CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 88/07
[2008] ZACC 16

EQUITY AVIATION SERVICES (PTY) LTD — Applicant

versus

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION — First Respondent

W FERREIRA NO — Second Respondent

NELSON MAWELELE — Third Respondent

Heard on : 6 May 2008

Decided on : 25 September 2008

JUDGMENT

NKABINDE J:

Introduction

[1] The main question in this case is whether section 193(1)(a) of the Labour Relations Act[1] (the LRA), properly interpreted, means that the back-pay payable to employees reinstated in their employment is limited to 12 months' wages. Section 193 provides for three remedies a court or arbitrator may order after ruling that a dismissal is unfair. They are reinstatement, re-employment or compensation. A court

[1] Act 66 of 1995.

must order reinstatement or re-employment unless one or more specified circumstances exist[2] in which case compensation may be granted depending on the nature of the dismissal. The section also vests a court or arbitrator with a discretion to order reinstatement from any date not earlier than the date of dismissal.

[2] The applicant seeks leave to appeal against the judgment of the Labour Appeal Court as well as condonation for the delay in lodging this application and condonation for the late filing of the record. The third respondent opposes the application for leave to appeal but does not oppose the applicant's applications for condonation. The third respondent seeks condonation for the late filing of the answering affidavit.

Parties

[3] The applicant, Equity Aviation Services (Pty) Ltd (Equity), is a registered company formerly known as Apron Services (Pty) Ltd. The first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) is a statutory body established under the LRA. The second respondent, the Commissioner, conducted arbitration proceedings under the auspices of the CCMA. The third respondent, Mr Mawelele,[3] is an erstwhile employee of Equity.

Facts

[2] See section 193(2) which provides that these remedies need not be adopted if the employee does not wish to be reinstated or re-employed; or the circumstances are such that continued employment would be intolerable; or it is not reasonably practical for the employer to reinstate or re-employ the employee; or the dismissal was unfair because of the procedure followed. The full text of the sub-section is set out at [24] below.

[3] I refer to him as "Mr Mawelele" and "the employee" interchangeably.

[4] Many of the facts in this case are common cause. They are dealt with in considerable detail in the judgment of the Labour Appeal Court in *Apron Services (Pty) Ltd v Commissioner for Conciliation, Mediation and Arbitration and Others.*[4] For the purpose of this judgment, it is not necessary to restate the facts in detail. It suffices to say that Mr Mawelele was employed by Equity as a shift control officer. During November 2000 he was charged with misconduct[5] and, following a disciplinary enquiry, found guilty and dismissed on 8 March 2001.[6] A dispute arose between Equity and the employee as to the fairness of the dismissal.

Arbitration proceedings

[5] Aggrieved by the dismissal, Mr Mawelele referred the dispute to the CCMA for conciliation. Conciliation having failed, the dispute was referred for arbitration.[7] The

[4] JA18/05, 15 June 2007, unreported.

[5] The misconduct related to events that took place on 15 November 2000. Following certain incidents on that date Mr Mawelele was summoned to a disciplinary hearing to answer four charges, namely, (1) leaving the work place without permission on 15 November 2000 and before the end of the shift; (2) failing to perform according to the required standard by failing to provide buses for flights SA 482 and SA 1734; (3) leaving a subordinate in charge with responsibilities that he could not carry out; and (4) bringing the company's name into disrepute by failing to meet service standards.

[6] Mr Mawelele lodged an unsuccessful internal appeal against the decision of the chairperson of the disciplinary enquiry.

[7] Section 191(1)(a) of the LRA provides:

> "If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to—
> (i) a council, if the parties to the dispute fall within the registered scope of that council; or
> (ii) the Commission, if no council has jurisdiction."

Commissioner issued an arbitration award on 18 March 2002[8] stating that the dismissal was both procedurally and substantively fair.[9]

Labour Court proceedings

[6] On 2 May 2002 Mr Mawelele launched proceedings in the Labour Court for the review of the award in terms of section 145(1)[10] of the LRA.[11] The relief sought was for the dispute between the parties to be referred back to the Commissioner for rehearing, alternatively, for the matter to be determined by that Court. The basis for remittal was that the record was insufficient. It was contended on behalf of Mr Mawelele that the finding that he had committed four acts of misconduct was not rationally connected to the evidence before the Commissioner. Equity opposed the review application.

[7] The Labour Court, per Revelas J, decided that although the record was unsatisfactory, it was not persuaded that the deficiency was of a nature that precluded it from making a finding on the rationality of the award. The Court found that the

[8] Case number GA130566.

[9] The Commissioner reasoned that a written warning would have been the appropriate sanction when regard is had to the charges in isolation, but concluded that the situation was different when the charges were considered cumulatively.

[10] Section 145(1) of the LRA provides:

> "Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award—
> (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17, 20, or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or
> (b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence."

[11] The six weeks within which the award should have been reviewed in terms of section 145(1) expired on 29 April 2002. The review application was thus late by three days.

charges arose from the same incident and that the offence should have been corrected with progressive discipline. It set aside the award and replaced it with an order that the "[employee] is to receive a final written warning to the effect that should he commit a similar transgression in the next two years he may be dismissed immediately". On 2 February 2005 the Labour Court granted Equity leave to appeal to the Labour Appeal Court and ordered that costs be costs in the appeal.[12]

Labour Appeal Court proceedings

[8] The Labour Court's decision was challenged for reviewing and setting aside the sanction of dismissal. The Labour Appeal Court, per Zondo JP, with Pillay and Kruger AJJA concurring, observed that the Labour Court did not expressly make an order of reinstatement after setting aside the award. However, the Labour Appeal Court said that there was no doubt that the Labour Court was of the view that the Commissioner ought to have ordered Equity to reinstate Mr Mawelele. That, the Labour Appeal Court said, arose from the fact that the Labour Court expressly held that the appropriate disciplinary sanction was a final warning on the condition imposed.

[9] The Labour Appeal Court also observed that the Labour Court did not consider whether a reinstatement order which the Commissioner ought to have made should have operated retrospectively, and if so, the extent of the retrospectivity. Regarding the merits of the case, the Labour Appeal Court found that the Labour Court was

[12] In the order granting leave to appeal to the Labour Appeal Court Mr Mawelele is erroneously cited as the applicant instead of Equity.

correct in setting aside the award even though it did not agree with the reasons for the decision. The Labour Appeal Court expressed doubt regarding the correctness of the condition included in the order setting aside the award, but said that it was not necessary to say more about it because Mr Mawelele had not noted a cross-appeal against that part of the order.[13]

[10] The Labour Appeal Court found that while an order of reinstatement may necessarily be implied in the order of the Labour Court,[14] the retrospectivity of the reinstatement order was not to be implied. The employee did not note a cross-appeal against the Labour Court's failure to make an order backdating the reinstatement to the date of dismissal. The Court opined that it was therefore not open to it to consider that aspect. It concluded that the reinstatement order that the Commissioner would have made should have run only from the date of the issuing of the award. The Court therefore made the following order, which in part reads:

> "3(c) The arbitration award issued by the commissioner in this matter is hereby reviewed and set aside and in its place the following order is made:
>
> (i) . . . .
>
> (ii) [Equity] is ordered to reinstate the [employee] in its employ on terms and conditions no less favourable to him than the terms and conditions which governed his employment immediately before his dismissal;
>
> (iii) [T]he order in (ii) above shall operate from the date of the issuing of this award."

[13] Above n 4 at para 51.

[14] Equity conceded during oral argument that the Labour Court order should be understood to embrace reinstatement.

The order in paragraph 3(c)(iii) above is the subject matter of this appeal. As will become more apparent later in this judgment, Equity's criticism is that the perceived retroactive order of reinstatement constitutes an infringement of its right to fair labour practices and that that order is at odds with the decision of the Labour Appeal Court in *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd.*[15]

Petition to the Supreme Court of Appeal

[11] On 12 July 2007 Equity applied for leave to appeal to the Supreme Court of Appeal against the judgment of the Labour Appeal Court.[16] The Supreme Court of Appeal dismissed the application with costs on 11 September 2007.

In this Court

[12] On 28 November 2007 Equity lodged an application for leave to appeal against paragraph 3(c)(iii) of the order of the Labour Appeal Court.[17] The Chief Justice directed[18] that written argument by the parties should address: (a) condonation and leave to appeal; (b) the merits of the appeal in relation to the order appealed against in case condonation and leave to appeal were granted; and (c) the appropriate remedy

[15] [2006] 2 BLLR 142 (LAC); (2006) 27 *ILJ* 292 (LAC).

[16] Equity was concerned with the appropriateness of the sanction. The essence of its petition was therefore that both the Labour Court and the Labour Appeal Court erred in usurping the discretion of the employer by imposing a sanction that they thought would be fair despite the contentions of the employer. Equity contended that the proper test for review was the one set out in *Rustenburg Platinum Mines Ltd v CCMA and Others* 2007 (1) SA 576 (SCA); (2006) 271 *ILJ* 2076 (SCA) at paras 40-3. Equity argued that the Labour Appeal Court strayed from the test set out by the Supreme Court of Appeal in that case. Equity was also of the view that in the light of the conflicting decisions in *Rustenburg Platinum Mines* and *Engen Petroleum Ltd v CCMA and Others* [2007] 8 BLLR 707 (LAC); (2007) 28 *ILJ* 1507 (LAC) confusion was caused amongst the general public.

[17] Above n 4 at para 54.

[18] The directions were issued on 21 January 2008.

should the appeal succeed, including the question whether the matter should be referred back to the Labour Appeal Court for it to determine the appropriate remedial order. Equity was directed to file the record by no later than 21 February 2008.

[13] The applicant seeks condonation for the late filing of the application for leave to appeal and of the record. The application for leave to appeal should have been lodged on 3 October 2007[19] but was lodged on 28 November 2007. The applicant explains that the need to appeal to this Court became apparent when the Supreme Court of Appeal handed down the judgment in *Republican Press (Pty) Ltd v CEPPWAWU and others*[20] of which it became aware a few days later. Equity makes the point that even if *Republican Press* were correctly decided, its appeal to the Labour Appeal Court was decided before the decision by the Supreme Court of Appeal in that case. Thus, Equity contends, the Labour Appeal Court was bound by its earlier decision in *Latex.*

[14] The record was lodged more than 11 days later than the date stipulated in the directions issued by the Chief Justice. The explanation for the delay is that the original record of the Labour Appeal Court proceedings could not be located and that Equity encountered difficulties in finding suitable transcribers to transcribe the record timeously. Equity explains further that it could not instruct its attorneys on time due to certain pressures on its business.

[19] In other words, 15 days from 11 September 2007 when the Supreme Court of Appeal dismissed Equity's application for leave to appeal.

[20] 2008 (1) SA 404 (SCA); [2007] 11 BLLR 1001 (SCA).

[15] Regarding the merits of the appeal, Equity relies on *Latex.* It contends that it is not competent for a court or tribunal to order retrospective operation of a reinstatement order in excess of 12 months. It is argued that if that order is granted after lengthy delays employers would be compelled to pay back-pay for the entire period, thereby imposing an exorbitant sanction on the employer that is far in excess of the compensation envisaged in terms of section 194 of the LRA. That, it is argued, would undermine the effect of section 194. Equity argues that the construction of section 193 by the Labour Appeal Court in *Latex* properly gives effect and protection to the right to fair labour practices enshrined in section 23(1) of the Constitution. In support of this it argues that orders making reinstatement fully retrospective to the date of dismissal constitute an infringement of the employer's right to fair labour practices; that a fully retrospective order should only be granted in the most exceptional circumstances and that limiting back-pay to 12 or 24 months is reasonable when viewed against the machinery of the LRA which is designed to ensure expeditious resolution of unfair dismissal disputes. Equity argues therefore, that section 193 is reasonably capable of being interpreted to mean that where reinstatement is ordered, it should operate with retrospective effect not beyond 12 months (in the case of 'ordinary' unfair dismissals) and 24 months (in the case of dismissals which are held to be automatically unfair).

[16] Adopting the reasoning in *Latex*, Equity argues that any order for payment of retrospective remuneration is, in effect, an order for compensation and thus the

limitations imposed by section 194 apply to any award of back-pay connected with a reinstatement order. It is contended that the remedies contemplated in section 193 are not alternative remedies, but can be ordered simultaneously. Equity concedes however that notionally, reinstatement cannot be ordered simultaneously with re-employment. Both remedies, it argues, can be ordered with compensation. Equity argues that the legislature has capped the amount of remuneration or back-pay in section 194 to which an employee is entitled on reinstatement to achieve fairness between employers and employees. It is argued that there is no rational basis on which to distinguish between the limit on financial compensation imposed where reinstatement is ordered and in circumstances where it is not. That, it is argued, would differentiate unfairly between employees who elect to, or are able to seek reinstatement, and those who do not.

[17] In the alternative, Equity contends that the Labour Appeal Court failed to exercise its discretion properly when ordering reinstatement to operate from the date of the issuing of the award. As to the question of appropriate relief, Equity asks that the matter be referred back to the Labour Appeal Court for that Court to hear further evidence to determine the date from which the reinstatement order should operate.

[18] Mr Mawelele does not oppose the applications for condonation but does oppose the application for leave to appeal on the basis that the application does not raise a constitutional matter and alternatively, that to the extent that the application might raise a constitutional issue, it is not in the interests of justice for leave to appeal to be

granted. It is contended on behalf of Mr Mawelele that Equity's interpretation of section 193(1)(a) – that no court can order reinstatement beyond 12 months – has no merit, and that there are no prospects of success on appeal.

Issues

[19] Apart from the preliminary issues that arise for decision, namely whether the applications for condonation and leave to appeal should be granted, the central issues that arise for consideration relate to: (a) the proper interpretation of section 193(1)(a) read with section 194, more pointedly, whether these sections, correctly interpreted, limit the payment of back-pay where a court orders reinstatement or re-employment to a maximum of 12 months wages as contended for by Equity; (b) whether the Labour Appeal Court exercised a discretion in relation to the retrospectivity of the order and, if so, whether it failed to exercise its discretion properly; and (c) whether remittal of the case to the Labour Appeal Court will constitute appropriate relief.

[20] Before I make a determination on these issues, it is necessary to delineate the relevant constitutional and statutory provisions as well as any relevant sources of international law.

The Constitution, statutory framework and ILO Convention

[21] Section 23 of the Constitution provides that "[e]veryone has the right to fair labour practices." Section 39(1) of the Constitution provides:

> "When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law."

[22] Section 3 of the LRA enjoins any person applying that Act to interpret its provisions—

"(a) to give effect to its primary object;
(b) in compliance with the Constitution; and
(c) in compliance with the public international law obligations of the Republic."

[23] The LRA, as evident from the long title, is intended "to give effect to section 27 of the Constitution."[21] The purpose of the Act is expressly stated as follows in section 1:

"[T]o advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are—
(a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;
(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can—
(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
(ii) formulate industrial policy; and
(d) to promote—

[21] Although the long title and section 1 of the LRA refer to section 27 of the interim Constitution, the relevant corresponding provision in the 1996 Constitution is section 23 and they should be read as if they refer to section 23 of the 1996 Constitution.

(i) orderly collective bargaining;
(ii) collective bargaining at sectoral level;
(iii) employee participation in decision-making in the workplace; and
(iv) the effective resolution of labour disputes."

[24] Section 193 of the LRA makes provision for remedies for unfair dismissals and "unfair labour practice". It reads as follows:

"(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—
(a) order the employer to re-instate the employee from any date not earlier than the date of dismissal;
(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
(c) order the employer to pay compensation to the employee.
(2) The Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless—
(a) the employee does not wish to be re-instated or re-employed;
(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
(c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or
d) the dismissal is unfair only because the employer did not follow a fair procedure.
(3) If a dismissal is automatically unfair or, if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.
(4) An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation."

[25] Section 194, as its heading shows, deals with "[l]imits on compensation." It provides:

> "(1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.
>
> (2) . . . .
>
> (3) The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.
>
> (4) The compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months remuneration."

[26] This Court has acknowledged in *South African National Defence Union v Minister of Defence and Another*[22] that in interpreting section 23 of the Constitution an important source of international law will be the conventions and recommendations of the International Labour Organisation (ILO).[23] An important source of international law for the purpose of this case is ILO Convention 158 of 1982.[24] Article 4 of Convention 158 lays the foundation for South African legislation

[22] [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 25.

[23] In *NUMSA and Others v Bader Bop (Pty) Ltd & Another* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC); [2003] 2 BLLR 103 (CC); (2003) 24 *ILJ* 305 at para 26, this Court stated that South Africa's international obligations are important to the interpretation of the LRA.

[24] Convention 158 of 1982 is titled 'Termination of Employment at the Initiative of the Employer.' This Convention superceded Recommendation 119 of 1963 of the ILO upon which the Industrial Court relied in formulating its guidelines regarding unfair dismissal.

regarding unfair dismissal based on misconduct, incapacity and operational requirements. That Article safeguards the security of employment by ensuring that employers do not dismiss employees at will. It provides that—

> "[t]he employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."

[27] Section 188 of the LRA[25] endorses Article 4 by ensuring that employers do not terminate contracts of employment at will,[26] that is to say, without giving fair reasons for the terminations of employment contracts. It is against this background that section 193 of the LRA must be understood and interpreted.

[28] I now turn to the issues for decision.

Should condonation be granted?

[25] Section 188 of the LRA provides:

> "(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove—
> (a) that the reason for dismissal is a fair reason—
> (i) related to the employee's conduct or capacity; or
> (ii) based on the employer's operational requirements; and
> (b) that the dismissal was effected in accordance with a fair procedure.
> (2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act."

[26] Under the common law a contract of employment could be terminated without any reason being furnished as long as the proper notice was given where notice was required. In such circumstances a summary dismissal would be unlawful only for want of notice. The employee's damages may then be restricted to his loss of earnings in the notice period. See in this regard *Key Delta v Marriner* [1998] 6 BLLR 647 (E) at 652G wherein Erasmus J commented obiter on this point.

[29] The application for leave to appeal to this Court should have been lodged on 3 October 2007.[27] It was lodged on 28 November 2007, a delay of approximately 48 days. The need to appeal to this Court, Equity submits, became apparent after the Supreme Court of Appeal delivered its judgment in *Republican Press*. Generally, condonation will be granted if it is in the interests of justice to do so.[28] Essentially, the applicant's explanation for the delay is not convincing but in the light of the fact that the application is not opposed and that the application for leave to appeal is before this Court, it is in the interests of justice for this Court to consider it.

Should leave to appeal be granted?

[30] In considering whether leave to appeal should be granted, it is necessary to determine whether the matter raises a constitutional issue and whether it is in the interests of justice for this Court to hear the merits of the case. This Court "may decide only constitutional matters, and issues connected with decisions on constitutional matters".[29] Section 167(7) of the Constitution provides that "[a] constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution." In *National Education and Health and Allied Workers Union (NEHAWU) v UCT*[30] this Court held that matters that concern the

[27] In other words, 15 days from the date of the dismissal of the application for leave to appeal by the Supreme Court of Appeal, required by Constitutional Court Rule 19(2).

[28] *Brummer v Gorfil Brothers Investments (Pty) Ltd & Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

[29] See section 167(3)(b) of the Constitution.

[30] [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at paras 15-6.

interpretation of legislation enacted to give effect to the Bill of Rights do raise constitutional issues.[31]

[31] The constitutional issue raised in this case relates to the interpretation of section 193(1)(a) which gives content to the right to fair labour practices that is underpinned by section 23(1) of our Constitution. Even though no order of retrospectivity was made by the Court below, the issue of the statutory limit, if any on the amount of back-pay that an employer may be required to pay when it has been ordered to reinstate or re-employ a worker is an important issue in labour law and one that extends beyond the interests of the parties directly involved in the case.[32] Also, the need for legal certainty regarding the interpretation of section 193(1)(a) given the difference of opinions in the decisions of the Labour Appeal Court and the Supreme Court of Appeal[33] is also a consideration to be taken into account. Prospects of success on appeal are an important consideration though not a determinative criterion.[34] I am of the view that leave to appeal should be granted.

[32] Next, I consider the proper interpretation of section 193(1)(a) of the LRA.

Proper interpretation of section 193(1)(a)

[31] See also *Bader Bop* above n 23 at para 15.

[32] *Republican Press* above n 20 at para 16 and *Bader Bop* above n 23 at para 16.

[33] *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 *ILJ* 2153 (LAC); [2005] 12 BLLR 1172 (LAC), *Latex* above n 15 and *Republican Press* above n 20.

[34] *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* [2002] ZACC 16; 2002 (5) SA 703 (CC) at para 10.

[33] Section 193(1)(a) provides that a court or arbitrator may grant one of the three remedies[35] to an employee who has been dismissed unfairly. A court or arbitrator must order the employer to reinstate or re-employ the employee unless one or more of the circumstances specified in section 193(2)(a)-(d) exist,[36] in which case compensation may be ordered depending on the nature of the dismissal. Reinstatement or re-employment may be ordered from any date not earlier than the date of the dismissal.

[34] Ordinarily, the primary rule in interpreting legislation is to determine the meaning of the words used in the relevant statute according to their natural, ordinary or primary meaning and also in the light of their context, including the subject matter of the statute and its apparent scope and purpose.[37] The provisions of the LRA must be purposively construed to give effect to the right protected by section 23(1) of the Constitution[38] that is enjoyed by both employers and employees.[39]

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[35] The employer may be ordered to reinstate or re-employ the employee, or the employer may be ordered to pay compensation to the employee.

[36] The circumstances exist where the employee does not wish to be reinstated or re-employed, where the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, where it is not reasonably practicable for the employer to reinstate or re-employ the employee, or where the dismissal is unfair only because the employer did not follow a fair procedure. None of these circumstances apply in the present case.

[37] *Republican Press* above n 20 at para 19; See also *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662; [1950] 4 All SA 414 (A) at 421.

[38] *NEHAWU* above n 30 at para 41. See also *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Mechanisms Union* (1999) 20 ILJ 89 LAC; [1998] 12 BLLR 1209 (LAC); (1999) 4 LLD 7 (LAC) at paras 22-3; and *Consolidated Frame Cotton Corporation Ltd v President of Industrial Court and Others Ltd; Consolidated Woolwashing and Processing Mills v President of Industrial Court and Others* 1986 (3) SA 786 (A) at 798E-F

[39] In *NEHAWU* above n 30 at para 40 this Court said:

> "[T]he focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the

[35] This Court, in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others,*[40] sets out the duty imposed by section 39(2) of the Constitution upon our courts – to interpret legislation so far as its language will allow so as to promote the spirit, purport and objects of the Bill of Rights. The Court said:

> "On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasion when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained."[41]

[36] 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.[42] 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

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> balance required by the concept of fair labour practices. It is in this context that the LRA must be construed."

[40] [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC); 2000 (2) SACR 349 (CC).

[41] Id at para 24.

[42] *Consolidated Frame* above n 38 at 798B-D.

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 only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal.[43] The ordinary meaning of the word "reinstate" means that the reinstatement will not run a date from after the arbitration award. Ordinarily then, if a Commissioner of the CCMA order the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the Commissioner decides to render the reinstatement retrospective. 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 the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly.[44]

[37] It should be emphasised that the issue in this case relates to the question of reinstatement for the period between the date of the arbitration award and the Labour Appeal Court order. It does not relate to the period between the date of dismissal and the date of the arbitration award.

[43] Section 193(1)(a) of the LRA. See in this regard *National Union of Metalworkers of SA & Others v Fibre Flair CC t/a Kango Canopies* (2000) 21 *ILJ* 1079 (LAC) at 1080H–1081A; [2000] 6 BLLR 631 (LAC) at 633B-E.

[44] *Latex* above n 15 at paras 107-8.

[38] The construction of section 193(1)(a) contended for by Equity is problematic. It circumscribes the role of a court or arbitrator in circumstances where a reinstatement order or award is considered appropriate. That construction is not consistent with the ordinary meaning of the words in section 193(1)(a). As correctly stated by counsel on behalf of Mr Mawelele, the Labour Appeal Court, as other appeal courts, decides appeals on the evidence placed before the court of first instance and may substitute the decision of the latter court. The construction contended for by Equity implies that the appeal court cannot, even in appropriate circumstances substitute the order of the court of first instance with an order of reinstatement or re-employment that will operate from the date of the award by the Commissioner, where more than 12 months have lapsed since the date of the dismissal by the time the Appeal Court determines the matter. Similarly, it would mean that a Commissioner who hears a dismissal dispute more than 12 months after the date of dismissal would not be able to order reinstatement on the basis that back-pay to the date of the dismissal would be paid. Moreover, there is nothing in the language of section 193(1)(a) or its context that supports that construction.

[39] The context, on the contrary, supports the view that the ordinary meaning of section 193(1)(a) does not offend the right to fair labour practices. Fairness ought to be assessed objectively on the facts of each case[45] bearing in mind that the core value of the LRA is security of employment. In this regard, it is important to bear in mind that where a court or Commissioner has decided that reinstatement is the appropriate

[45] *CWIU and Others v Algorax (Pty) Ltd* (2003) 24 *ILJ* 1917 (LAC); [2003] 11 BLLR 1081 (LAC) at para 69.

remedy, it will also have to be decided that the worker has been unfairly dismissed. The worker will thus have been deprived of wages, unfairly, as a result of the conduct of the employer. The importance of security of employment was affirmed by this Court in *NEHAWU*:[46]

> "Security of employment is a core value of the LRA and is dealt with in chap[ter] VIII. The chapter is headed 'Unfair Dismissals'. The opening section, section 185, provides that '[e]very employee has the right not to be unfairly dismissed'. This right is essential to the constitutional right to fair labour practices . . . . [I]t seeks to ensure the continuation of the relationship between the worker and the employer on terms that are fair to both. Section 185 is 'a foundation upon which the ensuing sections are erected'".[47]

[40] Equity contends that any order for payment of retrospective remuneration is in effect an order for compensation and that the limitations imposed by section 194 should apply to any award of back-pay. Conflicting decisions have been made by the Labour Appeal Court on the question whether reinstated employees may be awarded back-pay in excess of the equivalent of 12 months' wages (or 24 months in certain circumstances) as specified 194. In *Kroukam*[48] the majority, per Willis JA and Davis AJA, held that the limits set out in section 194 do not apply.[49] In *Latex*[50] a differently constituted court, per Zondo JP, Mogoeng JA and Jafta AJA, unanimously suggested that it is not competent to make a reinstatement order that requires an employer to pay

[46] Above n 30.

[47] Id at para 42. See also Article 4 of the ILO Convention referred to at [26] above.

[48] Above n 33 at para 55.

[49] In the minority judgment Zondo JP (in *Kroukam)* expresses a view that is only obiter on the relationship between sections 193 and 194 because it was not necessary to decide the issue (mentioned at para 126) whether "section 193 should be construed to mean that an order of reinstatement can operate retrospectively to the date of dismissal or up to 24 months or 12 months backwards, as the case may be, whichever is the earlier."

[50] Above n 15 at paras 114-6.

back-pay in an amount in excess of 12 months wages thus implying that the limits set out in section 194 apply. The rulings on this point in both judgments are obiter as the employees in neither case were awarded back-pay in excess of the statutory limits in respect of compensation. The Supreme Court of Appeal has clarified the position in *Republican Press.* It held that the back-pay to which the dismissed employee ordinarily becomes entitled when an order for reinstatement is made cannot be equated with compensation, thus allowing for the limitation contained in section 194 not to be applied in relation to back-pay.[51] Given the clear language used in section 193(1)(a) and the coherent legislative structure for the resolution of dismissal disputes in the LRA, the interpretation in *Republican Press,* in which the Supreme Court of Appeal endorsed the majority view in *Kroukam,* is, in my view, correct.

[41] Equity argues that the remedies of reinstatement and re-employment are not alternative remedies to be understood as alternatives to compensation. They can be ordered simultaneously with it. Equity maintains that in order to achieve fairness between employers and employees in circumstances of unfair dismissals the legislature deemed it fit to "cap" the amount of remuneration, or back-pay to which the unfairly dismissed employee is entitled on reinstatement.[52] The language used in

[51] *Republican Press* above n 20 at para 19.

[52] The argument was premised seemingly on the obiter remarks in the minority judgment in *Kroukam* above n 33 at paras 123-4, that:

> "It can be argued that back-pay which an unfairly dismissed employee gets paid when an order has been made for his reinstatement with retrospective effect constitutes in effect compensation for unfair dismissal in the same way as compensation provided for under section 194 of the Act constitutes compensation for unfair dismissal to an unfairly dismissed employee who is awarded compensation under section 194 of the Act. If that is so, thus would run the argument, a reinstatement order the retrospective operation of which goes beyond 24 months or 12 months, as the case may be, would amount to an award of compensation for unfair dismissal which exceeds the relevant maximum prescribed by section

section 193 is not amenable to this construction. While it was permissible under section 46(9) of the repealed Labour Relations Act 28 of 1956[53] for a court to order reinstatement and compensation in the same case if deemed reasonable and fair to the parties,[54] that is a far cry from the current statutory framework, particularly the provisions of section 193 read with those of section 194 of the LRA. If the provisions were to be interpreted to bring about that result, that reading would not only be unduly strained but would also distort the text. Grogan[55] succinctly makes the point with which I agree:

> "Although the employer must pay a reinstated employee a sum of money if the reinstatement order is made retrospective, that sum is not compensation as contemplated in subsection (1)(c) . . . . While 'back pay' is obviously a form of compensation for the loss of earning during the period of unemployment after the dismissal, it is generally regarded as distinct from compensation. Consistent with this view, the LRA deals with reinstatement and compensation in different sections, and suggests that reinstatement and compensation are alternative remedies. It seems clear that an employee who is awarded full retrospective reinstatement cannot be awarded compensation *in addition* to back pay. This would be inconsistent with the use of the disjunctive 'or' in section 193(1)."[56]

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194. The argument would be that such a retrospective operation of an order of reinstatement would undermine the capping of compensation prescribed by section 194 of the Act.

It would further seem that the construction that the only limitation on the extent of the retrospective operation of an order of reinstatement is the date of dismissal ignores the purpose of s 194. The purpose of s 194 is to limit the financial risks that an employer has when involved in an unfair dismissal claim."

[53] The predecessor to the LRA.

[54] *Chevron Engineering (Pty) Ltd v Nkambule & Others* 2004 (3) SA 495 (SCA); [2004] 3 BLLR 214 (SCA) at para 30. See also the remarks in *Kroukam* (majority judgment) above n 33 at paras 43-4.

[55] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2007) 2ed (Juta & Co Ltd, Cape Town 2007).

[56] Id at 583-4.

[42] It follows that the sum of money paid to an unfairly dismissed employee subsequent to an order of reinstatement with retrospective effect is not compensation as contemplated in section 193(1)(c) or section 194. The remedies in section 193(1)(a) are thus in the alternative and mutually exclusive.[57]

[43] Equity contends further that there is no rational basis for distinguishing between the limit of financial compensation where retrospective reinstatement is ordered and where it is not. I disagree. A distinction must be drawn between the remedies of reinstatement and compensation provided for in section 193(1)(a) and (c), respectively, so as to understand the scope of the "limits on compensation" under section 194.[58] It might well be that the limits on compensation seek to curtail the employer's financial risk when confronted with an unfair dismissal claim. In the case of re-employment or reinstatement, the statute provides two mechanisms for the management of such concerns. First, section 193(2)(c) provides that the remedies of reinstatement or re-employment need not be ordered if the court or Commissioner is satisfied that it would not be "reasonably practicable" for the employer to reinstate or re-employ the employees.[59] Secondly, that statute provides that a court or Commissioner has a discretion to determine the extent of retrospectivity of the order of reinstatement or re-employment. In exercising the discretion a court or an arbitrator may address, among other things, the period between the dismissal and the trial as well as the fact that the dismissed employee was without income during the

[57] This view finds support in *Republican Press* above n 20 at para 17.

[58] Section 194 is referred to in full at [25] above.

[59] In this regard, see the reasoning of the Supreme Court of Appeal in *Republican Press*, cited above n 20 at para 22.

period of dismissal, ensuring however, that an employer is not unjustly financially burdened if retrospective reinstatement is ordered or awarded.[60]

[44] It is evident from the clear language in which section 193(1)(a) is couched as well as the statutory context, that the back-pay to which an unfairly dismissed employee becomes entitled when retrospective reinstatement is ordered is not limited to the maximum periods of compensation provided in respect of compensation as contemplated in section 194. The legislative structure for the resolution of unfair dismissal disputes is clear and coherently crafted. The LRA allows for any of the three remedies set out in section 193(1) to be granted to an unfairly dismissed employee. Reinstatement or re-employment remains the legislatively preferred remedies so as to restore the employee to the employment relationship. They safeguard the employee's security of employment. Either of the two remedies may be granted except in the specified circumstances set out in section 193(2) in which case compensation in terms of section 193(1)(c) may be ordered, the amount of which depends on the nature of the dismissal.[61]

[60] This view finds support in the minority decision in *Kroukam* above n 33. In considering whether reinstatement should operate with retrospective effect to the date of dismissal or to any date, or whether it should be retrospective at all, Zondo JP said (at para 131) that he would have ordered the reinstatement to operate with retrospective effect to the appellant's date of dismissal. But, in the exercise of his judicial discretion regarding the appellant in that matter, he would take only two matters into account – first, that Mr Kroukam worked for Intensive Air for five months and earned R18 000 per month (R90 000 in total) which amount, he opined, had to be deducted from whatever back-pay or compensation the court would order. Second, the appellant's conduct in failing to accept a job offer made to him which would have paid him (at para 132) either the same or an even a better salary than the employer used to pay him. Zondo JP stated that the "decision not to take such job broke the causal connection between [Mr Kroukam's] financial loss and the respondent's conduct in dismissing him as it did" (at para 133).

[61] *Republican Press* above n 20 at para 17.

[45] Subsection 193(1)(c) read with section 194 relates to compensation only. The capping in section 194 has no bearing on retrospective reinstatement. It is only when reinstatement or re-employment is not ordered that compensation in terms of section 194 may be ordered to a maximum equivalent to 12 or 24 months' remuneration depending on the nature of the dismissal. It follows that it is competent to make a reinstatement order that requires an employer to pay back-pay for more than 12 months.

[46] For these reasons, the construction of section 193(1)(a) contended for by Equity must fail.

Exercise of discretion

[47] Equity's alternative contention concerns the perceived exercise of discretion by the Labour Appeal Court. It argues that if the construction contended for does not find favour with this Court, the appeal should nevertheless succeed on the basis that that Court erred in not exercising the discretion vested upon it as to the date from which the reinstatement order should have taken effect. Equity contends that the reinstatement took effect on the date the order of the Labour Court was made not least because there had been no request for retrospective reinstatement. It is contended further that the Labour Appeal Court did not properly consider "certain relevant factors".[62] Moreover, Equity argues that there is, on the recorded evidence, no reason

[62] These factors, Equity contends, include:

> a) the need to ensure that an employer is not financially burdened to an extent which is excessively harsh or unjust if reinstatement is ordered retrospectively;

why Mr Mawelele should benefit from the 19 months delay in prosecuting the review. It contends also that the order of retrospectivity is unduly harsh to its business, particularly because Equity has not received the benefit of services from Mr Mawelele.

[48] It is trite law that the power to grant a remedy in section 193 is by its nature discretionary and that the discretion must be exercised judicially by a court that enjoys that unfettered discretion. It must be stressed, however, that the focus of the appeal before the Labour Appeal Court was on the decision of the Labour Court to review the award and not on the "discretionary remedy" as there had been no appeal on that basis. The Labour Appeal Court was required to determine whether the decision of the Labour Court in reviewing the award was correct. The appeal was thus limited to the evidence on which the decision of the Labour Court was granted.[63]

[49] The Labour Court made an order replacing the award of the Commissioner's. The Labour Court's decision thus operated automatically from the date of the

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b) the consequences of any retrospective reinstatement to the employer and its business operations;
c) the question whether the employee did or could have obtained employment after dismissal;
d) the question whether an employee has been re-employed by the employer and if so on what conditions;
e) the fact that the legislature anticipated and intended unfair dismissal disputes to be resolved expeditiously and, accordingly that reinstatement orders would not normally require a lengthy period of retrospectivity;
f) the conduct of the parties giving rise to the dismissal;
g) the conduct of the parties in litigation; and
h) the extent of any delay in finalising the dispute, the reason for the delays and, in particular, whether the delays are the fault of any party.

[63] This view is consistent with the remarks by the minority judgment in *Kroukam* above n 33 at para 113 that generally, on appeal, the Labour Appeal Court makes such a decision as it thinks the Labour Court should have made on the evidence before it at the time it made its decision.

Commissioner's award. In determining whether the Labour Court correctly reviewed the award, the Labour Appeal Court interpreted the order of the Labour Court and rightly found that the order reinstating Mr Mawelele was correct. The Labour Appeal Court then assumed, correctly in my view, that it could not consider the question whether the reinstatement order should be made effective to a date later than the award as the issue of the discretion in respect of the retrospectivity of the reinstatement had not been raised, either in the notice of appeal or, seemingly, in argument before that Court. The Labour Appeal Court concluded that properly interpreted the order of the Labour Court meant that reinstatement should operate from the date of the award. It then made an order reflecting that position[64] as it was not open to it to deal with the extent of the retrospectivity of the reinstatement.

[50] The criticism by Equity that the Labour Appeal Court should have made the reinstatement order to run from the date of the order of the Labour Court is without merit. Equity had not raised the issue in its notice of appeal nor, seemingly, in argument before the Labour Appeal Court. The Labour Appeal Court could not mero motu consider the alleged "certain relevant factors" extraneous of the record despite the fact that the discretionary powers vested in it in terms of sections 145[65] and 174[66]

[64] This meant that Mr Mawelele would have lost out on the remuneration covering the period from the date of his dismissal to the date of the award because, importantly, he did not note a cross-appeal against the Labour Court's failure to make the implied order of reinstatement retrospective.

[65] Above n 10.

[66] Section 174 of the LRA deals with the powers of the Labour Appeal Court on the hearing of appeals. It reads:

> "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 instruction as regards the taking of further evidence or otherwise as the Labour Appeal Court considers necessary; and

are wide. That Court decides appeals on the evidence placed before the Labour Court and may substitute the decision of the Labour Court. It is not suggested on the applicant's papers, nor was it suggested in argument, that the Labour Appeal Court was asked to deal with the discretionary remedy and that any of the said "relevant factors" were placed before that Court. On this point there can be no criticism of the Labour Appeal Court for not having dealt with the said factors nor can its judgment be criticised in light of the evidence before it.

[51] As to the criticism that Mr Mawelele will benefit unjustly from the delay of 19 months in prosecuting the review, it is common cause that the delay was caused by the unavailability of the record of the proceedings before the CCMA. The tapes seemingly went missing. The delay was therefore not due to any deliberate, wilful or flagrant disregard for the express provisions and underlying purpose of the LRA. In the circumstances it would be unfair to lay the blame for the delay on Mr Mawelele.

[52] I should add in this regard that it is a matter of great concern that the system of expedited adjudication of unfair dismissal disputes which the LRA sought to establish often operates far from expeditiously. The case at hand is a good example of how labour disputes are taking far too long to reach finality. The adverse effects of these delays impose burdens both on employers and on workers, as this case again illustrates.

(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."

[53] Equity argues that the order of perceived retrospectivity is unduly harsh on its business, not least as it (Equity) has not benefitted from Mr Mawelele's services in the interim period. Equity seems to lose sight of the fact that a remedy of reinstatement is always granted to an employee wishing to offer his or her services to his or her employer. There is no evidence that Equity offered the employee a job and no contention to that effect has been made. Moreover, it is not suggested that there is any evidence which is relevant that ought to have been, but was not included in the record.

[54] The principle of the right of election is a fundamental one in our law. Equity made an election not to ask Mr Mawelele to render his services, nor did they offer him alternative employment. When exercising an election, the law does not allow a party to blow hot and cold. A right of election, once exercised, is irrevocable particularly when the *volte face* is prejudicial or is unfair to another.[67] As long as an employee makes himself or herself available to perform his or her contractual obligation in terms of the contract of employment, he or she is entitled to payment despite the fact that the employer did not use his or her services.[68] Mr Mawelele cannot, in the circumstances, be prejudiced by reason of the manner in which Equity exercised its election.

Relief

[55] Equity contends that the appropriate relief is for the matter to be remitted to the Labour Appeal Court to enable the parties to furnish that Court with evidence relevant

[67] *Chamber of Mines v NUM* 1987 (1) SA 668 (AD) at 681D-G.

[68] See in general *Johannesburg Municipality v O' Sullivan* 1923 AD 201.

to the issue of retrospectivity. In the alternative, Equity urges this Court to declare that Mr Mawelele's reinstatement should operate from the date of the order of the Labour Court.

[56] This Court has stressed the need for effective remedies.[69] In the circumstances of this case, there is no room for remittal. The Labour Appeal Court interpreted the order of the Labour Court and did not exercise a discretion. Even on the assumption that it did, an ex post facto attempt to introduce new evidence on appeal in this manner to justify a remittal cannot be allowed. The LRA's objective to resolve unfair dismissal disputes expeditiously will be frustrated if remittal is granted especially where no exceptional circumstances for that relief are shown to exist. On the contrary, it will afford Equity a second bite at the cherry. That will be unfair to Mr Mawelele and, needless to say, this Court cannot sanction that result. There is no legal or factual basis for granting the declaration sought. In the view I take of the matter, it would be inappropriate to remit the case to the Labour Appeal Court or declare that Mr Mawelele's reinstatement should operate from the date of the order of the Labour Court.

[57] For all these reasons, I conclude that the appeal must fail.

Costs

[69] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 65, 81-2.

[58] As to the matter of costs, counsel on behalf of Equity contended that Mr Mawelele should pay his own costs. In effect, this argument suggests that a successful litigant will be burdened with the costs occasioned by an unsuccessful review application and appeal. The argument has no merit. Mr Mawelele has had to suffer at the instance of Equity. He waited for almost six years for the dismissal dispute to be finalised. Although he was reinstated on 1 July 2007, he has not received payment for the period during which he was unemployed. In my view, considerations of the interests of justice and fairness dictate that Equity should pay Mr Mawelele's costs on the appeal to this Court.

[59] In the result, the appeal should be dismissed with costs including the costs occasioned by the employment of two counsel.

Order

[60] The following order is made:

(1) The applications for condonation for late filing of the application for leave to appeal and of the record are granted.

(2) The application for condonation for the late filing of the opposing papers by the third respondent is granted.

(3) The application for leave to appeal is granted.

(4) The appeal is dismissed with costs including the costs occasioned by the employment of two counsel.

Kroon AJ, Madala J, Mokgoro J, O'Regan J, Skweyiya J concur in the judgment of Nkabinde J.

YACOOB J:

[61] I have read the judgment of Nkabinde J and agree that the applicant should fail. Nkabinde J rightly holds that all the applications for condonation should be granted. It is apparent that this is a constitutional matter because the case concerns an application and interpretation of the Labour Relations Act.[1] I conclude however that the prospects of success are so bad that it is not in the interests of justice for leave to appeal to be granted.

[62] It will be convenient first to summarise the differences between the approach adopted by Nkabinde J and the approach in this judgment. Nkabinde J holds that section 193 of the Labour Relations Act[2] does permit a court to order retrospective reinstatement for a period of more than 12 months consequent upon a finding that the dismissal was unfair. That conclusion pre-supposes that an order of retrospective reinstatement was made by any of the courts below in this case. In my view, on a

[1] Act 66 of 1995.

[2] Discussed later in this judgment.

proper construction, the reinstatement ordered in this case was never retrospective. In the circumstances the question whether and the extent to which retrospective reinstatement is permitted by the Labour Relations Act does not arise. I motivate this conclusion below.

[63] The reinstatement order we are concerned with in this case was made in favour of the third respondent, Mr Mawelele. The applicant dismissed Mr Mawelele for misconduct[3] on 8 March 2001. Conciliation failed and the arbitration was conducted by the second respondent in the Commission for Conciliation, Mediation and Arbitration (the CCMA). The second respondent issued an award against Mr Mawelele on 18 March 2002, finding that the dismissal was neither procedurally nor substantively unfair. Mr Mawelele took the matter on review to the Labour Court. On 18 October 2004 that Court upheld the review, found that Mr Mawelele had been unfairly dismissed and set aside the award of the Commissioner. The Court ordered that Mr Mawelele should receive a final written warning saying that "should he commit a similar transgression in the next two years he may be dismissed immediately."[4] The Labour Court did not however order reinstatement in so many words.

[3] The details of the misconduct are not relevant for the purposes of this judgment.

[4] *Mawelele v Commission for Conciliation Mediation and Arbitration and Others* (JR 622/03) [2004] ZALC 77 (18 October 2004) at para 16.

[64] On 15 June 2007 the Labour Appeal Court[5] dismissed the appeal by the applicant, made no order as to costs and made the following additional order:

> "3.(c) The arbitration award issued by the commissioner in this matter is hereby reviewed and set aside and in its place the following order is made:
>
> (i) The applicant's dismissal was substantively unfair.
>
> (ii) The respondent is ordered to reinstate the applicant in its employ on terms and conditions no less favourable to him than the terms and conditions which governed his employment immediately before his dismissal;
>
> (iii) the order in (ii) above shall operate from the date of the issuing of this award . . .".[6]

[65] Section 193(1)(a) of the Labour Relations Act allows for the retrospective reinstatement of any person who has been unfairly dismissed provided that the date of reinstatement does not precede the date of dismissal.[7] The retrospectivity provision needs some elaboration. The decision whether the reinstatement is to be retrospective is that of the CCMA commissioner or the judge of the Labour Court who adjudicates on the dispute as a matter of first instance. That decision is the result of the conclusion by the CCMA commissioner or the Labour Court judge that the dismissal

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[5] *Apron Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (JA18/05) [2007] ZALAC 14; [2007] ZALC 14 (15 June 2007).

[6] Paragraph 3(c)(i)-(iii) of the Labour Appeal Court order.

[7] Section 193(1) provides:

> "(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—
>
> (a) order the employer to re-instate the employee from any date not earlier than the date of dismissal;
>
> (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
>
> (c) order the employer to pay compensation to the employee."

was unfair, that reinstatement is the appropriate remedy, and that some degree of retrospectivity is appropriate. The adjudicator concerned must decide whether the order of reinstatement will run from the date of the decision to reinstate or from an earlier date that does not precede the date of dismissal.

[66] An order of retrospectivity in relation to reinstatement can be said to properly have been made only if retrospectivity is ordered before the date on which a reinstatement order would have been made by the CCMA commissioner or the Labour Court judge acting correctly. A court seized with an appeal from a decision of another court, or with a review of the decision of a CCMA commissioner, is not an adjudication tribunal of first instance. It follows that if a court of appeal or review finds that the CCMA commissioner or the court of first instance should have ordered reinstatement, any order of reinstatement that operates from the date on which the correct order ought in the first place to have been made is not retrospective in the true sense. An order of reinstatement is retrospective only if it covers any of the period from the date on which the dismissal occurred until the date of the award of the CCMA commissioner or a judgment and order of a Labour Court of first instance. Section 193(1) in terms refers to "the Labour Court or an arbitrator". This is a reference to the Labour Court adjudicating the dispute as a court of first instance and includes a CCMA commissioner who arbitrates the dispute.

[67] The effect of the Labour Appeal Court order in this case is that the reinstatement dated back to the date of the order of the CCMA Commissioner which

was made on 18 March 2002. It did not cover any of the period from the date of the dismissal, 8 March 2001, until the date on which the incorrect award of the CCMA Commissioner was made. It was therefore not retrospective.

[68] Indeed the Labour Appeal Court was alive to this:[8]

> "In the order that the Court a quo made it did not, after setting aside the arbitration award, expressly replace it with an order of reinstatement. It only ordered that the third respondent be given a final written warning on the condition to which I have referred above. However, there can be no doubt that the Court a quo was of the view that the commissioner ought to have ordered the appellant to reinstate the third respondent. This flows from the fact that the Court a quo expressly stated that the correct sanction for the third respondent's misconduct was a final written warning and that this had to be on condition that, if he was found guilty of a similar act of misconduct within twelve months, the third respondent could be dismissed immediately.
>
> What the Court a quo did not deal with in its judgment is whether or not the order of reinstatement that the commissioner ought to have made should have been one operating retrospectively and, if so, up to what date retrospectively. While it may be argued that an order of reinstatement is necessarily implied in the order that the Court a quo made, it cannot be said that the reinstatement was ordered to be retrospective is also implied in the order of the Court a quo. Since the third respondent did not note a cross-appeal against the Court a quo's failure to make such implied order of reinstatement retrospective, I do not think that it is open to this Court to consider that issue. The retrospectivity that I am referring to does not relate to the period between the date of the issuing of the arbitration award and the date of the order of the Court a quo or indeed the date of this order. It relates to the period between the date of dismissal and the date of issuing of the award.
>
> In the light of this the reinstatement order that is implied in the order of the Court a quo as the reinstatement order that the commissioner should have made would have

[8] Above n 5 at paras 50-2.

> run from the date of the issuing of the arbitration award. I shall make an order that reflects this. That means that the third respondent would have lost out on remuneration covering the period from the date of the dismissal to the date of the delivery of the award."

[69] Reliance by the applicant on the case of *Latex*[9] was misplaced. That case, like the case of *Republican Press*,[10] was different from this one in that it was concerned with what I may call retrospectivity in the true sense: retrospectivity that extended to a date before that upon which the Labour Court of first instance made its order. The Labour Appeal Court ordered reinstatement from a date that preceded the date of the order of the Labour Court. That Court, having concluded that the Labour Court ought to have made an order of reinstatement, made the order retrospective to a date six months before the date upon which the Labour Court order should have been made.[11] It was precisely because the Labour Court of first instance in *Republican Press* had made an order of reinstatement that effectively preceded the date of its order by some six years that the interpretation of the retrospectivity element of section 193 became relevant.[12] By parity of reasoning, that interpretation is not relevant here.

[70] The applicant's submission that any retrospective order of reinstatement was made is therefore wrong. In these circumstances it is unnecessary to decide whether the law places any limitation on the period for which reinstatement might be retrospective.

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[9] *Chemical Workers Industrial Union & others v Latex Surgical Products (Pty) Ltd* [2006] 2 BLLR 142 (LAC); (2006) 27 *ILJ* 292 (LAC).

[10] *Republican Press (Pty) Ltd v CEPPWAWU and others* 2008 (1) SA 404 (SCA); [2007] 11 BLLR 1001 (SCA).

[11] Above n 9 at para 123.

[12] Above n 10 at para 22.

[71] The applicant's case has no prospects of success. I would dismiss the application for leave to appeal.

Langa CJ and Van der Westhuizen J concur in the judgment of Yacoob J.

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Counsel for the Third Respondent	Advocate JG Van der Riet SC and Advocate H Barnes instructed by Cheadle Thompson & Haysom Inc, Johannesburg.