

REPUBLIC OF SOUTH AFRICA



IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO: 111/CAC/Jun11

In the matter between:

**SOUTH AFRICAN COMMERCIAL, CATERING
AND ALLIED WORKERS UNION & OTHERS**

APPLICANT

and

MASSMART HOLDINGS LIMITED

FIRST RESPONDENT

THE COMPETITION COMMISSION

SECOND RESPONDENT

Heard: 14 February 2020

Delivered: 7 July 2020 (by email to the parties and release to SAFLII)

J U D G M E N T

Mnguni JA (Rogers and Mabindla-Boqwana JJA concurring):

[1] On 9 March 2012, this court approved the merger between Wal-Mart Stores Inc (Wal-Mart) and Massmart Holdings Limited (Massmart) in terms of s 16(2)(b) of the Competition Act 89 of 1998 (the Competition Act) subject to certain conditions, one of which was the following:

‘2.1.2 The merged entity is required to reinstate the 503 employees who were retrenched in 2009 and June 2010 and must take account of these employees’ years of service in the Massmart Group.’

[2] The issue, which arises for determination before us, is whether, properly interpreted, this court’s reinstatement order of 9 March 2012 is retrospective in effect. The applicant (SACCAWU) accepts that the reinstatement order does not expressly make provision for back pay. It, however, contends that it was implicit in the order that the reinstatement of the employees must be retrospective and seeks to have this part of the order interpreted as requiring the payment of back pay to the date of retrenchments (in 2009 and June 2010) and seeks orders directing Massmart to make payment of such back pay.

[3] The issue arising in this application will be better understood against the background that follows. During 2009 and 2010, and prior to the merger, Massmart retrenched 503 employees who worked for Game stores in Nelspruit and several other locations as well as at a number of Massmart’s regional distribution centres, citing operational reasons. On 27 September 2010, Massmart announced that Wal-Mart intended to acquire a controlling interest in the company by virtue of an acquisition of 51 percent of the ordinary share capital of Massmart. The transaction came to the attention of the retrenched employees and SACCAWU. SACCAWU took the view that while there was no direct evidence in that regard, the only reasonable inference to be drawn was that, given the timing of the retrenchment viewed with the process of merger negotiations, the retrenchments were merger related.

[4] Prior to the commencement of the merger proceedings before the Tribunal in May 2011, SACCAWU filed a notice of its intention to intervene in the proceedings in order to represent its members’ interests in the proposed transaction on a number of issues, including the interests of the 503 retrenched employees, contending that their retrenchments were merger related. The merged entity contested SACCAWU’s position, contending that the decision to implement the regional distribution structures, which gave rise to the retrenchment of the 503 employees, was made in 2002, while the decision to build a particular distribution centre was made in 2008, before any suggestion of a merger with Wal-Mart.

[5] The Tribunal concluded that there was insufficient evidence before it to support the conclusion that the employees' retrenchment had been merger specific. On 31 May 2011, it approved the merger subject to a number of conditions. With regard to the retrenched employees, the Tribunal imposed the condition that 'the merged entity must, when employment opportunities become available within the merged entity, give preference to the re-employment of the 503 employees that were retrenched during 2010 and must take into account those employees' years of service in the Massmart Group'.

[6] Aggrieved, SACCAWU launched an appeal against the Tribunal's decision before this court in which it challenged the Tribunal's findings and a number of conditions that the Tribunal had imposed on the merger, including the Tribunal's failure to approve the merger conditional upon the reinstatement of the 503 retrenched employees. On this particular condition, SACCAWU persisted with its contention that the retrenchments were merger related and continued to seek as a primary remedy the reinstatement of the retrenched employees.

[7] On 9 March 2012, this court delivered its judgment and order in which it approved the merger subject to a number of conditions. This court concluded that given the timing of the retrenchments, the merged entity had failed to rebut the inference that the retrenchments had been in anticipation of the merger. It set aside the condition imposed by the Tribunal relating to the 503 retrenched employees and replaced it with the condition foreshadowed in para 1 above.

[8] After the judgment, the parties engaged one another to give effect to the conditions in the court order under the supervision of the second respondent (the Commission). As early as April 2012, controversy between SACCAWU and Massmart arose on whether or not the reinstatement order was retrospective. Their views diverged. Massmart's stance was that it was not retrospective, whereas SACCAWU's stance was that it was. On 15 July 2013, the Commission weighed in on the debate and issued a letter expressing its view on the meaning of the term 'reinstate' in the order. Its stated view was that 'the reinstatement is not retrospective and does not include back pay'.

[9] In the same letter, the Commission raised concerns about the merged entity's compliance with the reinstatement order, recording that the merged entity's efforts to locate and contact all the retrenched employees were insufficient. Pursuant to that letter, Massmart prepared a remedial plan, which was implemented subject to periodic review by the Commission and engagement with SACCAWU. The remedial plan did not provide for retrospective reinstatement or back pay. On 15 August 2014, the Commission issued a letter to Massmart, which it copied to SACCAWU, dealing with the merged entity's compliance with the reinstatement order and terms of reinstatement as set out in para 4.1 of the letter (annexure AA2 to the answering affidavit). In para 5.2 of annexure AA2, the Commission recorded that upon fulfilment of the terms in para 4.1 of annexure AA2, Massmart would have complied with the reinstatement order of this court.

[10] On 27 March 2019, the Commission issued a letter (annexure AA3 to the answering affidavit) in respect of the 'termination of conditions imposed in the merger' in which it confirmed that it was satisfied, after considering the information contained in various compliance reports, that the merged entity had complied with the conditions imposed by this court's order of 9 March 2012. Throughout the course of Massmart reinstating the 503 retrenched employees, which commenced shortly after this court order of 9 March 2012, Massmart did so without paying them back pay.

[11] Massmart opposes this application on four grounds. The first and second grounds are interrelated. The basis of the opposition on these two grounds is that SACCAWU failed to bring the application within a reasonable time from the delivery of the order, and that given the delay in bringing the application, SACCAWU was obliged to bring a condonation application providing an adequate explanation for its delay. With a view to achieving finality and certainty, Massmart abandoned these two grounds during the course of argument.

[12] The third ground of opposition is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it because it is *functus officio*. Its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased. The court may only clarify its judgment or order if, on a proper interpretation, the meaning is obscure, ambiguous

or otherwise uncertain. The fourth ground, which is advanced in the alternative, is that even if this court were to find that the meaning of the term 'reinstatement' is ambiguous, the term does not in its ordinary sense connote retrospectivity and that there is no merit in SACCAWU's assertion that the 503 retrenched employees were unfairly and unlawfully retrenched (a circumstance on which SACCAWU relied for interpreting 'reinstatement' here as being retrospective).

[12] Although SACCAWU does not expressly say so in its papers, it became clear in the course of oral argument that its application is anchored in s 66(b) of the Competition Act, which makes provision for the Tribunal or this court, 'acting of its own accord or on application of a person affected by a decision or order' to 'vary or rescind its decision or order . . . in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission'. As observed by this court in *Mike's Chicken (Pty) Ltd & others v Astral Foods Limited & another*,¹ this section is modelled on Uniform Rule 42(1), with the counterpart to s 66(b) being rule 42(1)(b), and the principles developed in regard to rule 42 provide guidance in the interpretation of s 66(b).

[13] SACCAWU's contention is that the relief sought in this application falls within the ambit of one of the well-recognised exceptions to the *functus officio* rule which is that this court 'may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided that it does not thereby alter "the sense and substance" of the judgment or order'.² In this regard, SACCAWU contends that reinstatement granted outside the ambit of the Labour Relations Act 66 of 1995 (the LRA) is always retrospective in effect unless the order making provision for the reinstatement expressly provides otherwise, and that since the order is silent in respect of its retrospective effect, it therefore follows as a matter of law that the 503 retrenched employees are entitled to back pay.

[13] Not so, argues Massmart. It contends that the order is nothing of the sort because both in terms of its ordinary meaning and as a term of art in labour law

¹ *Mike's Chicken (Pty) Ltd & others v Astral Foods Limited & another* [2004] 1 CPLR 40 (CAC) para 13.

² *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 307A-B.

‘reinstate’ or ‘reinstatement’ carries no automatic retrospective connotation. Massmart contends that in the absence of any ambiguity in the order, this court does not have the power to entertain the application because it is *functus officio*.

[14] The basic principles applicable to construing documents also apply to the construction of a court’s judgment or order. The court’s intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known principles.³ As stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,⁴ a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the order.

[15] It is trite that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it, that that court thereafter becomes *functus officio*. The exceptions to this rule are few and concern accessory or consequential matters such as costs or interest; cases where the judgment or order is obscure, ambiguous or otherwise uncertain as is alleged in this instance; correction of clerical, arithmetical or other errors, and questions relating to costs.⁵

[16] As already stated, on SACCAWU’s contention, this court’s order, properly interpreted, is retrospective in effect. SACCAWU’s counsel submitted that reinstatement means the restoration of the status quo ante, and that in the case of a dismissed employee this translates into restoration of the original contract of employment as if the dismissal had not occurred. As authority for this proposition, she relied on a number of interrelated decisions. The one which she contends is most saliently in her favour is Zondo J’s dictum in *National Union of Metalworkers of South Africa obo Fohlisa & others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd*⁶ where the learned justice said:

‘Another point that supports the proposition that paragraph (a) of Cele AJ’s order is not a prospective reinstatement order is this. Outside of the LRA, if a court were to make an order that someone be reinstated in a certain position from which he or she had been unlawfully

³ Ibid at 304D-H.

⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

⁵ *Firestone* at 306H-307H.

⁶ *National Union of Metalworkers of South Africa obo Fohlisa & others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd* [2017] 6 BLLR 539 (CC).

removed, that order would mean both that that person should be put back into the position he or she occupied before his or her removal, and, that he or she should be paid whatever money or financial benefit he or she would have been entitled to during the intervening period had he or she not been removed from the position. This would be the meaning and effect of that reinstatement order without the court having to include a separate order to the effect that the order will operate with retrospective effect as is required in the case of an order of reinstatement under section 193 if the Labour Court or another appropriate tribunal wants to ensure that an employee does not, or employees do not, lose out on backpay or other benefits to which they would have been entitled in the intervening period had they not been dismissed.⁷

[17] She submitted that it was by reason of the meaning of reinstatement and its consequences that the courts have ruled that the back pay to which a dismissed employee ordinarily becomes entitled when an order for reinstatement is made cannot be equated with compensation, and that the retrospectivity of a reinstatement order is, therefore, not to be limited to either 12 months in the case of an ordinary dismissal or 24 months in the case of unfair dismissal⁸ She submitted that this court's reinstatement order operates with retrospective effect as a matter of law on its proper interpretation and was not linked to or dependent on a finding that the retrenchments were unlawful or unfair. She submitted that in any event the absence of an explicit finding in this court's judgment that the retrenchments were unlawful was not fatal because such a finding could be and was on the facts implicit in the judgment and order. She pointed out in this regard that retrenchments are only permitted in law if they are based on operational requirements which s 213 of the LRA defines to include economic, technological, structural or similar needs of an employer.

[18] By contrast, Massmart's counsel submitted that at the level of contract law, the alleged *unlawful* termination of a contract of employment, which is what Zondo J postulated in the passage from *Hendor Mining* relied upon by SACCAWU's counsel, affords the employee an election either to accept it and sue for damages or reject it and seek specific performance. He submitted that where specific performance is

⁷ Ibid para 97.

⁸ See *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* 2009 (1) SA 390 (CC).

sought and granted, the contract endures as if it were never terminated, which effectively produces the consequences described by Zondo J in *Hendor Mining*.

[19] He submitted that where a dismissal occurs in breach of a material statutory provision outside of the LRA, it is susceptible to being declared invalid. In that instance the dismissal is a nullity and is taken never to have occurred, with the result that the employee has never been dismissed, and to speak of reinstatement in that case is, strictly speaking, a contradiction in terms. He pointed out correctly that this matter does not involve an unfair, unlawful or invalid dismissal; instead, it involves an order of reinstatement as a condition to a merger in the public interest. Here the ordinary meaning of the term 'reinstatement' must apply. In regard to the ordinary meaning of 'reinstatement', he referred us inter alia to the judgment of McNally JA in *Chegut Municipality v Manyora* (1997) 18 ILJ 323 (ZSC).

[20] In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others*⁹ Nkabinde J, writing for a unanimous court, concluded that: 'The ordinary meaning of the word "reinstatement" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of s 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. 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. The ordinary meaning of the word "reinstatement" means that the reinstatement will not run from a date after the arbitration award. Ordinarily then, if a Commissioner of the CCMA orders 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

⁹ Footnote 8 above.

period was a direct result of the employer's conduct in dismissing him or her unfairly.¹⁰
(Footnotes omitted.)

[21] Section 193(1)(a) of the LRA provides that if the Labour Court or an arbitrator finds that a dismissal is unfair, the court or the arbitrator may 'order the employer to reinstate the employee from a date not earlier than the date of the dismissal'. Consequently, the retrospectivity of an order of reinstatement granted in terms of the LRA is not automatic. There is, therefore, a discretion to be exercised in relation to the period of retrospectivity of a reinstatement order, and a reinstated employee's entitlement to back pay and other benefits may be limited. The ordinary meaning of 'reinstatement', in accordance with *Equity Aviation*, is that the reinstated employee 'resumes' his or her service from the date of the order on the same contractual terms that applied when his or her services were terminated. It is in this respect that the remedy of 'reinstatement' differs from the remedy of 'reemployment', since the latter does not require the employer to allow the dismissed employee to resume employment on the terms which previously applied.

[22] Massmart's counsel correctly observed that Zondo J's remarks stand in contrast to those in *Equity Aviation* and were obiter in circumstances where the court was concerned with the meaning of the term 'reinstatement' in the labour law context. He pointed out, correctly, that the learned justice had qualified this obiter remark by stating that reinstatement would carry connotations of retrospectivity 'if a court were to make an order that someone be reinstated in a certain position from which he or she had been unlawfully removed'¹¹ (my emphasis).

[23] It is perhaps necessary to observe that in *Hendor Mining* the Constitutional Court split evenly in its reasoning though not in the outcome. Three justices concurred in the judgment of Zondo J while three concurred in the judgment of Madlanga J. For present purposes, there is thus no binding ratio. Madlanga J, in para 36 of his judgment, cited the meaning of 'reinstatement' given by the unanimous court in *Equity Aviation*.

¹⁰ Ibid para 36.

¹¹ *Hendor Mining* para 97.

[24] SACCAWU's counsel referred us to para 39 of Madlanga J's judgment where the learned justice said:

'I am not suggesting that, upon reinstatement, payment of remuneration for this period is not in accordance with the employment contract. It is. After all, it is the employment relationship that retrospectively comes back to life. Therefore, everything capable of retrospective performance, like payment of remuneration, must be done in terms of the contract. But the obligation to pay remuneration for this period retains its essential character.'

[25] This passage must be seen in the context of what the court was being asked to decide. The question was one of prescription of reinstated employees' right to back pay, and the answer was thought to depend on whether, as from the date of the reinstatement order, the reinstated employees' right to remuneration was a judgment debt or an ordinary contractual claim. Madlanga J held that it was a judgment debt. (Zondo J disagreed with that view but found, for other reasons, that the contractual claim had not prescribed.) Madlanga J took the view that where there was an order that employees be reinstated, the reinstatement only occurred when the employer actually took the dismissed employees back into service. In *Hendor Mining* there was, because of intervening appellate procedures, a gap of more than two years between the date of the reinstatement order and the actual reinstatement.

[26] The point Madlanga J was making was that when the employer eventually took the dismissed employees back into service, the employment contract retrospectively came back to life, ie from the date of the reinstatement order, but the right to the remuneration retained its essential character as a judgment debt. The learned justice was not concerned with the question whether a reinstatement order was retrospective in the sense of operating from a date earlier than the date of the order. In *Hendor Mining* there had been an express retrospectivity order, but the aspect that was controversial was the character of the reinstated employees' rights as from the date of the reinstatement order until the date they were actually taken back into service. (As applied to the facts of our case, Madlanga J's statement in para 39 would mean that where, pursuant to this court's order, retrenched employees were actually taken back into service later than 31 May 2011 (the date of the substituted Tribunal order), the reinstated employment contracts would retrospectively come into life as from 31 May 2011. This says nothing about whether the order would operate retrospectively to a date earlier than 31 May 2011.)

[27] I cannot accept SACCAWU's counsel's submission that it is implicit in this court's judgment that the 503 retrenched employees had been 'unlawfully' or even 'unfairly' dismissed. This court's reasoning was that, on the facts, a 'negative inference' could be drawn that the retrenchments were merger specific, that the evidential burden had shifted to the merging parties to rebut the inference, and that the merging parties' evidence was not sufficient to rebut the inference. This enquiry was undertaken in the context of determining whether the retrenchment was sufficiently related to the merger to warrant, as a matter of public interest, the imposition of an employment-related condition for merger approval. This court was not sitting as a court applying the LRA with a view to determining whether some remedy under that Act should be granted. There is no evidence that the retrenchments were, at the time they were made, attacked as being unlawful or unfair. Nowhere in this court's judgment is it said that the retrenchments were unlawful or unfair. The sorts of matters which would have been canvassed in a labour forum with a view to determining unlawfulness or unfairness do not feature in this court's judgment.

[28] In my view, what militates against SACCAWU's contention is that while specifically providing for the recognition of the employees' length of service with Massmart, the court set no other reinstatement conditions in relation to back pay or otherwise.

[29] This point gains added force when one compares para 1.2 of the Tribunal's order with para 2.1.2 of this court's order. The condition in para 1.2 of the Tribunal's order stated that when employment opportunities became available within the merged entity, the entity had to give preference to the 'reemployment' of the 503 retrenched employees 'and must take into account those employees' years of service in the Massmart Group'. It is clear that in terms of this order a retrenched employee's service would only recommence when such employee was actually reemployed. The requirement that such employee's years of service be taken into account was plainly intended to mean that, although there would be a break of service between the date of retrenchment and the date of reemployment, the actual years of service up to the date of retrenchment should be added to the service as from the date of reemployment in determining such employee's 'years of service'.

Clearly nothing would be added in respect of the period from the date of retrenchment to the date of reemployment.

[30] In the condition contained in para 2.1.2 of this court's order, this court replaced the first part of para 1.2 of the Tribunal's order (preferential reemployment) with a requirement that the merged entity 'reinstate' the 503 employees, but this court retained the second part of the condition ('and must take account of these employees' years of service in the Massmart Group'). It seems to me that the second part of the condition of this court's order fulfils precisely the same function as in the Tribunal's original order. This part of the condition recognises that there would be a gap in service from the date of retrenchment to the date on which the service contracts resume pursuant to reinstatement. Upon reinstatement, the years of service up to the date of retrenchment had to be taken into account in determining the years of service of the reinstated employees. If the 'reinstatement' was intended to mean that the retrenchments were unlawful and should be regarded as never having happened, there would have been no break in service and no requirement for the second part of the condition.

[31] Having carefully considered the matter, I am satisfied that the order permits only one interpretation, namely resumption of service with no implication of retrospectivity. In the circumstances, I am not disposed to depart from the authority of *Equity Aviation* on the strength of the obiter dictum of Zondo J. I may add that all three judges who authored or concurred in this court's judgment of 9 March 2012 serve or used to serve as judges of appeal in the Labour Appeal Court. They would have known that in the labour sphere reinstatement orders are not retrospective unless expressly so specified. I cannot conceive that they would have failed to include an express provision for retrospectivity if this is what they had intended. This conclusion renders it unnecessary to consider the fourth ground of objection. Hence, the application cannot succeed.

[32] What remains to be considered is the question of costs. The general rule is that in the ordinary course costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule. Both sides accepted that the costs of two counsel were justified.

Order

[25] In the result, the following order shall issue:

The application is dismissed with costs such costs to include costs of two counsel.

Mnguni JA

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