

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case No. JA56/99

In the matter between:

NUMSA

First Appellant

BENEDICT PHIHLELA AND OTHERS

Second to Ninth Appellants

and

FIBRE FLAIR CC T/A KANGO CANOPIES

Respondent

JUDGEMENT

WILLIS JA.:

This is an appeal against the decision of the Labour Court not to order that the reinstatement of the second to ninth appellants (“the appellants”) should operate retrospectively from the date of their dismissal. The Court *a quo* granted leave to appeal to this court.

The decision of the Court *a quo* has been reported. (**National Union of Metalworkers of SA & Others v Fibre Flair CC t/a Kango Canopies** (1999) 20 ILJ 1859 (LC).)

The respondent (“the employer”) manufactures glass fibre canopies. It is a small business employing approximately thirteen employees.

It is common cause that the appellants participated in an unlawful work stoppage on 19th February, 1997. This work stoppage was in protest against the introduction of “short time” by the employer with effect from 19th February, 1997. The introduction of this system was announced by the employer on 17th February, 1997. According to the employer, the need to introduce this system arose from the declining productivity of its employees and the resulting poor performance of the employer in the market.

For this conduct the appellants received final written warnings.

On 4th March, 1997, the employer was advised that its employees would take part in a one hour protest the following day. In response, the employer issued a notice to all staff advising that such action would be illegal and unprocedural and, drawing attention to the final written warnings, warned of the possibility of “severe disciplinary action” if employees went ahead with the protest.

A short protest, in the form of a march through the surrounding industrial area, and lasting for approximately thirty-five minutes did take place the following day. It seems clear that warnings and appeals by the employer contributed to the short duration of the work stoppage.

On 7th March, 1997, the employer dismissed nine of its employees, who had previously received final written warnings, including the appellants. It relied on the previous final written warnings. The employer did not hold any disciplinary enquiry before deciding to dismiss these employees.

On 11th March, 1997, the first appellant (“the union”) advised the employer that it wished to lodge an appeal against the dismissals. The employer refused to hear any appeal. It relied on the expiry of the forty-eight hour period provided for in the disciplinary code.

The employer then offered re-employment to the dismissed employees. The wages in the new contract were substantially lower than those which had been paid prior to the dismissals.

Only one of those dismissed accepted the offer of re-employment. The remaining eight invoked the provisions of section 77 of the Labour Relations Act No. 66 of 1995 (‘the LRA’), relating to protest action to promote or defend the socio-economic interests of employees, to refer their dispute to the court *a quo*.

There was no dispute that the employees were guilty of misconduct and that they had acted in breach of a reasonable and valid rule of which they were aware.

The Court *a quo* found that there was procedural unfairness in the dismissal of the employees. It also found, in the light of the totality of the evidence, that “ the dismissal is substantively unfair”.

The Court *a quo* exercised its discretion against ordering retrospective reinstatement as a mark of its disapproval of the misconduct of the appellants. Judgement was given on 11th March, 1999 and reinstatement ordered with effect from 1st April, 1999.

The appellants contend that this court is in as good a position as the court *a quo* to exercise the relevant discretion to order the fully retrospective reinstatement of the employees and

should do so, alternatively, that the decision of the court *a quo* was based upon a wrong principle or was not based on substantial reasons.

Section 193 (1)(a) of the LRA provides that if the Labour Court finds that a dismissal is unfair, it “may order the employer to reinstate the employee from any date not earlier than the date of the dismissal.” (my emphasis). These words clearly confer a discretion upon the Labour Court to order reinstatement which is not fully retrospective.. The appellants agree that this is so.

In **Media Workers Association of SA v Press Corporation of SA Ltd** 1992 (4) SA 791 (A) at 800 the following is said at 800D-E :

“ *Henning ‘ Diskresie-uitoefening’* in 1968 THRHR 155 at 158 quotes the following observation concerning discretionary powers:

“ ‘ “ (A) truly discretionary power is characterised by the fact that a number of courses are available to the repository of the power ” (Rubinstein *Jurisdiction and Illegality* (1956) at 16).’

The essence of a discretion in this narrower sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and the exercise of power could not be set aside merely because a court would have preferred him to

have followed a different course among those available to him.”

Clearly, section 193 (1)(a) of the LRA gives the Labour Court the power to follow any one of a number of available courses. It may select as the date for reinstatement *any* date not earlier than the date of dismissal. It seems to me to be clear that section 193 (1)(a) confers upon the Labour Court a true discretion.

In any event in the **Media Workers** case (*supra*) it is said at 800H:

“ (E)ven where a discretion is not discretionary in the narrow sense considered above, there may be features in the nature of the decision or the composition of the tribunal a quo which might call for restraint by a Court of appeal in the exercise of its powers. ”

It is clear that given a particular set of facts, such as those here present, a number of reasonable persons may have decided upon a number of different dates from which to order reinstatement. Policy reasons, in particular the need for expeditious finality in labour disputes, militate against the Labour Appeal Court interfering with such decisions (i.e decisions made in terms of section 193(1)(a) of the LRA). The fact that it may, in various instances, have reached a somewhat different conclusion from the Court *a quo* would not, in itself , justify a departure from this general rule against interference in a discretion exercised in terms of this subsection.

The test for interference in a discretion exercised in terms of subsection 193(1)(a) of the LRA is thus that formulated in **Ex parte Neethling and Others** 1951 (4) SA 331(A) at 335E:

“ Can it be said in the present case that the Court a quo has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgement to bear on the question or has not acted for substantial reasons? ”

and, as put somewhat differently in **S v Kearney** 1964 (2) SA 495 (A) at 504B-C:

“ When a court of first instance gives a decision on a matter entrusted to its discretion, a Court of appeal can interfere only if the decision is vitiated by misdirection or irregularity or is one to which no court could reasonably have come- in other words if a judicial discretion was not exercised. ”

In **Camdons Realty (Pty)Ltd and Ano. v Hart** (1993) 14 ILJ 1008 (LAC) it was said at 1018F:

“This court may intervene only if it is shown that the Industrial Court has failed to exercise its discretion, or has exercised its discretion improperly or unfairly.”

The Court *a quo* referred to the cases of **Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others** (1994) 15 ILJ 65 (A) and **NUMSA and Others v Benicon Group** (1997) 18 ILJ 123 (LAC) as guiding its decision not to award retrospective reinstatement by reason of the employees’ misconduct.

The appellants were unable to show that the Court *a quo* acted capriciously, or upon a wrong

principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or an irregularity, or failed to exercise its discretion, or exercised its discretion improperly or unfairly.

On the contrary, the record shows that the Court *a quo* in exercising its discretion acted carefully and in a manner consistent with established principle.

For these reasons, I should dismiss the appeal.

There are no considerations of fairness that require a departure from the normal practice in this Court that costs should follow the result.

Accordingly, the following order is made:

The appeal is dismissed with costs.

DATED IN JOHANNESBURG THIS DAY OF MARCH 2000

N.P.WILLIS

JUDGE OF APPEAL

I agree.

R.M.M ZONDO

ACTING JUDGE PRESIDENT

I agree.

J.H. CONRADIE

JUDGE OF APPEAL

Counsel for Appellant: Adv. P Buirski

Attorneys for Appellant: Ruth Edmonds

Counsel for Respondent: Adv. M.. J. Van As

Attorneys for Respondent: Hofmeyr, Herbsteins Gihwala, Cluver Walker Inc.

Date of hearing: 9th March, 2000

Date of judgement: 17th March, 2000