THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO: 218/06

In the matter between :

REPUBLICAN PRESS (PTY) LTD Appellant

and

CEPPWAWU & GUMEDE AND OTHERS Respondent

Before:	**FARLAM, NUGENT, JAFTA, MLAMBO & MAYA JJA**
Heard:	**15 AUGUST 2007**
Delivered:	**27 SEPTEMBER 2007**
Summary:	**Appeal direct from Labour Court - competent when Labour Appeal Court has declined to entertain appeal – reinstatement of dismissed employee - retrospective effect not limited.**
Neutral citation:	**This judgment may be referred to as *Republican Press v CEPPWAWU* [2007] SCA 121 (RSA)**

NUGENT JA

NUGENT JA:

[1] The applicant (the company) wishes to appeal against an order that was made by the Labour Court (Pillay J). In the ordinary course an appeal from a final judgment or order of the Labour Court lies to the Labour Appeal Court, but only with the leave of the Labour Court or, where such leave is refused, with the leave of the Labour Appeal Court.[1] In the present case leave to appeal to the Labour Appeal Court was refused by both those courts. Hence the present application, which is for leave to appeal direct to this court. The judges of this court who considered the petition referred it for oral argument[2] with directions that the parties prepare to argue the merits of the appeal if called upon to do so.

[2] The Rules of the Labour Appeal Court provide that a petition for leave to appeal must be disposed of by three judges of that court designated by the Judge President (the decision of the majority to be decisive).[3] In comparable circumstances (the context was ss 20(1) and 21(1) of the Supreme Court Act 1959) it was held by this court in *S v Khoasasa*[4] that the refusal of leave to appeal to a High Court by designated judges of that court constitutes a final order of that court. Similarly, in my view, the refusal of leave to appeal by designated judges of the Labour Appeal Court constitutes a final order of that court. The Labour Appeal Court having refused leave to appeal the question that now arises is whether this court is authorised to entertain an appeal.

---

[1] Sections 166 (1) and (2) of the Labour Relations Act 1995.
[2] See s 21(3)(c)(ii) of the Supreme Court Act 1959.
[3] Rules 4(7) and (8) of the Rules Regulating the Conduct of the Proceedings of the Labour Appeal Court promulgated under Government Notice 1666 in Government Gazette 17495 of 14 October 1996 as amended.
[4] 2003 (1) SACR 123 (SCA).

[3] That question is answered by the decision of this court in *Numsa v Fry's Metals (Pty) Ltd*.[5] It held that the Constitution confers final appeal authority on this court in all matters, barring constitutional matters, in which appellate jurisdiction falls to be exercised.[6] That decision was made in the context of an order that had been made by the Labour Appeal Court on appeal to it from the Labour Court but the principle that it articulated applies as much to this case. There remains only an ancillary question, which is whether the appellate authority of this court falls to be exercised over the orders that were made by the Labour Court, or whether it is instead to be exercised over the order of the Labour Appeal Court refusing leave to appeal (in which case the consequence of a successful appeal will be that the matter reverts to the Labour Appeal Court for it to consider an appeal against the orders of the Labour Court with the possibility of a further appeal to this court).

[4] In *Khoasasa* the appellant wished to appeal against the sentence that had been imposed on him by a regional magistrate. At that time the Criminal Procedure Act 1977, as amended by the Criminal Procedure Amendment Act 1997, allowed an appeal to the High Court only with the leave of the lower court or, if leave was refused by that court, with the leave of the relevant High Court.[7] Leave to appeal against the sentence was refused by both the lower court and the High Court. This court held that it had no authority to entertain an appeal directly from the regional court, but that it had authority to grant leave to appeal against the order of the High Court refusing leave to appeal. The effect was that a person convicted by a regional court could not appeal to

[5] 2005 (5) SA 433 (SCA).
[6] See paras 16 and 32.
[7] Section 309(1)(a) read with ss 309B(1) and 309C(1), as they then existed. The relevant sections were subsequently declared to be invalid by the Constitutional Court in *S v Steyn* 2001 (1) SACR 25 (CC).

this court unless an appeal to the High Court had failed (subject to the necessary leave being granted).[8]

[5] I do not think the same considerations apply in the present case. *Khoasasa* (and *S v N*[9] before it) was decided upon a construction of the Supreme Court Act 1959. As pointed out in *Fry's Metals*, the appellate jurisdiction of this court derives from the Constitution.[10] To the extent that the Supreme Court Act might have the effect of imposing restrictions on the manner in which that jurisdiction might be exercised it does not purport to do so in relation to matters emanating from the labour courts. While it might lie within the competence of this court, in the exercise of its power to regulate its own process conferred by s 173 of the Constitution,[11] to direct that an appeal first be heard by the Labour Appeal Court before it will be considered by this court (on the assumption that there are proper grounds for an appeal at all) I do not think it is 'in the interests of justice' to do so.[12] The Labour Relations Act 1995 exhorts expeditious finality in labour disputes. That exhortation would be considerably thwarted if the ordinary appeal process were to be revisited after the Labour Appeal Court has refused leave to appeal. Once the ordinary appeal process has been exhausted by the refusal by the labour courts of leave to appeal in my view this court may and should exercise its final appeal authority (subject, of course, to the applicant meeting the prerequisites for special leave to appeal to this court that were laid down in *Fry's Metals*[13]).

---

[8] *Khoasasa* para 12. See, too, *S v N* 1991 (2) SACR 10 (A) at p 16a-e.
[9] Above.
[10] *Fry's Metals* para 23.
[11] *Fry's Metals* para 40.
[12] Section 173 of the Constitution.
[13] *Fry's Metals* para 42.

[6] This matter originates in a decision by the company to retrench about 150 workers with effect from 6 September 1999. Amongst those selected for retrenchment were the 40 workers whose claims are the subject of the present proceedings. (I will refer to them as the workers). The workers and their union (the first respondent) contested the fairness of their dismissals in proceedings that were commenced in the Labour Court after an attempt at conciliation had failed.[14] The matter came to trial some six years after the workers were retrenched (the delay in bringing the matter to trial is dealt with later in this judgment). There was no dispute that the company's operational requirements justified the retrenchments. The only issues at the trial were whether the workers were selected for dismissal in accordance with selection criteria that were fair and objective (as required by s 189(7)(b) of the Act) and if not, what relief should be granted. The learned judge held that the workers were not selected for dismissal in accordance with fair and objective criteria. She ordered that 28 of the workers be reinstated with effect from 7 September 1999 (subject to the deduction from their back-pay of an amount equivalent to two and a half years' wages and of the notice and severance pay that they had received), that seven of the workers be paid compensation in an amount equivalent to 12 months' pay, and that compensation in the same amount be paid to the estates of five of the workers who had meanwhile died.

[7] In argument before us it was correctly conceded by counsel for the company that there were no special circumstances justifying an appeal against the finding of the Labour Court that the workers were not selected for dismissal in accordance with fair and objective criteria. The orders for the payment of compensation were also not contested. The company sought leave

[14] Section 191(5)(b)(ii) of the Act.

to appeal only against the order for reinstatement (paragraphs 2 and 3 of the order of the Labour Court). The arguments that were advanced in that regard (to which I will return later in this judgment) arise from the fact that the order for reinstatement was made six years after the event.

[8] The procedures for resolving disputes concerning unfair dismissal are designed to bring them to finality expeditiously. In the ordinary course such a dispute must be brought before a conciliator within 30 days of the dismissal.[15] If the dispute remains unresolved after another 30 days the employee may refer the dispute either to arbitration or to the labour court depending upon the nature of the dispute.[16] In some cases that are subject to arbitration the arbitrator is required to commence the arbitration immediately after it has been certified that the dispute remains unresolved after conciliation.[17] In all cases an arbitrator is obliged to determine the dispute 'fairly and quickly' with the 'minimum of legal formalities'[18] and must deliver an award within 14 days of the conclusion of the proceedings.[19] Cases that are referred to the Labour Court rather than to arbitration are to be disposed of subject to its rules,[20] which similarly envisage the minimum of formality. Proceedings are initiated by the filing of a statement of claim that must be responded to within ten days.[21] Not later than ten days thereafter the parties must hold a pre-trial conference and a copy of the minute must be delivered within five days thereafter.[22] Once that has occurred, or the time for filing the minute has

[15] Section 191(1)(b)(i) of the Act.
[16] Section 191(5) of the Act.
[17] Section 191(5A) of the Act.
[18] Section 138(1) of the Act.
[19] Section 138(7) of the Act.
[20] Rules for the Conduct of Proceedings in the Labour Court promulgated by Government Notice 1665 in Government Gazette 17495 of 14 October 1996.
[21] Rule 6(3)(c).
[22] Rules 6(4)(a) and (d).

expired, the registrar must send the file to a judge who may direct that the matter be enrolled for hearing or give directions for the holding of a conference.[23]

[9] It will be apparent that if an aggrieved worker (or his or her union) acts with diligence and expedition disputes concerning unfair dismissal ought ordinarily to be capable of being resolved by the Labour Court within about six months of the dismissal (assuming there are no systemic delays) and in the case of arbitrations even earlier. It is convenient at this stage to set out briefly why it took six years in this case to resolve the dispute.

[10] Conciliation failed on 3 November 1999. The statement of claim was filed only three months later on 14 February 2000 and the response was filed seven days later. A pre-trial conference was held on 22 March 2000 (17 days late) and the minute was filed on 17 April 2000 (13 days late). On 26 May 2000 a judge of the labour court to whom the matter had been allocated directed the parties to comply with certain pre-trial guidelines that are apparently standard practice in the Labour Court. That direction seems to have been ignored. On 1 November 2000 a firm of attorneys advised the company's attorneys that it had been appointed to act for the union but two weeks later the attorneys advised that the matter 'has reverted to the union'. It seems that another firm (Chennels Albertyn and Tanner) was then appointed by the union but nothing further seems to have been done until a letter was sent to the union's then attorneys by the registrar of the Labour Court on 3 September 2001 directing them to index and paginate the file within 5 days failing which the matter would not be enrolled and the file would be sent to the archives.

[23] Rule 6(5).

The directive also required a bundle of any documents that were to be used at the trial to be filed before the matter would be enrolled. (The parties had agreed at the pre-trial conference that the company would submit a bundle of documents to the union within 14 days but evidently nothing was done in that regard.) The directive from the registrar prompted a letter from the union's attorneys to the company's attorneys and on 8 November 2001 the company's attorneys submitted its bundle of documents. Apart from a perfunctory exchange of correspondence early the following year nothing further occurred for about two and a half years. In December 2002 Chennels Albertyn and Tanner closed down but the union failed to retrieve its file because it had simply forgotten about the matter. In May 2004, in the course of consultations concerning another matter involving the company and the union, it became apparent to the union that the present case had not been attended to. The union's present attorneys then put the court file in order in accordance with the registrar's earlier direction. On 27 September 2004 the Registrar advised the parties that the matter had been enrolled for hearing on 24 January 2005.

[11] A week before the trial was due to commence the union applied for the discovery of documents (why it had not done so earlier is not explained) and the company filed what it called a 'special plea'. In its plea the company alleged that it had been so prejudiced by the delay in prosecuting the matter that the claim should be dismissed on that ground alone. The matter came before Ngcamu J on the allocated date, who directed the respondents to explain the delay by way of affidavit, and the matter was postponed for that purpose. A lengthy explanation was filed on behalf of the union, an answer was filed by the company, and the union replied. On 24 May 2005 the

Registrar gave notice that the trial had again been enrolled for 5 September 2005.

[12] Various skirmishes then occurred in the course of which Pillay J (who dealt with the matter with commendable decisiveness and expedition once she became seized of it) dismissed the 'special plea', observing in the course of her judgment that the delay that had occurred 'could be factored into the evidence at the trial'. Her order dismissing the 'special plea' was initially sought to be appealed against but the application for leave appeal against that order was not pursued and I need say no more about it. The trial commenced on the allocated date and lasted four days. In a considered and reasoned judgment that was delivered by Pillay J a week later (on 13 September 2005) the learned judge granted the relief that I referred to earlier.

[13] If the union (which was dominus litus) had prosecuted the matter diligently in accordance with the Act and the rules there is no apparent reason why the matter should not have been resolved by no later than about August 2000 (bearing in mind that on the two occasions that the matter was enrolled it was enrolled for a date no more than four months hence) and even earlier if the union had not waited three months before filing its statement of claim. No doubt some of the delay might have been attributable to the tardiness of its former attorneys but instructing an attorney did not absolve the union of responsibility for ensuring that the matter was dealt with promptly.

[14] In its petition the company raised two issues arising from the delay. First, it contended that the reinstatement of the 28 workers after the lapse of a period of six years was wholly inappropriate. It pointed out that, amongst

other things, a number of the jobs concerned had since been outsourced, considerable business restructuring had occurred, and there had subsequently been further retrenchments. (Evidence to that effect was similarly given during the course of the trial.) Secondly, it contended that the order that was made by Pillay J is in conflict with the decision of the Labour Appeal Court in *Chemical Workers' Industrial Union v Latex Surgical Products (Pty) Ltd.*[24] It is convenient to deal with that issue first.

[15] *Latex Surgical Products* similarly concerned the retrenchment of workers. It was found by the Labour Appeal Court, amongst other things (as the Labour Court found in this case) that the affected workers were not selected for dismissal in accordance with criteria that were fair and objective.[25] As for the remedy the court considered it appropriate to order reinstatement, but it held that in the case of 'an ordinary unfair dismissal' (by which was meant a dismissal that is not automatically unfair as contemplated by s 187(1) of the Act)[26] it is 'not competent to order retrospective operation of a reinstatement order…which is in excess of 12 months'.[27]

[16] That case was decided after the order in the present case was made but before the petition to the Labour Appeal Court for leave to appeal was filed, which expressly relied upon that decision.[28] It is curious in those circumstances that leave to appeal was refused by the Labour Appeal Court because the order made by Pillay J is in conflict with the construction of the

[24] (2006) 27 ILJ 292 (LAC).
[25] Para 97.
[26] Para 112.
[27] Para 116.
[28] *Latex Surgical Products* was decided on 25 November 2005. The petition to the Labour Appeal Court was filed on or after 30 November 2005 and the parties were advised on 31 March 2006 that the petition had been refused.

law that was adopted by the Labour Appeal Court in *Latex Surgical Products.* If *Latex Surgical Products* was correctly decided on that point then clearly the order made in this case cannot stand. But even if *Latex Surgical Products* was not correctly decided (with the result that it was legally competent for the Labour Court to make the order that it made) the further question (which in my view is related to the first for reasons that I will come to) is whether it was appropriate for a reinstatement order to be made so long after the dismissals occurred. In my view those are both issues that have potential ramifications far beyond the immediate interests of the parties in this case and warrant this court's entertaining the appeal.

[17] The Act allows for any one of three remedies to be granted to a worker who has been unfairly dismissed: the employer may be ordered to reinstate the worker, or the employer may be ordered to re-employ the worker, or the employer may be ordered to pay compensation.[29] The legislatively preferred remedy is the restoration of the worker to employment either by reinstatement or by re-employment. Either of those remedies must be granted except in specified circumstances,[30] in which case compensation may be ordered, but to a maximum amount equivalent to 12 or 24 months' remuneration depending upon the nature of the dismissal.[31] (In the present case the maximum would be 12 months' remuneration, and I will deal with the matter with reference only to a case of that nature.)

---

[29] Section 193(1) of the Act.

[30] '193(2): The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –

(a) the employee does not wish to be reinstated or re-employed;
(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
(c) it is not reasonably practical for the employer to reinstate or re-employ the employee; or
(d) the dismissal is unfair only because the employer did not follow a fair procedure.'

[31] Section 193(1) read with s 194.

[18] In *Latex Surgical Products* Zondo JP, adopting the reasoning of his earlier minority opinion in *Kroukam,*[32] pointed to the apparent anomaly that might arise if an order for reinstatement were to be made more than 12 months after the date of dismissal. The effect would be that the employer would ordinarily be liable to remunerate the worker for the period from dismissal until the order was made (more than 12 months) whereas had an order for compensation been made the employer's liability would have been limited to remuneration for 12 months.[33] Relying upon inferences that were sought to be drawn from the background against which the Act was drafted it appears to have been the view of the learned Judge President that that could not have been intended.[34] The learned Judge President also said that it was arguable that the liability of an employer to recompense a worker for lost back-pay when an order for reinstatement is made can be construed as compensation as envisaged by s 195 of the Act.[35] On those twin bases (as I understand the reasoning that led to his conclusion) it was held that the Act must be construed so that an order for reinstatement could not be given 'retrospective operation' for longer than 12 months.[36]

[19] I respectfully disagree with that construction. I do not think that the back-pay to which a worker ordinarily becomes entitled when an order for reinstatement is made is to be equated with compensation (thus allowing for the limitation contained in s 194 to be applied in relation to back-pay).[37] As

[32] *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC). The pronouncements on the issue in *Kroukam* were said in *Latex Surgical Products* at para 113 to be obiter.
[33] *Kroukam* para 126 adopted in *Latex Surgical Products* para 114.
[34] *Kroukam* paras 124 and 125 adopted in *Latex Surgical Products* para 114.
[35] *Kroukam* para 123 adopted in *Latex Surgical Products* para 114.
[36] *Latex Surgical Products* para 116.
[37] *Kroukam* para 123 adopted in *Latex Surgical Products* para 114.

pointed out by Davis AJA in *Kroukam,*[38] (and I respectfully agree) an order of reinstatement restores the former contract and any amount that was payable to the worker under that contract necessarily becomes due to the worker on that ground alone. Perhaps a court (or an arbitrator) that makes such an order may also order that part of that remuneration shall not be recoverable (I make no finding on that point) but I agree with Davis AJA that the remuneration becomes due under the terms of the contract itself and does not constitute compensation as envisaged by s 194.[39] I can also see no proper reason to read into the Act the limitation that is suggested in *Latex Surgical Products.* I do not think it is permissible to interpret a statute with reference to the supposed intention of parties who had an interest in its enactment and it would be most undesirable to do so. The meaning of a statute is ordinarily to be interpreted with reference to the language in which it is expressed. It is true that the language must be seen in its context, which includes its background, but the background must necessarily play a limited role when the language is clear.[40] In the present case it is apparent from the statute that it was carefully and meticulously crafted to create a coherent structure for resolving labour disputes and I can see no grounds for assuming that the limitation that is now suggested was inadvertently omitted from section 194(1) but not omitted from the next section. I might add that the very existence of two separate remedies (reinstatement and re-employment) to restore the worker to employment, but by different means, might in itself suggest that it is inherent in reinstatement, as that word is used in the Act, that the contract revives from the date of

[38] Davis AJA in *Kroukam* para 59.
[39] Davis AJA in *Kroukam* para 55.
[40] Per Schreiner JA in *Jaga v Dönges NO*; *Bhana v Dönges NO* 1950 (4) SA 653 (A) page 662H.

dismissal (notwithstanding the apparent power to restore it from a later date)[41] but it is not necessary to decide whether that is so. It is sufficient to say that there are no proper grounds for inferring that the limitation suggested in *Latex Surgical Products* was inadvertently omitted and ought now to be read into the section.

[20] It follows that the order that was made by the Labour Court was competent in law. But it does not follow that the order was properly made. The apparent anomaly referred to by the Labour Appeal Court occurs only if an order restoring the worker to employment is made with effect from a date earlier than 12 months from the date of the order. In my view it is most probable that the draftsman of the Act omitted to place any limitation on that term simply because it was never anticipated that orders of that kind might be made more than 12 months after the dismissal occurred. I have already pointed out that a hallmark of the Act in this regard is its insistence upon disputes concerning unfair dismissal being resolved expeditiously. 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.

---

[41] The distinction was not drawn in the former Labour Relations Act 1956. The ordinary modern meaning of 'reinstatement' is to 'reinstall or re-establish (a person a person or thing *in* a place, station, condition *etc*) ; to restore to its proper or original state (Shorter Oxford English Dictionary) cf *Consolidated Frame Cotton Corporation* but in the context of the former Act. Contra Martin Brassey: *Commentary on the Labour Relations Act* (Rev. Ser. 2 2006) A8-145; John Grogan: *Dismissal Discrimination and Unfair Labour Practices* 498-9; Clive Thompson and Paul Benjamin: *South African Labour Law* Vol 1 (Service 47 2005) AA1-449, but in which the point is not fully considered.

[21] That retrenchments were justified was not in dispute. The dispute was confined to the selection of those who were to be dismissed. 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.

[22] 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. In my view it was entirely inappropriate for such an order to be granted. If the learned judge exercised any discretion in that regard at all (whether she did so is not apparent from the judgment) in my view the order that she made is the clearest indication that

she misdirected herself in doing so and the order cannot stand. The only alternative remedy that is available in the circumstances is an order that the company compensate the workers for their unfair dismissal. That must necessarily be limited to 12 months' remuneration and the company accepted that that would be appropriate. The company also did not press for the costs of this appeal.

[23] The following orders are made:

1. The application for leave to appeal against paragraphs 2 and 3 of the order made by the Labour Court on 13 September 2005 is granted.
2. The appeal is upheld. Paragraphs 2 and 3 of that order are set aside and the following order, which is to be applicable to the workers named in paragraph 2 mentioned above, is substituted in their stead:

   'The respondent is ordered to pay compensation to each of the applicants equivalent to 12 months' remuneration at the rate of remuneration applicable at the time of dismissal.'

_____

R.W. NUGENT
JUDGE OF APPEAL

CONCUR:

FARLAM JA)

JAFTA JA)

MLAMBO JA)

MAYA JA)