

in a dispute between the appellants and the respondent concerning an alleged unfair labour practice as defined in sec 1 of that Act. The second to the sixth appellants had been employed by the respondent. They were dismissed on the 18th July 1996. After they had been dismissed, they instituted proceedings in the Industrial Court in terms of sec 46(9) of the old Act alleging that the respondent's conduct in dismissing them constituted an unfair labour practice and seeking an order of reinstatement. The Industrial Court, after hearing evidence and argument, decided that such conduct did not constitute an unfair labour practice and dismissed the appellants' claim. It is against that determination that the appellants now appeal to this Court.

The facts

- [2] The relevant facts in this matter are largely undisputed. The respondent is a country club based in Mpumalanga. With effect from the 15th January 1996 the respondent employed a new manager, one Mr Van der Merwe. When Mr Van der Merwe took over as manager of the respondent, the respondent was in a weak financial position. Eskom, on which the respondent relied heavily, if not exclusively, for subsidies, informed Mr Van der Merwe that it was giving him 12 months to turn the respondent around failing which Eskom would cut its subsidy and the

respondent would either have to close down or generate its own funding.

- [3] Mr Van der Merwe testified that at various staff meetings he informed the staff that the future of the respondent was hanging in the balance. He also testified that, when he took over as manager of the respondent, the personnel files needed to be updated. They were in such a state that he could not tell, for example, which employees had taken leave and how much leave they were entitled to. Mr Van der Merwe sought to rectify this situation by ensuring that the personnel files were properly updated. In this regard one of the decisions that were made was to prepare written contracts of employment which would be signed by each employee and kept in each employee's file. The respondent referred to these as service agreements. The records showed that at some stage in the past some employees had signed certain written contracts of employment. Using an old contract of employment; Mr Mavuso, the vice-chairman of the respondent, had prepared what he considered to be updated contracts of employment which would be presented to the employees to sign.
- [4] On a number of occasions during the first half of 1996 the respondent asked its employees to sign the service agreements. Some of the employees signed the service

agreements but the second and further appellants did not. In June 1996 the appellants were issued with warnings for refusing to sign their respective service agreements. They were again asked to sign the agreements and were told that, if they failed to do so, they would be dismissed. They still failed or refused to sign the service agreements. They were then dismissed on the 18th July 1996. It appears from their letters of dismissal that their dismissal was summary.

Consideration of the fairness of the dismissal

- [5] As the second and further appellants were dismissed for alleged misconduct and they dispute the fairness of their dismissal, the respondent must show that they committed a material breach of their contracts of employment before it can be said that it had a right in law to terminate the contracts. If it fails to show a material breach of the contracts in circumstances where the dismissal was summary, this will mean that the respondent had no right in law to terminate the contracts. If it did not have such a right in law, then the dismissal will almost invariably be unfair. If, however, it had such a right, that would not be the end of the inquiry. The respondent would still have to show that it exercised that right in a fair manner.
- [6] The first question that arises in this matter is, therefore, whether the conduct of the second and further

appellants in refusing to sign the service agreements constituted a material breach of their contracts of employment. In our law an employer only has a right to summarily terminate a contract of employment where the employee has committed a material breach of the contract of employment. The respondent labelled the conduct of the second and further appellants as a **“failure to comply with a reasonable official order”**.

[7] Although an employee is obliged to obey an instruction from his employer failing which he may be disciplined, this does not apply to a situation where the employee's refusal does not constitute a breach of the employee's contract of employment or where the employee's conduct cannot be said to be unlawful. As the second and further appellants were dismissed for refusing or failing to sign written contracts of employment, the respondent had to show that it was a term of their contracts of employment that they were obliged to sign the written contracts of employment that they were required to sign. The respondent has not proved this.

[8] The respondent also did not prove that the documents presented to the second and further appellants to sign were only records of the actual agreements between the parties. In argument Counsel for the respondent indicated that he could not dispute that the documents included few

terms and conditions of employment. Accordingly the respondent has failed to prove that, by failing or refusing to sign such written contracts, the second and further appellants acted in breach of their contracts of employment.

- [9] The second and further appellants may have been ill-advised in making an issue of the signing of the contracts but that is a far cry from saying that they acted unlawfully or in material breach of their contracts of employment. The respondent was also misguided in dismissing them for such conduct. The effect of the conclusion that the respondent failed to prove a breach of the contracts of employment is that the respondent had no right in law to summarily dismiss the second and further appellants. The dismissal of the second and further appellants was therefore, in those circumstances, both unlawful and unfair. It also constituted an unfair labour practice. In holding to the contrary, the industrial court erred.

Relief

- [10] There remains the question of what relief, if any, should be granted to the second and further appellants. In their statement of case they asked for reinstatement with retrospective effect to the date of their dismissal. That date is the 18th July 1996. The trial in the Industrial Court

was finalised in March 1998 when the determination was handed down. That was just under two years since the date of the dismissal. The appeal in this Court was heard in March 2001. That means that it took three years for the appeal to be heard. The record of appeal was delivered to the Registrar of this Court in terms of the Rules on the 29th of August 2000 and the appeal was set down for hearing on the 1st March 2001.

[11] From the above it is clear that there was no delay in the appeal being heard once the record was ready. It appears therefore that the delay was between the date of the handing down of the determination of the Industrial Court and the date of the delivery of the record. There has been no suggestion that the delay was due to negligence or lack of diligence on the part of any of the parties. If the Industrial Court had made the correct determination, namely, that the dismissal constituted an unfair labour practice, the period of just under two years between the date of dismissal and the date of the determination would certainly not have been so long as to justify a refusal of reinstatement.

[12] The question which arises in this case is whether the long period of time, namely, just over five years, which has lapsed between the date of the dismissal of the second and further appellants and the date of the finalisation of

this matter on appeal precludes the granting of reinstatement. On its own, it should not. However, it is a factor to be taken into account together with all other relevant factors in deciding whether the relief of reinstatement should be granted. In any event this Court must make such order as, in its opinion, should have been made by the court a quo unless special circumstances have arisen since then which make it inappropriate or incompetent to make such an order.

- [13] In the court a quo the respondent led evidence to the effect that it had employed permanent employees in the posts previously occupied by the second and further appellants and that there were no vacancies that could be filled by the second and further appellants. The respondent sought to use this as one of the reasons why the second and further appellants should not be granted reinstatement. Mr Van der Merwe testified that, if the second and further appellants were reinstated, he would not know what to do with the respondent's current employees. He testified that he was working very well with the current employees. He also said that there was a very good spirit in the work place. He asked whether he would be expected to turn to the present employees and tell them that he had no work for them anymore.

- [14] The answer to Mr Van der Merwe's problem is that it was

wrong for the respondent to employ new employees on a permanent basis in circumstances where the respondent knew that there was still pending litigation arising from the dismissal of the second and further appellants and that the latter were still seeking reinstatement in their jobs. According to Mr Mavuso's evidence the current employees were employed on a permanent basis **"last November"**. It is not apparent from the record whether Mr Mavuso said this before or after November 1997. If it was after November 1997, then it would mean that the current employees were made permanent in November 1997. If it was before, it would mean that they were made permanent in November 1996. In either case it was at a time when the respondent knew full well that the litigation was still going on. If it was November 1997, it would mean that the matter was part-heard when the respondent decided to employ the current employees on a permanent basis.

- [15] No reason has been given by the respondent in this matter why it did not do what every reasonable employer does when there is litigation pending between itself and its former employees about their dismissal in which they seek reinstatement and employees are needed to work in the meantime, namely, to employ employees on a temporary basis or to employ them on whatever basis but on the condition that, their contracts of employment will

be terminated if the dismissed employees are granted reinstatement. The temptation to infer that the respondent adopted the attitude that it would **“we will cross that bridge when we come to it”** is irresistible.

[16] Even before the Labour Relations Act, 1995 was passed, our law had reached such a stage of development that courts were required to lean towards granting reinstatement when a dismissal had been found to be unfair unless the employer could show that reinstatement would be inappropriate. If an employee should not have been dismissed in the first place in the sense that there was no valid reason for such employee's dismissal, justice demands, generally speaking, that such employee should be reinstated. The employer cannot, therefore, frustrate the attainment of justice by the device of simply employing another employee on a permanent basis in the dismissed employee's position.

[17] The respondent can only have itself to blame if the second and further appellants are reinstated and it has to decide what to do with its present employees. It is true that, as Mr Van der Merwe testified in the court a quo, the respondent may face litigation from the current employees if it dismisses them in order to accommodate the second and further appellants. The respondent should have foreseen that it was taking a risk of this happening when it employed the current employees without making

it a condition of their employment that their contracts of employment would be terminated if the reinstatement of the second and further appellants was ordered. The respondent must accept the consequences of its action in this regard.

[18] The respondent's witnesses also testified that the second and further appellants should not be reinstated because there was no longer any trust relationship between the parties. Mr Van der Merwe emphasised that there was a lot of trust between himself and the current employees. The question arises as to why this is so if, indeed, it is so. The reason for the dismissal of the second and further appellants was not in any way related to dishonesty. Both parties may have been misguided in handling the matter of the signing of the service agreements in the way that they did. That cannot on its own lead to the disappearance of the trust relationship.

[19] It cannot be said that, simply because the second and further respondents refused to sign a document that they were not under an obligation to sign, that resulted in the disappearance of the trust relationship that had existed between the parties before nor can it be said that the trust relationship which had existed before has disappeared because the second and further appellants have sought to pursue their legal rights through the courts. The trust

relationship cannot also be said to have disappeared because of the time lapse since the dismissal. I think that the position is simply that the respondent would prefer to keep the current employees rather than to have the second and further appellants back. Such a preference does not go to the serious issue of the trust relationship. In any event when an employee has been dismissed in circumstances where he should not have been dismissed, he cannot be denied reinstatement simply because the system he has had to use in order to protect his rights takes a long time to have the matter finalised.

[20] In all of the circumstances I am satisfied that no good reason exists to deny the second and further appellants the relief of reinstatement. Accordingly an order of reinstatement will be made at the end of this judgement.

Should the order of reinstatement be made retrospective? If so, for how long should it be retrospective?

[21] The appellants asked in their statement of case that they be granted an order of reinstatement with retrospective effect to the date of their dismissal. The financial position of the respondent is relevant in this regard. Before Mr Van der Merwe took over as manager of the respondent, the respondent had had to close its restaurant. This had

resulted in the retrenchment of about 12 or 13 employees. Accordingly, Mr Van der Merwe took over at a time when a lot of work needed to be done in order to ensure that the business of the respondent was conducted in such a way that it remained financially viable and Eskom did not cut its subsidy.

[22] In considering this part of the matter, the Court must seek to do justice to both sides. I have already held that the respondent had no right in law to dismiss the second and further appellants and should not have dismissed them. There is no reason not to accept that, had they not been dismissed, they would have continued to work for the respondent in the interim period.

[23] As I have said above, this Court must give such order as, in its judgement, should have been granted by the court a quo at the time of the judgement of the court a quo. In this case that was in March 1998. From the 18th July 1996 when the dismissal took place to March 1998 is approximately 20 months. I am of the opinion that the reinstatement order that should be awarded to the second and further appellants should not be retrospective to the date of dismissal. This is because the respondent's stance that it was never told by the second and further appellants what the nature of their difficulties were with the signing of the service agreements was not disputed in any way. It

is also because the respondent's witnesses made it clear that they would have been amenable to any changes to the contents of the service agreements that the second and further appellants might have wished to be made if they had suggested changes.

[24] The second and further appellants also contributed to this situation in that, had they articulated their difficulties, if there were any, to the respondent, common understanding may have been reached. Of course, the respondent must take a bigger portion of the blame. That is why reinstatement without any retrospectivity would be inappropriate. It must not be forgotten that in the present state of unemployment, the second and further respondents have probably spent the most part of the period without any income. Their suffering should not be overlooked. In these circumstances I am of the view that the reinstatement order that the industrial court should have ordered is one which would have been retrospective for at least 12 months. That still leaves the second and further appellants not having been paid wages for just under one year.

[25] With regard to costs it appears to me that the requirements of law and fairness dictate that the appellants should be awarded their costs on appeal and that in the court a quo no order as to costs should be

made. In the result the order I make is as follows:-

1.The appeal is upheld with costs.

2.The order of the Industrial Court is set aside and replaced by the following one:-

- “a) The dismissal of the second to the seventh applicants by the respondent on the 18th July 1996 constituted an unfair labour practice.**
- b) The respondent is ordered to reinstate the second to the seventh applicants in its employment on terms and conditions of employment not less favourable to them than those that governed their employment immediately prior to their dismissal and to accord them all such benefits as they would have been accorded had they not been dismissed.**
- c) The order in 2 above is to operate with retrospective effect from 12 months from the date of this order.**
- d) There is to be no order as to costs”.**

RMM Zondo

Judge President

I agree

D.M Davis

Acting Judge of Appeal

I agree

B.R. du Plessis

Acting Judge of Appeal

Appearances:

For the appellants	:	Mr Modise
Instructed by	:	Routledge-Modise
Attorneys		

For the respondent	:	Mr Snyders
Instructed by	:	De Klerk Van Dyk &
Snyders		

Date of argument	:	1 March
2001		

Date of Judgement	:	14 September 2001
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