

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

CASE NO: JA55/00

In the matter between:

THERESA NUGGET & 3 OTHERS

Appellants

and

H & M CASINGS PACKAGING

1st Respondent

THE PRESIDENT OF THE INDUSTRIAL

COURT OF SOUTH AFRICA

2nd Respondent

MR EUGENE B.M. VAN ZUYDAM

3rd Respondent

JUDGMENT:

VAN REENEN, AJA:

1] The first respondent is a close corporation the members' interests wherein are held by Mr Carl Emile Herman Coetzee (Mr Herman Coetzee), his wife and their son Mr Neill Coetzee.

2] The first to fourth appellants were employed by the

first respondent, in a factory near Bloemfontein, in the production and packaging of casings made from the intestines of slaughtered animals.

3] It is common cause that during the afternoon of Friday the 10th May 1996 (the 10th May), Mr Herman Coetzee advised the appellants when they collected their pay that their employment with the first respondent had come to an end because he considered that they had resigned earlier that day, and that he and Mr Neill Coetzee at approximately 7h30 on Monday the 13th May 1996 (the 13th May), advised the appellants that their services with the first respondent had come to an end and by refusing them access to its premises prevented them from tendering their services.

4] As the appellants held the view that the first respondent's conduct constituted an unfair labour practice within the meaning thereof in section 1 of the Labour Relations Act, No. 28 of 1956 (the 1956 Act), they after a failed attempt at conciliation, timeously referred the

dispute between themselves and the first respondent to the Industrial Court for determination.

5] The hearing in the Industrial Court commenced on the 2nd February 1998, and was on the 3rd February 1998, postponed to the 8th June 1998. On the last-mentioned date the matter was struck from the roll as the appellants and their legal representatives failed to appear.

6] No further steps were taken in the matter until the appellants' representatives had it set down for hearing under the auspices of the Commission for Conciliation, Mediation and Arbitration on the 31st August 2000. In terms of the provisions of item 22 A of Schedule 7 to the Labour Relations Act, No 66 of 1995 (the 1995 Act), the Minister of Labour had by then, by notice in the Government Gazette, authorised that body to perform the functions of the

Industrial Court.

7] On the 31st August 2000 the proceedings were postponed to be heard on the 16th and 17th October 2000, and by agreement between the parties, commenced **de novo** before the third respondent, who handed down a determination on the 31st October 2000, dismissing the appellants' claims and made no order as regards costs.

8] That determination forms the subject-matter of this appeal.

9] Before entering into the merits of the appeal there is a procedural aspect that needs to be dealt with first.

10] The appellants noted an appeal to this court within the prescribed period, but failed to deliver to the respondents, and file with the registrar of this court, copies of the record of the proceedings within the period of 60 days prescribed by this court's rules.

The appellants on the 6th November 2001, brought an application for the condonation of the late delivery and filing thereof. The first respondent's counsel, Mr De Vries, at the hearing of the appeal, signified an intention on the part of the first respondent to oppose that application and handed in an affidavit attested to by his instructing attorney earlier that day, in which the grounds on which the opposition were based were set out. When Mr Ponoane, who appeared for the appellants, intimated that the appellants required an opportunity to deal with the averments in that affidavit, Mr De Vries withdrew his client's opposition but intimated that it did not accede to the granting of the relief sought.

- 11] This court, in terms of the provisions of Labour Appeal Court Rule 12(1), is empowered "for sufficient cause shown" to excuse any party from compliance with

the provisions of its rules. The question whether good or sufficient cause has been shown to exist is dependent on the exercise by a court of a judicial discretion on the basis of all the circumstances of a particular case, with a view to achieving fairness between the parties (See: **Torwood Properties (Pty) Ltd v South African Reserve Bank** 1996(1) SA 215 (W) at 228 B). Considerations relevant to the exercise of that discretion in the case of an appeal include a) the degree of non-compliance; b) the explanation for such failure; c) the prospects of success in the intended appeal; d) the importance of the case e) the respondent's interest in the finality of the judgment; f) the convenience of the court; and g) the avoidance of delays in the administration of justice (See: **Federated Employers Insurance Co Ltd and Another v McKenzie** 1969(3) SA 360 (A) at 362 F – H). The list is not exhaustive. The fact

that a respondent chooses not to oppose the granting of the relief sought is a relevant but by no means overriding consideration (See: **Salojee and Another NNO v Minister of Community Development** 1965(2) SA 135 (A) at 138 E - F).

12] It appears from the founding affidavit in the application for condonation, that the appellants' representative commenced liaising with the registrar of the Industrial Court as early as the 14th December 2000, in order to locate the tapes on which the proceedings before the third respondent were recorded, with a view to having them transcribed. Despite telephone calls and letters at regular intervals, the tapes became available only on the 15th March 2001, and were handed to Snellers Recordings (Pty) Ltd on the 20th March 2001, who

completed the transcribing thereof on the 1st May 2001. Although the appellants' explanation for their failure to have filed the record of the proceedings within the prescribed 60 day period was adequate, no explanation was provided why the record of the proceedings was filed with the registrar of this court only on the 18th July 2001, and why, despite the fact that the appellant's attorneys had as early as the 6th August 2001 declined to consent to the late filing thereof, the application for condonation was launched only on the 6th November 2001. As the strength of a single consideration or more, may compensate for the weakness of others (See: **United Plant-Hire (Pty) Ltd v Hills** (supra) at 720 E – G), the mentioned deficiencies are clearly not decisive of the outcome of the application for condonation.

13] It is the practice of courts exercising appeal jurisdiction to consider a condonation application at the same time as the appeal, if the availability of the record of the proceedings, the judgment of the court **a quo** and the heads of argument, enable it to do so (See: **South African Allied Workers' Union (in liquidation) and Others v De Klerk NO and Another** 1992(3) SA 1 (A) at 3 B). As all the material enabling it to do so is before this court, the first respondent's application for condonation will be considered at the same time as the merits of the appeal.

14] The sole issue in this appeal is whether the appellants were dismissed by the first respondent on the 13th May in circumstances that constituted an unfair labour practice, as contended by the

appellants, or whether they resigned on the 10th May, as contended by the first respondent.

15] The facts on which the appellants base their contention that the first respondent, by having refused them access to its premises when they tendered their services on the 13th May constituted a dismissal without notice, were not in issue. What the first respondent set out to do was to avoid the legal consequences of such conduct by averring that the appellants had resigned on the 10th of May, which is tantamount to a confession and avoidance. Accordingly the first respondent carried the evidentiary burden to adduce evidence in support of its contention that the appellants resigned.

16] It is common cause that one of the first respondent's

employees, who was referred to only by her first name Alina, suffered injuries in an altercation that took place during working hours in the first respondents factory on Wednesday the 8th May 1996. According to Ms Theresa Nugget (the first appellant), Alina insulted her and her co-workers on her return from the office. When they required an explanation Alina approached Ms Theresa Nugget, grabbed hold of and assaulted her. Ms Maria Kidama (the third appellant) intervened. A co-worker Mr Solomon Madudu Kenke (Mr Kenke) testified that he saw Ms Theresa Nugget fighting with Alina whilst holding an object, that had the appearance of a knife, in her hand and that Ms Dora Nugget, Ms Kidama and Ms Rebecca Matlebe (the fourth appellant) joined in the fight and kicked Alina in the face resulting in a bloodied nose. The appellants disputed Mr Kenke's version: they magnified Alina's

involvement in the fracas and minimised their own. After the factory manager, Mr Pat Ellis (Mr Ellis) had restored order all workers, other than the appellants, were allowed to return to their workstations. Mr Ellis telephonically reported the incident to Mr Herman Coetzee who was in Johannesburg on business and was due to return prior to the 10th May. Pending his arrival the appellants were allowed access to the premises but were not permitted to resume their duties.

17] It was not in dispute that Mr Herman Coetzee returned from Johannesburg during the afternoon of the 9th May, and that he in a telephone conversation with Mr Ellis early on the 10th May arranged a meeting for 10h00 at the First Respondent's premises. Mr Herman Coetzee instructed his

secretary to prepare handwritten first warnings that contained the names and identity numbers of all the appellants as his computer was out of order.

18] It is common cause that a meeting at which Mr Herman Coetzee, Mr Neill Coetzee, Mr Ellis, Mr Kenke and the appellants were present took place at approximately 10h00 on the 10th May in an office in the factory. Mr Kenke's intended function at the meeting was that of an interpreter as Mr Herman Coetzee was Afrikaans speaking, a language which the appellants, save for Ms Dora Nugget did not understand.

19] The appellants, except Ms Matlebe, testified at the hearing. In the case of Ms Matlebe certain facts that she would have testified about were recorded as having been admitted. Mr Herman Coetzee and Mr

Kenke testified on behalf of the first respondent. The parties' respective versions differ as regards what transpired at the above-mentioned meeting and immediately thereafter; the circumstances relating to the handing over by the appellants of their overalls and gumboots; and whether the appellants were present outside the first respondent's premises late during the afternoon of the 10th May as well as their behaviour at the time.

20] The appellants' version of what took place at the meeting on the 10th May was that Mr Herman Coetzee had a piece of paper in his possession that he said had been obtained from "Manpower" (the Department of Labour) and wanted them to sign once he had read it out aloud and Mr Kenke had translated it. Ms Dora Nugget demanded to be allowed to read the document. Mr Coetzee denied her the

opportunity to do so and told the appellants that they had nothing to fear because it was from the Department of Labour and recorded that they had to do whatever their employer required them to do even if it entailed having to go outside and pick up papers or stones. Mr Herman Coetzee then placed the document on the table for signature. When Ms Dora Nugget refused to sign it he said that the appellants were at liberty to go to the Department of Labour and ask for a similar document so that they could read it. The appellants then proceeded to the offices of the Department of Labour and spoke to a person called Jasper who disavowed any knowledge of papers that had been handed to Mr Herman Coetzee for the appellants' signatures. When it was put to Ms Dora Nugget that she and the appellants left because they were unhappy about the fact that they were being issued with a warning, she replied: "I never knew it was a

warning letter". When it was further put to her that the document Mr Herman Coetzee required the appellants to sign was a first warning her response was: "If he did that I would ask him what have I done?" When the cross-examiner put it to Ms Dora Nugget that the appellants had refused to take the document with them, left the office and "then you yelled out in very uncertain terms that you're quitting your job and that you will come back for your pay", she replied "It is not like it is said, I said he must give me the paper, he refused, he said I will get the paper if I go to manpower."

The appellants then proceeded to the offices of The Food and Allied Workers Union (FAWU) where an organiser called Juliet advised them to return to work.

21] When the appellants arrived back at the factory Mr Neill Coetzee advised them not to resume work but to await the arrival of Mr Herman Coetzee. When he arrived they were called into the office one at a time and presented with two envelopes, the one containing their wages and the other their leave pay. The leave pay was offered to them because Mr Herman Coetzee alleged that they had resigned earlier that day. The appellants

accepted their wages but refused to accept the envelopes containing their leave pay. Mr Herman Coetzee then instructed Mr Neill Coetzee to take possession of the appellants' overalls and gumboots. When Mr Neill Coetzee refused to do so Mr Herman Coetzee removed them by force from Ms Theresa Nugget, whereafter the others placed their overalls and gumboots outside the office. The appellants then returned to the offices of FAWU where they were advised that they had not been dismissed and should return to work. The appellants denied having gathered outside the first respondent's premises in a threatening mood and that Ms Theresa Nugget had scratched the kombi in which other employers had been transported.

22] The appellants further testified that when they returned on the 13th May, at 07h30, Mr Herman Coetzee positioned himself at the entrance to the premises; told them that their services were terminated; and refused them access to the premises.

23] Mr Herman Coetzee's evidence was that he instructed his secretary to type letters containing a first warning for each of the appellants. Thereafter he, Mr Neil Coetzee and Mr Ellis went to the factory. He brought Mr Kenke "as a witness because he is a supervisor in the factory". He said that his idea was to give the appellants a warning and to tell them that they had to stop with their fighting, with their go-slow as well as stirring up people in the factory. They then summoned the appellants. He testified that he told

the appellants that he was giving them a first warning. He said that he then read the warning out to them and told them that, if they could not understand it, “we’ll explain it to Solomon [Mr Kenke] and when he couldn’t understand certain words I explained it to him in certain terms and he understood that and he transferred it over to these people, to the ladies.” According to the record of the proceedings Mr Herman Coetzee was at that stage shown a document which he identified as “a letter demanding them or giving them a first warning then to (indistinct) stirring up people in the factory” and having been asked to “say it in Afrikaans” seemingly, reading from a document, said - “van werksopdragte, opstokery onder personeel, sloerstaking en baklei met personeel which they understood very clearly”. When he was asked the basis of his statement that the appellants understood what was written in the document he said: “because that was transferred over to them from Solomon to them and I asked them whether they understood and they said yes and then I said take the, there’s the letter I turned it around on the table and I said look, and Dora came along and she read it and she says I refuse to sign then I said to her but if you don’t understand this letter and go to the Department of Labour and let them explain it to you, which she refused to do - all of them refused.” When Mr Herman Coetzee was asked what happened after the appellants had refused to sign he said: “They never gave me a chance to explain to them why I’m giving this to them, Dora said in her words ‘Ons maak klaar, ons loop’, and they turn around and they walked out of the office and on the outside of the office, but I don’t understand their language, is that Theresa and some of the people in the factory heard her say ‘maak op ons pay’ and the “f” word and she says we’re leaving, we’re leaving the company all of us.” He testified that he turned to Mr Kenke and Mr Ellis and confirmed that they had heard “what was going on there and they said yes.”

24] Thereafter Mr Herman Coetzee took Mr Kenke to the Department of Labour where he wanted him to sign a statement as to what had happened earlier that day. There a Mr Jasper Francois Bolieris took a statement from Mr Kenke. He said that the statement was later given to him. It appears that a statement purporting to be such a

statement, but not part of the record on appeal, was shown to Mr Herman Coetzee and identified as the statement that Mr Kenke had made. He testified further that, after the appellants had left the office, he did not know where they had gone to but instructed his accounts staff to make up their pay and leave pay because, on his version, they had said that they were resigning.

25] Mr Herman Coetzee testified that the appellants returned later that afternoon to collect their wages. When their turn came he told them that as they had resigned they were entitled to their leave pay in addition to their wages but that they refused to accept any leave pay. He then told Mr Neill Coetzee to take possession of the appellants' overalls; that he complied; and placed them outside the office. He further testified that after the appellants had gone to the outside of the premises, Mr Kenke reported that it seemed that they were intent upon intimidating the other workers. After Mr Herman Coetzee had satisfied himself that the appellants were in an unfriendly mood he gave instructions for the other workers to be transported from the premises by means of a kombi and a bakkie and when those vehicles slowed down at the entrance to the premises Ms Theresa Nugget scratched the side of the kombi with a knife.

26] Mr Herman Coetzee testified further that he, because

of what had happened on the afternoon of the 10th

May, anticipated further upheavals on the 13th May,

and for that reason was present at the factory at

7h15. Mr Ellis, who was stationed at the door of the

factory was instructed not to allow the appellants in.

Mr Herman Coetzee and his son, who had stationed themselves at the entrance to the premises, told the appellants that as they had resigned the previous Friday, their employment with the first respondent had come to an end and denied them access to the premises.

27] An important feature of the evidence of Mr Kenke, who testified on behalf of the first respondent, is that he failed to state in his evidence that Ms Dora Nugget made the statement that Mr Herman Coetzee attributed to her, namely, “ons maak klaar, ons loop”. He did not do so in his evidence in chief, under cross-examination, when he was being questioned by the commissioner or in re-examination. It is strange that the respondent’s representative did not direct any questions to Mr Kenke aimed at obtaining corroboration for Mr Herman Coetzee’s version,

especially because by the time he testified, Ms Dora Nugget had already given her evidence and it was known that she had denied that she had made such a statement. The fact that Mr Kenke did not corroborate Mr Coetzee's version on such a crucial aspect of the respondent's case, when it is common cause that he was present at the meeting concerned, creates serious doubt about the reliability of Mr Herman Coetzee's version thereanent. Mr Kenke, however, did corroborate Mr Herman Coetzee's evidence that he offered the document to the appellants and said that it was a warning. Part of Mr Kenke's evidence was that "Mr Coetzee read the warning to Dora and gave it to her and I also read the document for them, that paper for them. Mr Coetzee showed them where to sign and they refused to sign. They said if that is the case they can go. Mr Coetzee said you can go and go to manpower. He said you can have the paper and take the paper with you and they refused, They left the letter behind and went away". For them to have said that if that

is the case, they would go, seems to me to be more consistent with Mr Herman Coetzee having refused them something than vice versa.

Mr Kenke also confirmed that the appellants had gathered outside the premises and exhibited such animosity that he requested Mr Herman Coetzee to provide transport to the other employees and that when the vehicles left the premises one of the appellants scratched the kombi with a knife.

28] The third respondent made negative credibility findings against the appellants who testified at the hearing on the bases that they contradicted themselves on numerous occasions and failed to corroborate each other. Although the third respondent did not make specific credibility findings in regard to Mr Herman Coetzee he preferred his

version of the events at the meeting during the morning of the 10th May to that of the appellants as, in his view, it was corroborated by Mr Kenke whom he found to have been an impressive witness. The third respondent, on the basis of the first respondent's version, found that the appellants had resigned on the 10th May and accordingly, dismissed their claims for reinstatement or compensation.

29] I am in disagreement with the third respondents conclusions that the appellants who testified contradicted themselves on numerous occasions; that they failed to corroborate each other; and that Mr Herman Coetzee's version was to be preferred to theirs. Not only is Mr Herman Coetzee's evidence not beyond criticism in a number of respects but there are material discrepancies between his evidence and that of Mr Kenke. However, as the

central issue in this appeal, namely, whether or not the appellants resigned on the 10th May, can be decided on the first respondents version it is not necessary to resolve the factual conflicts between the different versions.

30] It is not in dispute that Mr Herman Coetzee had formed the view that the appellants had resigned when they left the meeting during the morning of the 10th May. That he had formed that view by then is apparent from the fact that he had their pay and leave pay made up and told them that they had resigned when they returned the afternoon to collect their pay. It accordingly, is unnecessary to have regard to subsequent events in order to determine whether the appellants had resigned or not.

31] With regard to the test for resignation Farlam J (as

he then was) in **Fijen v Council for Scientific and Industrial Research** (1994) 15 ILJ 759 (LAC) who, at 772 C – D, said that an employee has to “either by words or conduct evince a clear and unambiguous intention not to go on with his contract of employment” and that to resign effectively has to “act in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract.” That view received the imprimatur of this court in **CEPPWAWU and Another v Glass Aluminium 2000 CC** [2002] 5 BLLR 399 at 406 F – G.

32] As on the first respondent’s version none of the appellants explicitly stated that they were resigning it must be determined whether it could be inferred from their utterances and conduct that they in fact did so.

33] That enquiry must be preceded by an investigation into what it is that the appellants are alleged to have said and done prior to and whilst they were leaving the meeting on the 10th May. The words attributed

to Ms Theresa Nugget (see paragraph 23 above) constituted hearsay which, in the absence of compliance with any of the requirements of Section 3(1) of the Law of Evidence Amendment Act, No 45 of 1988, is inadmissible (See: **S v Ndhlovu and Others** 2002(2) SACR 325 (SCA)). That leaves one with the evidence of Mr Herman Coetzee that the **ipsissima verba** used by or on behalf of them were:

“Ons maak klaar ons loop” (per Dora Nugget); “... they just said I’m leaving, I’m going”, “... ons maak klaar, we’re leaving, ons loop”, “... look we’re leaving, we’re leaving to-day” and the evidence of Mr Kenke that they said: “... if that is the case (i.e. that they were required to sign the documents presented to them) they can go.” On the basis of Mr Herman Coetzee’s aforementioned evidence it is not possible to find, with any degree of confidence, what the exact words were that were used by or on behalf of the appellants - if on the facts the existence of

such authority can be construed - before and whilst they were leaving the meeting. Accordingly the high-water mark of the first respondent's case is the evidence of Mr Kenke who testified that they said they would go if they had to sign the document that was being presented to them for signature.

34] Whatever the appellants said and did must, however, be considered against the backdrop that there was disaffection because Alina did not form part of the meeting and Mr Herman Coetzee, on his own version, invited them to take the document that he required them to sign to the Department of Labour so that the import thereof could be explained to them. It is not in dispute that the appellants in fact attended at the offices of the Department of Labour and from there proceeded to the offices of FAWU where they were advised to return to their employment. They did

so and refused to accept leave pay when it was tendered to them on the basis that they had resigned earlier. The appellants did not do anything after the morning meeting on the 10th May that was consistent with their having resigned. On the contrary the fact that they endeavoured to report for work on the 13th May is clearly inconsistent therewith. The appellants aforementioned conduct, in my view, is clearly irreconcilable with their having resigned on the 10th May.

35] A clear and unambiguous intention not to continue with their contracts of employment with the first respondent, in my view, is not the most plausible of the possible inferences of which the appellants' aforementioned words and conduct are susceptible. I accordingly incline to the view that the first

respondent failed to discharge the evidentiary burden of showing that the appellants resigned on the 10th May and that the third respondent erred in concluding that they had done so.

36] The first respondent by having refused to allow the appellants access to its premises on the 13th May and subsequently, in my view, evinced a clear intention of terminating the contracts of employment between it and the appellants in that it rendered their continued employment with the first respondent impossible. Such conduct constituted a dismissal without notice (See: **John Grogan: Workplace Law**, 6th Ed, at 104).

37] Did the first respondent's dismissal of the appellants constitute an unfair labour practice within the meaning thereof in Section 1 of the 1956 Act?

38] It is trite that the question whether a labour practice is unfair or not has to be determined with reference to all the facts and circumstances of a particular case (See: **National Union of Metal Workers of SA and Others v MacSteel (Pty) Ltd** (1992) 13 ILJ 826 (A) at 834 H).

39] The finding that the appellants had not resigned on the 10th May leads to the conclusion that the first respondent had no justification whatsoever for having summarily dismissed them on the 13th May. It is axiomatic that such dismissal would be unfair both substantively and procedurally and would constitute an unfair labour practice.

40] In terms of Section 17 (21A)(c) of the 1956 Act, read with item 22(2) of Part E of Schedule 7 this court may make an order or decision according to the requirements of the law and fairness.

41] Which of the remedies provided for in Section 46(9) (d) of the 1956 Act should the appellant's be awarded?

42] As regards how a court should approach the exercise of its discretion in respect of the remedies provided for by section 46(9)(a) of the 1956 Act, Cameron J (as he then was), gave the following exposition in

National Construction Building and Allied Workers Union & Another v MF: Woodcraft (Pty)

Ltd (1997) 18 1LJ 165 (LAC) at 171 J – 172 H:

“For some years the Industrial Court and the Labour Appeal Court took the approach that, in the absence of special circumstances, an unfair dismissal should have as its consequence an order for reinstatement. This approach was most notably expressed by Goldstein J in **Sentraal-Wes Koöperatief Bpk v Food & Allied**

Workers Union & others (1990) 11 ILJ 977 (LAC) at 994 E:

‘Prima facie, if an unfair dismissal occurs the inference is that fairness demands reinstatement. And it is for the employer to raise the factors which displace such inference.’

In **Performing Art Council of the Transvaal v Paper Printing Wood & Allied Workers Union & Others** 1994(2) SA 204 (A) at 219 A – C (the PACT case); (1994) 15 ILJ 65 (A), Goldstone JA, on behalf of the majority of the appellate Division, rejected this approach as ‘too widely stated’:

‘No reasons are furnished for those conclusions and, in my opinion, they are far too widely stated. In every case the Industrial Court must make a reasonable determination. In some cases fairness and justice may dictate that reinstatement is the proper relief. In others compensation or some other form of relief may be more appropriate. Each case must depend on its own

facts. A rule of thumb, even if applied on a prima facie basis, will tend to fetter the wide discretion of the Industrial Court (or the Labour Appeal Court). That result is one to be avoided. In my opinion the correct approach is to give due consideration to the relevant conduct of the parties and, in the light thereof, to decide upon the appropriate relief.'

Less than a year after the PACT decision, however, the Appellate Division put a further gloss on the test for reinstatement. In **National Union of Metalworkers of SA & others v Henred Fruehauf Trailers (Pty) Ltd** 1995(4) SA 456 (A) at 462 H – I (1994) 15 ILJ 1257 (A)), the PACT approach, namely that the correct attitude was to give due consideration to the parties' relevant conduct, and in the light of that, to decide upon the appropriate relief, was reaffirmed. However, Nicholas AJA, on behalf of the majority of the court, added at 462 I – 463 A:

'Where an employee is unfairly dismissed he suffers a wrong. Fairness and justice require that such wrong should be redressed. The Act provides that the redress may consist of reinstatement, compensation or otherwise. The fullest redress obtainable is provided by the restoration of the status quo ante. It follows that it is incumbent on the court when deciding what remedy is appropriate to consider whether, in the light of all the proved circumstances, there is reason to refuse reinstatement.'

This formulation to my mind comes very close indeed to endorsing the original approach by Goldstein J in the **Sentraal-Wes** case, to the effect that it is an inference, at least prima facie, that an unfair dismissal merits reinstatement. In the

Henred Fruehauf formulation, once there is an unfair dismissal, the inquiry is whether there is reason to refuse reinstatement.”

43] Has it been shown that there is reason to refuse the reinstatement of the appellants?

44] The only evidence placed before the Industrial Court by the first respondent in order to show that a reinstatement order would be unreasonable as between it and the appellants, was that as a result of the reduced production levels because of the importation from abroad of casings at prices lower than the first respondent's production costs, a number of its employees had to be retrenched and more retrenchments were anticipated in the future. Although a change in staff structures may in a given case justify refusing reinstatement (Cf: **Khumalo & Others v Millburg Painting Contractors (Pty) Ltd** (1988) 9 ILJ 338 (IC) at 340 I) it, in my view, does not

justify refusing to restore the **status quo ante** in the instant case. If the appellants can no longer be employed by reason of the first respondent's changed staff requirements, retrenchment procedures could be implemented (See:

Provinsiale Administrasie: Wes-Kaap v

NEHAWU [2000] 5 BLLR 566 (LAC) at 568 J – 569

A). The first respondent has only itself to blame for not having placed other evidence before the Industrial Court to show that reasons exist for not restoring the **status quo ante** (Cf: **Chevron**

Engineering (Pty) Ltd v Nkambule & Others

[2001] 4 BLLR 395 (LAC) para 46).

45] The only other aspect that, in my view, could possibly militate against the retrospective reinstatement of the appellants is the considerable time-lapse since their dismissal. It appears to me to be axiomatic that the lapse of time since a dismissal, per se, cannot be a bar to retrospective reinstatement: it is a factor only if to order it will result in unreasonableness as between an employer and an employee. In that event, the remedy of restoring the **status quo ante** should be so structured that such a

result is avoided. The dispute between the appellants and the first respondent was referred to the Industrial Court on the 8th August 1996. The trial commenced on the 2nd February 1998 and continued until the next day when it was postponed until the 8th of June 1998 and scheduled to continue for a further two days thereafter. As neither the appellants nor their representatives, legal or otherwise, were present on the date to which the matter had been postponed it was struck from the roll. After an absence of any activity the matter was by means of a notice dated the 10th August 2000 set down for hearing on the 31st August 2000. On that date the matter was postponed to the 16th and 17th October 2000 and finalized. Of the appellants that testified in the Industrial Court only Me Theresa Nugget was questioned about the delay, but the questioning was only in respect of the period 8 June 1998 to 31st August 2000. The gravamen of her responses thereanent was that the appellants could not communicate with their representative because he/she “was staying far away” and that FAWU undertook to appoint another representative and did so. As the hearing before the third respondent was completed within two days the trial could have been finalized had the appellants and their representative(s) not failed to put in an appearance on the 8th of June 1998. There is no explanation for such failure and why they did not pursue their claim between that date and August 2000. The appellants had failed to secure alternative employment and accordingly the prosecution of their case against the first respondent could not have been unimportant even if allowance is made for their lack of education and sophistication. Despite the importance of the matter to them the appellants failed to appear on the 8th June 1998

and did not take any steps to advance its conclusion until the 10th August 2000 and by their remissness delayed the completion of the trial in the Industrial Court by approximately 26 months. As it in my view would be unfair to the first respondent to allow the appellants to benefit from their remissness by reinstating them until the date of their dismissal, I incline to the view that they should be reinstated retrospectively but to a date approximately 26 months after their dismissal i.e. the 13th of July 1998.

46] In the premises I am of the opinion that the appeal should succeed and that the order of the third respondent dismissing the appellants' claim should be set aside and substituted with an order that the claim succeeds and that the appellants are reinstated with effect from the 13th July 1998 on terms and conditions no less favourable than those that governed their employment with the first respondent as at the time of their dismissal.

47] It follows that I am of the view that the appellants have succeeded in showing the existence of good cause and that the application to condone the late delivery and

filing of the record of the proceedings should be granted.

48] Mr De Vries drew attention to the fact that the appellants in respect of the proceedings in the Industrial Court were responsible for wasted costs having been incurred by the first respondent in respect of the hearing scheduled to commence on 8th June 1998 and requested that the appellants should be ordered to pay such costs even if the appeal succeeds. On the facts before us, fairness dictates that the appellants should be ordered to pay the first respondent the wasted costs incurred by it in respect of the hearing scheduled to commence on the 8th June 1998 despite the fact that they have been substantially successful in the appeal.

49] As far as the costs of the appeal are concerned Mr De Vries requested the court to dismiss the appeal with costs. Mr Ponoane, on the other hand, requested that the appeal be upheld and that no order should be made as regards costs. Mr Ponoane's request is acceded to and

accordingly no order is made as regards the costs of the appeal.

50] The following orders are made:

- The appellants are ordered to pay the first respondent the wasted costs incurred by it in respect of the hearing scheduled to commence on the 8th June 1998.

- The application for the condonation of the late delivery and filing of the record of the proceedings is granted without any order as regards costs.

- The appeal succeeds and the order made by the third respondent in Industrial Court in Case No FS18213 (ICF 11/2/0240) is set aside and substituted with the following order:

“a) The application is granted and first, second, third and fourth applicants are reinstated as from the 13th July 1998 on terms

and conditions no less favourable than those that governed their employment with the first respondent at the time of their dismissal;

b) No order is made as regards costs.”

4] No order is made as regards the costs of the appeal.

D. VAN REENEN
Acting Judge of Appeal

I agree.

R.M.M. ZONDO
Judge President

I Agree.

M.T.R. MOGOENG
Judge of Appeal

Appearances:

For the appellants:

Mr M. Ponoane instructed by the Food and Allied Workers
Union.

For the first respondent:

Adv J.D. de Vries instructed by Webbers

Date of Hearing: 20 November 2001

Date of Judgment: 11 December 2002