

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA 02/18

In the matter between:

MOBILE TELEPHONE NETWORKS (PTY) LIMITED

Appellant

and

SOMAHKHANTHI PILLAY AND 37 OTHERS

Respondents

Coram: Waglay JP, Coppin JA et Murphy AJA

Heard: 12 February 2019

Delivered: 05 April 2019

Summary: Application for payment of arrear salary consequent upon Labour Appeal Court's order declaring that employees transferred to employer as contemplated in section 197 of the LRA – employer refusing to heed to court order prompting employees to seek payment of remuneration from the date of the transfer, including mora interest – employer raised an *exceptio non adimpleti contractus* alternatively prescription as defences to the claims for remuneration. The Labour Court upheld the employees' claims but only granted mora interest from the date of the Labour Appeal Court's order

The employer's appeal is centered around its defences in the court below while the employees cross-appealed the Labour Court's finding on mora interest-

In respect of the *exceptio* court held that: the tender of services was implicit in the employees' conduct in launching the application for a declaratory order. Further that, it is disingenuous for the employer to contend that the employees did not tender their services to it, when it vigorously resisted their claims that it had become their employer.

Concerning the prescription, court held that obtaining a declaratory order, that the appellant was indeed their employer, was essential and, thus, effective in interrupting the running of prescription in respect of their claims for remuneration for the period 1 December 2010 up to and including 21 April 2015. In those circumstances the claims had not prescribed.

Cross- appeal - mora interest at the applicable legal rates is payable for the period 1 December 2010 up to and including 21 April 2015 in respect of the remuneration for that period that remained unpaid subsequent to its due date, and shall continue to accrue until the payment in respect of such remuneration is made.

Appeal dismissed with costs and cross –appeal upheld.

COPPIN JA

- [1] This is an appeal against the judgment of the Labour Court (Gush J), with the leave of that court (“the court *a quo*”). It concerns the following: the duty to tender services in a claim for arrear remuneration, the accrual of mora interest on the arrears, and the prescription of those claims, consequent upon a declaratory order issued by this Court, *inter alia*, declaring that the respondents became employees of the appellant when it acquired a business as a going concern, as contemplated in section 197 of the Labour Relations Act ¹(“the LRA”).
- [2] The appellant contests the correctness and validity of an order made by the court *a quo*, *inter alia*, directing it to pay remuneration to each of the respondents for the period 1 December 2010 to 21 April 2015; dismissing its defence that the claims for such remuneration prescribed and ordering the appellant pay the costs of the proceedings. The respondents are counter appealing that court’s dismissal of their claims for mora interest on their arrear remuneration.
- [3] The record of appeal was filed late and in a substantive, unopposed application, the appellant sought reinstatement of the appeal. Considering all the relevant factors and the interest of justice, the late filing was condoned and the appeal was reinstated.
- [4] The facts are largely common cause. The respondents were employees of Interaction Call Centre (Proprietary) Limited (“Interaction Call Centre”), a call centre business operating from Mount Edgecombe in Durban, when the appellant took over its business as a going concern on 1 December 2010.
- [5] Notwithstanding the take-over, the appellant refused to recognise the respondents as its employees, disputed that the take-over fell within the ambit of section 197 of the LRA and that the respondents’ contracts of employment had automatically transferred to it as contemplated in that section. Instead,

¹ Act 66 of 1995.

the appellant offered employment to certain selected employees at Interaction Call Centre.

- [6] On 11 May 2011, the respondents launched application proceedings in the Labour Court for an order, *inter alia*, declaring that the appellant's acquisition of the business of Interaction Call Centre fell within the ambit of section 197 and that, consequently, the respondents had become employees of the appellant.
- [7] The respondents appealed to this Court against the dismissal of their application by the Labour Court. In a judgement handed down on 21 April 2015, this Court upheld the respondents' appeal with costs, set aside the Labour Court's order dismissing the application and substituted it with an order in the following terms: declaring that there was a transfer of business as a going concern from Interaction Call Centre to the appellant and that the transfer fell within the ambit of section 197; secondly, declaring that the respondents are in law employees of the appellant "effective from 1 December 2010 with no loss of service"; and lastly, ordering the appellant to pay the costs in that matter.
- [8] Notwithstanding the order of this court of 21 April 2015, the appellant failed and/or refused to pay the respondents any remuneration. As a result, the respondents launched another application in the Labour Court in which they claimed relief, essentially, directing the appellant to give effect to this Court's order. In particular, they sought orders directing the appellant to provide each of them with contracts of employment and to pay the remuneration that was due to them in terms of their contracts of employment from 1 December 2010 up to the date of the launch of the second application, inclusive of mora interest, and costs.
- [9] Shortly before the hearing of the application, the appellant tendered to pay the remuneration that was due to the respondents from 22 April 2015 to 27 June 2016. The tender was accepted by the respondents and the hearing proceeded in respect of the remaining issues, namely, whether the respondents were entitled to be paid remuneration for the period 1 December

2010 up to 21 April 2015 and whether that remuneration would include mora interest.

- [10] The appellant resisted the claims on, essentially, two grounds. It raised an *exceptio non adimpleti contractus*, a defence available to a party to a contract where the performance of obligations are reciprocal, that its obligation to perform has not arisen, because the (suing) party has not performed its obligation(s).² The appellant contended that it was essential for the respondents to have, at least, tendered their services to the appellant in order to be entitled to the remuneration, and submitted that since the respondents had failed to tender their services to the appellant on 1 December 2010, or, at least, to aver having tendered their services then, they had failed to make out a case for the payment of the remuneration. In the alternative, the appellant raised prescription as a defence, contending that the claims for remuneration for that period had prescribed in terms of the Prescription Act³, as more than three years had elapsed since the remuneration became due in terms of the contracts of employment.
- [11] Having dismissed the *exceptio* and prescription defence, the court *a quo* held that the respondents were entitled to payment of remuneration for the period 1 December 2010 to 21 April 2015, but held that mora interest only accrued from the date of this Court's order on 21 April 2015, because it is only then (according to the court *a quo*) that the remuneration became due. Accordingly, the court *a quo* ordered the appellant to pay the respondents the amounts due to them in terms of their (respective) contracts of employment for the period 1 December 2010 up to and including 21 April 2015, but only awarded mora interest from 22 April 2015 on the amounts owed for that entire period. The court *a quo* also ordered that "[t]he calculation of the quantum of the remuneration is to be based on the principle applied by the [appellant] to the calculation of the tender accepted by the [respondents] in respect of the remuneration payable to the [respondents] for the period from 22 April 2015 to

² *Grand Mines (Pty) Ltd v Giddy* NO 1999 (1) SA 960 (A); *BK Tooling (EDMS) Bpk v Scope Precision Engineering (EDMS) Bpk* 1979 (1) SA 391 (A).

³ Act 68 of 1969.

5 July 2016” (my substitution). In addition, the appellant was ordered to pay the costs of the application.

- [12] On appeal, the appellant, basically, persists with the arguments it made in the court *a quo*. It submits that the court erred in rejecting its defences and in ordering it to pay the costs of the application. The respondents, on the other hand, argue that the court *a quo* was correct in that regard, but erred in finding that mora interest only accrued from 22 April 2015.
- [13] The issues for determination on appeal are thus reasonably crisp, namely, firstly, whether the respondents had made out a case for the payment of the remuneration they claimed for the period 1 December 2010 to 21 April 2015; secondly, whether any of the claims for this period had prescribed as envisaged in the Prescription Act; thirdly, whether mora interest on the amounts due for that period only accrued as from 22 April 2015; and, lastly, whether the court *a quo* had exercised its discretion correctly in ordering the appellant to pay the costs. I intend to deal with each of those issues in turn.

The nature of the order of 21 April 2015

- [14] In their founding affidavit in the application, the respondents (i.e., the applicants there) aver, *inter alia*, that in failing to pay them the appellant had failed “*to comply with the spirit and letter*” of the order of this Court of 21 April 2015. In the replying affidavit, they specifically mention that they “*had been deprived for a substantial period of time of the relief that should necessarily flow from the Labour Appeal Court order which is their reinstatement, and their right to payment for the period December 2010 to date of reinstatement, together with mora interest.*” (My emphasis).
- [15] The question thus arises whether this Court’s order of 21 April 2015 was a reinstatement of the respondents, and notwithstanding, whether it implicitly directed the appellant to pay to the respondents, the amount of remuneration that was due to them (respectively) from 1 December 2010 to 21 April 2015.
- [16] If this was indeed a reinstatement order, then the Constitutional Court’s decision in *National Union of Metalworkers of SA obo Fohlisa and Others v*

*Hendor Mining Supplies (A Division of Marschalk Belleggings (Pty) Ltd*⁴ ("*Fohlisa*") provides the answer to the first two issues to be determined without any need for further analysis.

[17] In *Fohlisa*, it appears to have been established that a (retrospective) reinstatement order, in fact, implicitly requires the employer to pay the employees their backpay for the retrospective period. It was held that where a claim for backpay, for the retrospective period, is based on a simple reinstatement order, the claim arises from the reinstatement order and not from the employment contract, even though the employee's entitlement to backpay flows from the reinstated contract of employment.⁵ It was further held concerning its prescription, that such a claim constitutes a judgement debt with a prescriptive period of 30 years.⁶ Regarding the *exceptio non adimpleti contractus*, it was held in *Fohlisa* that in such a case, the defence was not available to the employer in respect of the retrospective backpay (i.e. up to date of the reinstatement order), because the court that gave the reinstatement order had already, albeit implicitly, ordered payment of such backpay. The defence would only have been available to an employer if the claim arose from contract.⁷

[18] However, despite the wording of the second paragraph of this Court's order of 21 April 2015, it is not a reinstatement order. The respondents were never dismissed and never lost their employment, which is a necessary circumstance for reinstatement.⁸ The order of 21 April is a mere declaration of rights,⁹ without any consequential relief. It declared that when the appellant acquired the business of Interaction Call Centre, for whom the respondents were working at the time, there was "a transfer of a business as a going concern" by Interaction Call Centre to the appellant, and that the transfer fell within the ambit of section 197 of the LRA. Significantly, it goes further and

⁴ *National Union of Metalworkers of SA obo Fohlisa and Others v Hendor Mining Supplies (A Division Belleggings (Pty) Ltd* (2017) 38 ILJ 1560 (CC) ("*Fohlisa*").

⁵ *Fohlisa* (above) at paras 10-14 (Madlanga J); at para 90 (Zondo J).

⁶ *Fohlisa* (above) paras 15, 22-24 (Madlanga J); para 29 (Zondo J).

⁷ *Fohlisa* (above) paras 116-123 (Zondo J); J Grogan "Basic Principles" ELJ (June 2017; Part 3) (Lexis Nexis).

⁸ See: s 193(a) and s193(2) of the Labour Relations Act 66 of 1995 ("the LRA").

⁹ In terms of s 158(a)(iv) of the LRA the Labour Court has the power to grant a declaratory order.

declares that the respondents were, in law, the employees of the appellant from 1 December 2010 “with no loss of service”. The order clearly implied, *inter alia*, that as far as the respondents’ employment was concerned, the transfer was seamless, their service unbroken, and they ought to suffer no loss of “service” as a result of the transfer.

[19] Section 197 (2) of the LRA spells out the position of the new employer and the employees, unless otherwise agreed by them, as contemplated in that subsection. The same terms and conditions that were applicable to the employees under the old employer “continue in force” under the new employer. The new employer “*steps into the transferor’s shoes, and after the transfer is affected, simply employs the transferred employees as if they had always been on its payroll*”.¹⁰ It is thus implicit in section 197 that the new employer, like the old employer, has a duty, *inter alia*, to pay the employees their wages as and when they fell and fall due in terms of their, respective, employment contracts.

[20] Even though it is not a retrospective reinstatement order, this Court’s order of 21 April 2015, not only implicitly declares that the new employer is to allow the employees to work, but also that it pays the arrear remuneration that is due to them in terms of their contracts of employment, at least up to the date of the order.

The tender of services

[21] The court *a quo*, in essence, held that taking into account the nature and effect of section 197 – “it would appear that it was not required of the employees to tender their services where the business employing them is transferred in accordance with section 197”, because “the employment continues uninterrupted”. It held, alternatively, that the respondents had in fact tendered their services to the appellant as “[n]othing could be a clearer tender of their service by the [respondents] than their referral of the dispute to the Labour Court concerning the applicability of s 197 and the relief they sought”.

¹⁰ J Grogan *Workplace Law* (9 ed. Juta) p 251.

- [22] Counsel for the appellant criticised those findings and, relying on what he perceived was held by this Court in *Coca-Cola SABCO (Pty) Ltd v Van Wyk*¹¹ (“Coca-Cola”) concerning the tender of services, argued that the court *a quo*, therefore, erred in its finding that the respondents “were not in law to tender their services before instituting a contractual claim for remuneration”. Counsel also argued that there was no “basis in law for the court *a quo*’s conclusion that the mere launching of a section 197 application constituted a tender of services by the respondents”.
- [23] The reliance on the decision in *Coca-Cola* was misplaced. In fact, that decision is authority for the proposition that an employee’s tender of her labour after the reinstatement is a tender in terms of the employment contract and the employee is therefore entitled to payment in terms of the contract of employment.¹² In that matter, this Court’s statement concerning the tender of services turned on the question how the reinstated employee could recover remuneration between the date of the reinstatement award and the date of actual reinstatement, if she tendered her services, because the LRA does not expressly provide for relief between the date of the reinstatement award and the date of actual implementation of the award. The issue in the present matter is different. In any event, what this Court had to say about the matter in *Coca-Cola* seems to have been overtaken by the Constitutional Court’s judgements in *Fohlisa*.
- [24] In any event, the argument of the appellant does not resolve the question of how and when the respondents were to tender their services in respect of a period that had already passed. Because the appellant does not seem to accept that the tender of services was implicit in the respondents’ conduct in, *inter alia*, launching the application for a declaratory order, and appears to suggest that the tender should be retrospective, which would clearly be a superfluous exercise.

¹¹ *Coca-Cola SABCO (Pty) Ltd v Van Wyk* [2015] 8 BLLR 774; (2015) 36 ILJ 2013 (LAC) (“Coca-Cola”) at paras 24-26.

¹² *Coca-Cola* (above) at para 24.

- [25] The principle is still valid, namely, that in a claim for the payment of agreed salary or wages, the employee needs not allege having provided, or tendered the required service, but would have to prove having provided or tendered the service if the employer contends that the service has not been provided, or tendered.¹³ But the appellant's argument in this Court, probably due to a misreading of the decision in *Coca-Cola*, appears to be a misconception of the requirements for making out a case for the payment of backpay, or remuneration, in general, in that it seems to suggest that the employee has to, at the outset, allege and prove having provided the service, or of having tendered to provide it, even though the employer does not dispute that fact.
- [26] In any event, it is disingenuous for the appellant to contend that the respondents did not tender their services to it, when it vigorously resisted their claims that it had become their employer. The appellant had never before, including in the proceedings that culminated in this Court's order of 21 April 2015, contended that the respondents had not rendered, or had not tendered to render services to it. And that is hardly surprising, because such a contention would have detracted from the cogency of the appellant's denial that the respondents automatically became its employees upon transfer of the business to it. Further, there is no merit in the appellant's assertion, that the respondents' pursuit of the declaratory order did not imply a tender of their services to it.
- [27] In fact, the appellant's resistance of the respondents' claims, that it was their employer, was tantamount to a repudiation of the contracts of employment with the respondents. Being innocent in the matter, the respondents would in those circumstances have been relieved of the obligation to perform their reciprocal contractual duties, or of tendering performance thereof.¹⁴
- [28] For the reasons stated above, the court *a quo*'s findings on the tender of services are unassailable.

¹³ *Coca-Cola* (above) at para 24; *Prins v Universiteit van Pretoria* 1980 (2) SA 171 (T).

¹⁴ *GNF Office Automation CC v Provincial Tender Board Eastern Cape* 1998 (3) SA 45 (A) at 51F; RH Christie *The Law of Contract in South Africa* 6ed (2016 Lexis Nexis) p518; M Brassey *Employment Law* (1997 Juta) at F2:33.

Prescription

- [29] The defence of prescription is, similarly, disingenuous for various reasons, the most obvious being that it fails to address the impact which the appellant's resistance to the respondents' claims, that it had become their employer, and the steps taken by the respondents in that regard, had on the running of prescription.
- [30] It was correctly submitted by the respondents' counsel that the application for a declaratory order launched on 11 May 2011, effectively interrupted the running of prescription as contemplated in section 15 of the Prescription Act and that this interruption endured until this Court finally decided that application on 21 April 2015.
- [31] Section 15(1) of the Prescription Act provides that "the running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt". The application for the declaratory order is process as contemplated in that section. It is for the enforcement, *inter alia*, of the very right the respondents have to the payment of remuneration, or for the substantial enforcement of that right. Unless the appellant was the employer of the respondents it would have no obligation to pay them a salary or wages as per their contracts of employment. Obtaining a declaratory order, that the appellant was indeed their employer, was essential and, thus, effective in interrupting the running of prescription¹⁵ in respect of their claims for remuneration for the period 1 December 2010 up to and including 21 April 2015. In those circumstances, the claims had not prescribed.
- [32] Another possible reason why the prescription defence is bad, but which was not argued by either of the parties and in respect of which I make no finding, relates to whether prescription could ever have started to run in circumstances where the appellant, effectively, denied being the debtor. In terms of section 12(1) of the Prescription Act, prescription commences when

¹⁵ *CT Municipality v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C), referred to with approval in *Peter Taylor & Associates v Bell Estates (Pty) Ltd* 2014 (2) SA 312 (SCA) at paras 12, 13 and 16.

the debt is due, but in terms of section 12(3), a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor. The respondents in this instance could only establish in law that the appellant was indeed their debtor by the declaratory order sought and eventually granted by this Court on 21 April 2015.

Mora Interest

- [33] The court *a quo* held that the debt (in respect of the arrear remuneration) only fell due when this Court made its order on 21 April 2015 and mora interest can only run from that date.
- [34] The respondents' counsel submitted that the court *a quo* erred in that regard. According to the argument, this Court's order "was retrospective in operation" and amounted to a correction of the court *a quo* in that instance. Thus, effectively, this Court's order stated what the Labour Court's order ought to have been on 23 May 2013, when its judgement was handed down. The court *a quo*, in the present matter, therefore, erred in stating that interest would run from the date of this Court's order (i.e. 21 July 2015). It should have held that the interest ran from 23 May 2013.
- [35] However, so it was argued by counsel for the respondents, even that date would be incorrect, since mora interest would have begun to run in terms of the common law as and when the remuneration was not paid when it fell due at the end of each month. The appellant was in *mora ex re* as the time for payment had been fixed by the individual contracts of employment read with the Basic Conditions of Employment Act¹⁶ ("the BCEA").
- [36] Ultimately, the argument of the respondents' counsel posits for consideration whether the claims for remuneration relating to the period 1 December 2010 up to and including 21 April 2015, arises from the order of this Court of 21 April 2015 or from the individual contracts of employment.
- [37] Whilst it may be so that the court *a quo* erred in holding that the amounts claimed became due on 21 April 2015, whereas that date ought to have been

¹⁶ Act 75 of 1997.

23 May 2013, as this Court's order substituted the Labour Court's order, there is, nevertheless, a difficulty with the argument, in effect, that the amounts claimed by the respondents only became due as a result of the order of this Court of 21 April (i.e., which the Labour Court ought to have made).

[38] With regard to a retrospective reinstatement order, it was held in *Fohlisa* that the claim for the backpay for the period retrospective to the reinstatement order (after the date of the reinstatement order) arises from the reinstatement order and was not due before that order was made. The reasoning, especially in the judgment of Zondo J (as he then was) in *Fohlisa*, was that the backpay was ordered (albeit implicitly) in the reinstatement order, in the exercise of the Labour Court's discretion and not because the employees there were entitled to backpay in terms of their contracts of employment, and that, therefore, mora interest relating to the backpay had to run from the date of the reinstatement order.¹⁷

[39] As mentioned above, this Court's order of 21 April 2015 is a declaration of rights and not a retrospective reinstatement order. It determines the existing, future and contingent rights of the respondents in their capacity as employees of the appellant, flowing from their individual contracts of employment and the law (including the BCEA). While the Labour Court had also exercised a discretion in determining whether to grant the declaratory order, a declaratory order is no more than what its name suggests. It does not implicitly order that the appellant pay the respondents any specific amount as remuneration, but declares that the appellant is liable to pay the respondents such remuneration as may be due to them, for the requisite period, in terms of their contracts of employment and the law.

[40] The remuneration claimed did not only become due when the declaratory order was made but was due on the dates fixed in the contracts of employment, read with the BCEA. When the appellant failed to pay the

¹⁷ *Fohlisa* (above) at para 199.

remuneration as and when it fell due at the end of each month, in terms of those instruments, it was in mora (ex re).¹⁸

[41] A fundamental difference between the situation in *Fohlisa* and the present is, *inter-alia*, the following. Absent the retrospective reinstatement order, in the case of a dismissal, there would be no entitlement or claim for backpay. On the other hand, the absence of a declaratory order does not entail that there would be no claim for the arrear remuneration. The employee can still claim such a remuneration based on the employment contract and the law. A separate declaration of rights would not necessarily have been essential, for the employee to succeed in, what could be termed, a claim for consequential relief, either to do perform an act(s) (*ad factum praestandum*) and/or to pay money (*ad pecuniam solvendam*).¹⁹

[42] In conclusion on this point, mora interest accrued and is payable for the period 1 December 2010 up to and including 21 April 2015 in respect of the remuneration that remained unpaid subsequent to its due date, and shall continue to accrue until the payment in respect of such remuneration is made. The Prescribed Rate of Interest Act²⁰ fixes the applicable interest rates, and it is significant to note in that regard that the rate applicable, when mora interest first begins to run in respect of a particular debt, applies until the payment of that debt, irrespective of variations in the rate over that period.

The costs

[43] The appellant's counsel argued, in effect, that the court *a quo* had exercised its discretion wrongly in ordering the appellant to pay the costs. Counsel submitted that the order was inappropriate because the court *a quo* failed to take into account that the respondents had only succeeded in obtaining mora interest from 22 April 2015 and that the matter involved novel points of law.

¹⁸ *Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga* 2013 (2) SA 259 (SCA) at paras 15-17; RH Christie *The Law of Contract in South Africa* 6ed (2016 Lexis Nexis) pp 519-520.

¹⁹ See *inter alia*, the recent, as yet unreported, decision of this Court in *Road Traffic Management Corporation v Tasima (Pty) Ltd* (LAC case no. JA10/19) (delivered 15 March 2019) at paras 25-30.

²⁰ Act 55 of 1975.

[44] It is trite that while a court of appeal has the power to amend an award of costs, it will not exercise that power hastily, and will only exercise the power where it is satisfied that the lower court has not exercised its discretion judicially.²¹ In this case that has not been established. Taking into account all factors and circumstances, including the disingenuousness of the points relied upon by the appellant in the face of this Court's order of 21 April 2015, the costs order of the court *a quo* is more than appropriate.

Conclusion

[45] In light of the above, the appeal must fail. It is appropriate, taking into account both the law and fairness, that the costs should follow the result.

Quantification of the claims

[46] As mentioned earlier, before the hearing in the court *a quo*, the appellant made a tender to pay specific amounts in respect of the period 22 April 2015 to 5 July 2016, and the respondents accepted that tender. The court *a quo* was of the view that the tender and acceptance thereof was "helpful in determining the basis of the calculation of the remuneration" due to the respondents for the period 1 December 2010 to 21 April 2015. In paragraph 46(a) of its order, the court *a quo* provides the formula for calculating the remuneration due. The paragraph reads: "the calculation of the quantum of the remuneration is to be based on the principle applied by [appellant] to the calculation of the amount of the tender, accepted by the [respondents] in respect of the remuneration payable to the [respondents] for the period from 22 April 2015 to 5 July 2016" (my substitutions).

[47] None of the parties took issue with the court *a quo*'s approach to the quantification of the claims (including the aforesaid formula). The respondents accepted it. However, at the hearing before us, the amounts payable to the individual respondents had not been calculated accordingly (even tentatively).

[48] For reasons of expediency, we requested the parties to attempt to settle the quantum of the claims of each of the respondents and to submit agreed

²¹ *Merber v Merber* 1948 (1) SA 446 (A) at 453.

figures to this Court for incorporation into its order. Unfortunately, it appears that the figures could not be agreed upon. Despite the formula, each of the parties, claiming to have applied it, submitted their own figures which differed materially, evidencing a lack of consensus in that regard. We are unable to resolve those differences in this forum. The quantification of the claims was not an issue before us and as we are not apprised of all the facts pertaining to the quantification of the claims and no submissions concerning that issue was addressed in argument before us. Unless the parties are able to settle the amounts in accordance with the formula, duly adjusted to accommodate this Court's finding on the mora interest, they would have to resort to quantification by the Labour Court or an agreed forum.

[49] In the result, the following is ordered:

49.1 The appeal is dismissed;

49.2 The cross-appeal (in respect of interest) is upheld;

49.3 The appellant is to pay the costs of the appeals.

49.4 The court *a quo*'s order is amended to read as follows:

“(a) The respondent (Mobile Telephone Networks (Pty) Ltd) is ordered to pay the applicants (Pillay and 37 others) the remuneration due to them in accordance with their contracts of employment for the period 1 December 2010 up to and including 21 April 2015;

(b) The respective amounts contemplated in paragraph (a) shall bear mora interest at the legal rate applicable from the day following the date upon which the respective amount became due and payable, up to the date of its payment;

(c) The calculation of the quantum of the remuneration is to be based on the principle applied by the respondent to the calculation of the amount of the tender accepted by the applicants in respect of the remuneration payable to the

applicants for the period from 22 April 2015 to 5 July 2016, save that interest should be calculated in accordance with paragraph (b);

- (d) The respondent is to pay the costs of the application.”

P Coppin

Judge of the Labour Appeal Court

I agree

B Waglay

Judge President of the Labour Appeal Court

I agree

J Murphy

Acting Judge of the Labour Appeal Court

APPEARANCES:

FOR THE APPELLANT:

M J Van As

Instructed by Mashiane Moodley & Monama Inc.

FOR THE RESPONDENTS: M Pillemer SC

Instructed by Brett Purdon Attorneys

LABOUR APPEAL COURT