship intolerable. Although the dismissal was later found to be substantively unfair, at the time it occurred it was the perfectly proper decision. The employee's own, *prima facie* dishonest and imprudent actions, have cost the employer money, time and organisational disruption. The Respondent was thus in possession of facts necessary to resist reinstatement as a remedy on the basis of intolerability at the arbitration. I make this point by way of illustration only. It is not for a reviewing court to invent a new submission for the Respondent. Doing so would also deprive the Applicants of an opportunity to reply to it.

[72] In the circumstance then, in the absence of evidence supporting any of the reasons set out in section 193 of the LRA that justify departing from reinstatement as a remedy for a substantively unfair dismissal, the commissioner's decision to only award compensation was a decision no reasonable decision-maker could made.

Relief

[73] The Applicants argue that instead of remitting the matter to the PHSDSBC for a rehearing, I should replace the finding of the commissioner, ordering their reinstatement. I intend to do that.

[74] However, I am not convinced that, standing in the shoes of the commissioner as I have been invited to do, reinstatement should be accompanied by full retrospective backpay to the date of dismissal.

[75] The Constitutional Court in ***Equity Aviation Services (Pty) Ltd v CCMA and Others***[5] considered the retrospectivity of an award of reinstatement and found that the adjudicator hearing the matter exercises a discretion in terms of Section 193(1). The Court in *Equity Aviation* said:

> 'The ordinary meaning of the word "reinstate" 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 s 193(1)*(a)* indicates, the extent of retrospectivity is dependent upon the *exercise of a discretion* by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal.'[6] (emphasis added)

[76] Guidance on how to exercise this discretion judicially is to be found in a judgment of the LAC in ***Mediterranean Textile Mills (Pty) Ltd v SA Clothing and Textile Workers Union and Others***[7]. Ndlovu, JA, found:

> 'However, the only issue for critical consideration is the extent of retrospectivity of the employees' reinstatement. This is a matter in respect of

[5] (2008) 29 ILJ 2507 (CC)
[6] At para 36.
[7] (2012) 33 ILJ 160 (LAC) at para 43

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

> "Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances. And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act."'

[77] The court in ***Mediterranean Textile Mills*** found that full retrospective reinstatement unjustifiably burdened the employer financially, also considering the conduct of the employees and was not fair and objective on the facts. The Court limited back pay to 12 months, which the Court considered "just and equitable in the circumstances."

[78] As alluded to above, I believe I have both the power and a sufficient factual basis to exercise the same discretion the commissioner would have enjoyed in respect of the amount of backpay the Applicants should be given.

[79] In this regard I take into consideration the Applicants' own role in triggering their dismissal by pleading guilty for no good reason. Indeed, their deposing to affidavits the morning of their change of plea has a distinct cloud of cynicism hanging above it. I doubt very much they would have complained at

all about their union representative's 'pressure' had the gambit of showing remorse worked.

[80] However, I also take into consideration the admitted delay caused by the Respondent in instituting a cross-review.

[81] In the circumstances, I believe that 12 months backpay is just and equitable in the circumstances.

Order

[82] The finding in respect of remedy issued by the Second Respondent is hereby reviewed and set aside.

[83] The finding is replaced with the following:

(i) The Fourth Respondent shall re-employ the Applicants either at the Third Respondent or in any other reasonably suitable work on the same or similar terms and conditions and without any break in service being recorded.

(ii) The reinstatement referred to above is with backpay limited to twelve (12) months, calculated on the basis of what the Applicants would have been earning as of the date of this judgment had they not been dismissed.

(iii) The Third and Fourth Respondent is to pay the Applicants' costs.

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BENITA WHITCHER

JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicants: D.S Rorick instructed by Brett Purdon Attorneys

For the Third and Fourth Respondents: N S V Mfeka instructed by the State Attorney (KwaZulu-Natal)