Twenty Years of the Remedy of Reinstatement in the Law of Unfair Dismissal in South Africa: Some Preliminary, Jurisprudential and Sundry Issues

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Abstract

Reinstatement as a remedy for unfair dismissal was known to and applied by the Industrial Court of the bygone labour relations regime of 1956. It was, however, the Labour Relations Act 66 of 1995 (LRA) that entrenched this remedy in the modern South African labour relations system designed essentially to do justice between the employer and the employee and, fundamentally, to achieve industrial justice. After two decades of the operation of the adjudicative institutions established by the 1995 Act, it is time to evaluate the ways in which the labour arbitrators, the Labour Courts and the Labour Appeal Court, have interpreted and applied the provisions of the LRA relating to reinstatement. This evaluation exercise also extends to the immense contributions of the Supreme Court of Appeal and the Constitutional Court to the jurisprudence surrounding reinstatement as an unfair dismissal remedy in contemporary South African labour law. This article starts by defining reinstatement, distinguishing the remedy of re-employment and, further, the Constitutional Court's judicial activist innovation to the labour relations lexicon—'instatement'. Then it settles down to tackle issues that are preliminary and jurisprudential in nature—issues that were probably not contemplated by the enabling legislation, but which have arisen in adjudication. These include resignation and its effect on reinstatement, automatic reinstatement in the form of a declaration, and whether a court is able to order either 'interim reinstatement' or 'semi-urgent interim relief'.

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The latter part of this article examines those non-statutory obstacles to accessing the remedy of reinstatement. These include the employer's non-compliance with the order of reinstatement, as was the issue in the protracted litigation concerning *Myers v National Commissioner of the SAPS* ((2013) 34 *ILJ* 1729 (SCA); *Myers v National Commissioner of the SAPS* [2014] 5 BLLR 461 (LC); *Myers v National Commissioner of the SAPS* [2015] ZALCCT 68); whether the Prescription Act applies to claims for reinstatement; and such sundry issues as whether arrear wages could be recovered as a judgment debt. Finally, we consider whether an employee nearing the retirement age who is unfairly dismissed is entitled to reinstatement.

Keywords: employee; employer; prescription; re-employment; reinstatement; automatic reinstatement; instatement; unfair dismissal

Introduction

The most important and primary remedy for unfair dismissal under the Labour Relations Act 66 of 1995 (LRA) is the order of reinstatement,[1] followed by re-employment and compensation.[2] The Act goes further in subsection (2) of section 193 to lay down conditions that may militate against making the order. In other words, the existence of any of the conditions listed in paragraphs (*a*)–(*d*) of section 193(2) would impel the arbitrator or the Labour Court not to make the order but to consider making the order of re-employment or compensation, as the case may be. Since the LRA is itself a product of section 23(5) and (6) of the Constitution of the Republic of South Africa, 1996,[3] the interpretation of its provisions, in so far as it is possible, must be in conformity with the spirit, purport and objects of the Bill of Rights.[4] There is no doubt that the link between contemporary labour relations rights and practices and the Bill of Rights has emboldened attempts to drag constitutional-law adjudicative principles into labour adjudication such as resorting to declaratory judgments to enforce labour relations issues by requesting the court to issue an 'automatic reinstatement' order in the form of a declaration[5] or the court's making an order of 'interim reinstatement' or 'semi-urgent interim relief'.[6]

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1 Section 193(1)*(a)* of the LRA. It is therefore the law that once the employer is unable to discharge the onus of showing that a dismissal was for a fair reason and that dismissal was the fair sanction to impose in the circumstances of a case—for instance, where the employer had set a sales target which shows that either the period was too short or that the target was incapable of being achieved, hence the dismissal for poor work performance was found to be unfair—there would be no reason why reinstatement, the primary remedy, should not be ordered—*Damelin (Pty) Ltd v Solidarity obo Parkinson* [2017] ZALAC 6 (10 January 2017) paras 41–43.

2 Sections 193(1)*(b)* and *(c)* of the LRA, respectively.

3 Act 108 of 1996, now referred to as the Constitution of the Republic of South Africa, 1996.

4 Per Langa DP, *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) para 24; *Equity Aviation (Pty) Ltd v CCMA* 2009 (1) SA 390 (CC) para 35.

5 *Edcon v Steenkamp, and Related Matters* 2015 (4) SA 247 (SCA); *Steenkamp v Edcon* 2016 (3) SA 251 (CC).

6 *De Beer v Minister of Safety and Security* (2013) 24 *ILJ* 3038 (LAC) para 23.

Also discussed in this article are such issues as:

- the problems of delay in the adjudicatory process and its effect on the remedy;
- those instances where the employer had failed to comply with an order to reinstate; and
- the question whether a claim for reinstatement is subject to the Prescription Act.[7]

It is our conclusion that the legislation was well intended while the lawmakers were wise not only because they crafted the remedies in such a way that made reinstatement a priority remedy over the other remedies on a finding of unfair dismissal, but also because they laid down the conditions precedent to making such an order, bearing in mind that a personal relationship is called into question in an employment relationship. The law was well conceived and invariably elegantly drafted except for human elements in the interpretation of its provisions and, sometimes, of the individual litigant's efforts to get the courts to tailor their judgments to suit their individual fancies or when litigants proceed to treat the court's judgment according to their particular understanding, rightly or wrongly, of that judgment. Such conduct has led to some of the difficulties encountered in the enforcement of court orders which would ordinarily not have arisen. In spite of these problems, which are not commonplace and could be treated as exceptions rather than the rule, reinstatement has served the purpose of guaranteeing job security, which is a priceless commodity in the face of rampant unemployment in today's 'tight economic and labour market times'.[8]

7 See *De Beer v Minister of Safety and Security* (n 6).

8 *Per* Coglan CJ, *Edwards v Board of Trustees of Bay Islands College* [2015] NZEmpC 6 (3 February 2015) para 287, citing *Angus v Ports of Auckland Ltd (No 2)* (2011) 9 NZELR 40 paras 61–68.

Meaning of Reinstatement[9]

Long before the coming into force of the 1995 Act—which in any event does not define the term—'reinstatement' had been defined quite early in English labour law,[10] and this definition had since been accepted by South African courts.[11] To avoid any doubt, reinstatement has been said to represent a situation in which a person unfairly dismissed from a position is placed back in the same position they occupied prior to their dismissal and restored to the status quo ante the dismissal.[12] That has remained the understanding of

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9 The term 'reinstatement' has different meanings in different branches of the law where it is used. These other aspects of reinstatement are of no relevance to this discussion, so no attempt is made in this context to go into those other meanings of this expression outside the law of employment. Suffice it to refer to one area of law where the issue of reinstatement frequently appears: the meaning of reinstatement in the National Credit Act 34 of 2005, for which see the far-reaching pronouncements of the Constitutional Court in *Nkata v First Rand Bank Ltd (The Socio-Economic Rights Institute as amicus curiae)* 2016 (4) SA 257 (CC) and the discussion by Harold Smit and Sabina Ismael Essa, 'Nkata: The Court's Interpretation of s 129 of the NCA and the Meaning of "Reinstatement"' 2016 (July) De Rebus 28–30; Gian Louw, 'Banks Beware: Reinstatement of Mortgage Loan Agreements' 2016 (July) De Rebus 52. 'Reinstatement' is also often used in practice and procedure in court, for example the reinstatement of an appeal—*Muller v Sanlam* [2016] ZASCA 149 (30 September 2016).

10 See, generally, Chuks Okpaluba, 'Reinstatement in Contemporary South African Law of Unfair Dismissal: The Statutory Guidelines' (1999) 116(4) SALJ 815, especially in 2.

11 See, for example, *SEAWU v Trident Steel* (1986) 7 *ILJ* 418 (IC) 437E–F, where it was said that reinstatement restores the original contract but does not create a new one. See also *Performing Arts Council of Transvaal v PPW&AWU* 1994 (2) SA 204 (A); *NUMSA v Henred Fruehauf Trailers (Pty) Ltd* 1995 (4) SA 456 (A); *NUMSA v Boart MSA (Pty) Ltd* [1996] 1 BLLR 13 (LAC); *Dierk v University of South Africa* (1999) 20 *ILJ* 1227 (LC).

12 In *SADTU v Head, Department of Education, Northern Province* [2001] ZALC 49 (30 March 2001) paras 20, 22–23, where Nkabinde AJ (as she then was) was approached to make an arbitration award an order of court. The department had withdrawn the appointment of certain teachers as principals of schools in the province and the question before the Labour Court was whether the arbitration award was capable of implementation. The Acting Judge held that the question turned on the meaning of 'reinstate' or 'reinstatement' under s 193 of the LRA. The award in question had contained the following words: 'reinstatement of the Grievants to the principalship posts with retrospective effect.' Nkabinde AJ then held: The ordinary meaning of the word 'reinstatement' in the context in which the word is used in the award, does not appear to require the employer to reinstate the individual applicants in the very positions or posts which they occupied prior to the withdrawal of their appointments: it would be impossible to reinstate them to such positions 'with retrospective effect'. The order, in my view, requires the Department to reinstate the individual applicants with retrospective effect on terms and conditions of employment which are no less favourable than the terms and conditions applicable to them prior to such withdrawal.
In effect, the department does not have to kick out the present incumbents. In holding that the award was capable of being implemented, the Acting Judge was fortified by the statement of Thirion J in *Consolidated Frame Cotton Corporation Ltd v The President, Industrial Court* 1985 (3) SA 150 (N) 158J–159A, as affirmed by the Appellate Division in (1986) 7 *ILJ* 489 (A) to the effect that: where a dispute has arisen concerning the termination of an employee's employment, it is competent for the Industrial Court to make an order requiring the employer to reinstate the employee in his employ, despite the fact that the employee's employment was terminated through redundancy and the position in which reinstatement is sought no longer exists and the employer is unwilling to have the employee reinstated.

the term in modern times.[13] For instance, speaking in the often-cited judgment of the Constitutional Court in *Equity Aviation (Pty) Ltd v CCMA*,[14] which has provided us with the proper interpretation of section 193(1)*(a)* of the LRA and the most acceptable articulation of the concept of reinstatement in modern South African labour law, Nkabinde J (later DCJ) said that:

> The ordinary meaning of the word 'reinstate' is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes.[15] It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal.[16]

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13 According to D'Arcy du Toit and others, *Labour Relations Law: A Comprehensive Guide* (5 edn, LexisNexis 2006) 468, reinstatement implies continuity of the employment relationship notwithstanding the employer's attempt to terminate it. Martin Brassey, *Employment and Labour Law*: *Commentary on the Labour Relations Act, Vol 3* (Juta 2006) A8–146, opines that an award of reinstatement has the effect of regenerating the pre-existing employment relationship and that the court does not and cannot create a contract on new terms when it reinstates. According to John Grogan, *Dismissal, Discrimination and Unfair Labour Practices* (Juta 2005) 449, because reinstatement revives the original employment contract, the court and arbitrators cannot fashion new contracts when they order reinstatement.

14 2009 (1) SA 390 (CC).

15 The situation under the UK Employment Rights Act 1996 is similar to that of South Africa, where, if the dismissed employee so wishes, reinstatement is the primary remedy for unfair dismissal or, at least, a presumption in their favour, followed by re-engagement rather than compensation. In terms of s 116 of the Act, it is provided that reinstatement or re-engagement should be considered first by the tribunal, having taken into consideration some other listed factors—*Oasis Community Learning v Wolff* [2013] UKEAT 0364 (17 May 2013) para 10. It was held in *British Airways Plc v Valencia* [2014] UKEAT 0056 (26 June 2014) para 8 that the statute requires reinstatement to be considered first, and it is only if a decision is made not to order reinstatement that the question of re-engagement will arise. Quite recently, the UK Supreme Court offered further clarification of the issue when, in *McBride v Scottish Police Authority* [2016] ICR 788 (UKSC) para 32, Lord Hodge said:
> If the complainant wishes such an order, the tribunal is required first to consider whether to make an order of reinstatement, and if it decided not to make such an order, then, secondly, to consider whether to make an order for re-engagement [sections 112(2), (3) and 116(1), (3)]. If neither order is made, the tribunal may make an award of compensation for unfair dismissal [section 112(4)].
> This may be contrasted with the situation in Namibia, where reinstatement is lumped together with other 'appropriate awards' the arbitrator can make under s 86(15) of the Labour Act 11 of 2007. Therefore, in the exercise of the discretion whether or not to award reinstatement or compensation, the arbitrator must also bear in mind that reinstatement is not a primary remedy of unfair dismissal in Namibia. An award of compensation is just as important. This point was made by Damaseb JP in *Paulo v Shoprite Namibia (Pty) Ltd* 2013 (1) NR 78 (LC) paras 18–19; and quite recently by Geier J in *Negonga v Secretary to Cabinet* 2016 (3) NR 670 (LC) para 66.

16 *Equity Aviation* (n 14) para 36. cf *per* McNally JA of the Zimbabwe Supreme Court, who, in *Chegutu Municipality v Manyora* 1997 (1) SA 662 (ZS) 665H, defined reinstatement in the employment context to mean

The learned Justice of the Constitutional Court further offered clarifications of the implications of an order of reinstatement regarding these issues: the operative date of the order, back pay and its retrospective effect.[17] In effect, *Equity Aviation* brought clarity not only to the meaning of reinstatement[18] but also to: (a) the nature and interrelationship

no more than putting a person again into his previous job. You cannot put him back into his job yesterday or last year. You can only do it with immediate effect or from some future date. You can, however, remedy the effect of previous injustice by rewarding back-pay and/or compensation. But mere reinstatement does not necessarily imply that back-pay and/or compensation automatically follows.

This interpretation accords with the definition adopted by the Supreme Court of Namibia interpreting 'reinstatement' in the context of the Labour Act 1992 in *Transnamib Holdings Ltd v Engelbrecht* 2005 NR 372 (SC) 381E–G to the effect that the mere use of the words 'in the position which he or she would have been had he or she not been so dismissed' does not necessarily mean that the reinstatement in that 'position' runs from the date of dismissal. So, too, Damaseb JP reiterated in *Paulo v Shoprite Namibia* (n 15) para 10 that, except for the difference that reinstatement is a primary remedy in South Africa whereas it is not in Namibia and Zimbabwe, nothing in the interpretation of the word 'reinstatement' by the highest courts in the three jurisdictions recognises the right of an employee who has been found to have been unfairly dismissed to be automatically entitled to back pay and/or compensation.

17 Section 89(9)*(b)*(ii) of the 2007 Labour Act, has introduced a provision that was not in the 1992 Act or not found in the LRA 1995 of South Africa but which takes care of back pay or a retrospective award pending the conclusion of the proceedings. Taking away the power of an arbitrator to make a retrospective reinstatement award, it replaces same with the said subparagraph, which provides that 'the continuation of the employer's obligation to pay remuneration to the employee pending the determination of the appeal or review, even if the employee is not working during that time.'

It was held in *Paulo v Shoprite Namibia* (n 15) paras 20–22 and 25*(a)* that the applicant (employee of the first respondent) did not work between the suspension of the award and the dismissal of the appeal, because of the exercise by the first respondent (as employer) of its right of appeal and to seek the suspension of the arbitrator's award, pending appeal. It could not have been the intention of parliament that the employer be punished for doing that which the law allowed it to do, especially considering that the employee was not without a remedy. The court held further that s 89(9)*(b)*(ii) of the Labour Act of 2007 provided an employee with a remedy to the extent that the court was empowered to impose as a condition of suspension of an award pending appeal 'the continuation of the employer's obligation to pay remuneration to the employee pending the determination of the appeal or review, even if the employee is not working during that time.' In the present case, the applicant had not made use of that remedy, therefore the declaratory order was dismissed.

18 The question whether the employer was in contempt of court arose in a recent Labour Court case—*Michael & Another v Phakisa Technical Services (Pty) Ltd* [2017] ZALCJHB 73 (7 March 2017)—where the Labour Court had found the dismissal of two employees to be both substantively and procedurally unfair and the employer was ordered in one case to 'reinstate the applicant with immediate effect on the same terms and conditions applicable prior to his dismissal', while the other was to be reinstated 'from 2 November 2015 on the same terms and conditions governing his employment prior to his dismissal.' The employer's defence for not reinstating the employees to the positions they had held prior to dismissal was the restructuring of the original site where they were. It was submitted that the employers had complied with the court's order to reinstate the employees since their placement in a different site had not altered their terms and conditions of employment and that it was part of their contract of service that they could be transferred to any available site. There was no dispute that the employer had made attempts to reinstate the applicants, albeit at different sites and in different positions. The question was whether the applicants were reinstated as was required by the respective court orders, since it was the applicants' case that reinstatement in accordance with the orders ought to have been in line with the principles laid down in

between the remedies of reinstatement, re-employment and compensation under section 193(1); (b) the effect on the time of reinstatement in terms of section 193(2), and (c) whether the limits on compensation in terms of section 194 of the LRA also applied to remuneration payable upon reinstatement.[19]

Meanwhile, the question in *Nel v Oudtshoorn Municipality*[20] was whether the reinstatement of a municipal manager constituted a fresh appointment requiring compliance with the provisions of the Local Government: Municipal Structures Act 117 of 1998. This question arose against the backdrop of the council's having passed a resolution to the effect that the dismissed employee 'be reinstated to his position as Municipal Manager of the employer with effect from Tuesday 10 August 2010' and that the relationship between the parties would be 'subject to and regulated by the terms and conditions of the employment agreement concluded between the parties dated 1 August 2007.'[21] Answering that question, Schoeman AJA held that the provisions of the LRA and the existing case law do not support a proposition that reinstatement is the same thing as offering the dismissed employee a fresh contract of employment when the employer merely restores the position to what it was before the dismissal. In other words, compliance with the council resolution did not constitute a fresh appointment; rather, it was meant to restore and continue the appointment that had been made in 2007. It would, he held, indeed, be

> absurd to construe the settlement of a labour dispute on the terms on which this dispute was settled to constitute a fresh appointment. That construction would necessarily require the council to advertise the position, interview numerous hopeful applicants, and then decide who to appoint, which would make it impossible to settle a labour dispute on these terms,

Equity Aviation in the sense that they were to placed back at the site where they were and paid retrospectively from the date of dismissal.

The first factor to consider was that it was not contested whether the site where they were placed was a Temporary Employment Services, meaning that the employer's placement of its employees at the clients' sites depended on the availability of work at the sites. The second was that in both orders the Labour Court had not exercised its discretion under s 193(1)*(a)* of the LRA to order the reinstatement to be retrospective. Tlhotlhalemaje J held that on the facts of the case, especially in view of the intention and willingness on the part of the employer to reinstate the applicants, the fact that the site at which they had been employed had undergone restructuring meant that there was impossibility of performance. There was no fault that could be attributed to the employer, nor were there any mala fides on its part. In fact, it was willing throughout the trial to abide by the order of the court but for the impossibility of reinstating the dismissed employees on the particular site, given the nature of the employment in question. Since the contempt charge was based on the applicants' incorrect interpretation or different understanding of s 193 as elucidated in *Equity Aviation,* there was no contempt or non-compliance with the court order.

19 *Equity Aviation* (n 14) paras 36, 39, 41–43. See also *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile* (2010) 31 *ILJ* 273 (CC) ('*Billiton Aluminium'*) para 19.

20 (2013) 34 *ILJ* 1737 (SCA).

21 *Nel* (n 20) paras 2 and 10.

> contrary to the concept of reinstatement which is the 'primary statutory remedy in unfair dismissal disputes'.[22]

In order to determine the remuneration due upon reinstatement in *Themba v Mintroad Sawmills (Pty) Ltd*,[23] Snyman AJ held that it is always important to determine what it means exactly whenever an arbitrator makes an order of reinstatement. Referring to section 193(1)*(a)* of the LRA, the Acting Judge held that the subsection does not dictate the terms applicable to reinstatement but left the matter to the court or the arbitrator, except that it directs that reinstatement cannot operate earlier than the actual date on which the employee was dismissed.[24] Relying on the celebrated definition of the term by Nkabinde J in *Equity Aviation*,[25] Snyman AJ held that it is clear from that case that reinstatement means the restoration of the status quo ante. It is as if the employee was never dismissed. Where reinstatement is awarded, an employer will be in compliance with such an award if the employer, on, or from, the date of the award having been made, takes the employee back into its service on the same terms and conditions of employment of the employee as existed at the time of their dismissal. As a necessary consequence, the original starting date of employment of the employee will remain the same and applicable if such reinstatement is awarded.[26] The court then held:[27]

> When it comes to the issue of the retrospectivity of reinstatement, this is however, in terms of the above *ratio* in *Equity Aviation*, a completely different issue. Reinstatement is not necessarily coupled with retrospectivity and is not a *sine qua non* of it. Retrospectivity of reinstatement is a separate discretion that must be exercised by the arbitrator or the judge when deciding to award reinstatement. Retrospectivity, in simple terms, relates to what is commonly known as 'backpay', and constitutes what the arbitrator or judge expects an employer to pay the employee for the time the employee has been languishing without remuneration as a result of the employee's unfair dismissal. In short, reinstatement means taking the employee back on the same terms and conditions of employment as if the dismissal of the employee never occurred, which would apply as from the date of the award of reinstatement and with the continuity of employment intact. But the concept of reinstatement does not *per se* include the issue of back pay. Back pay is a separate issue and determination, albeit coupled with reinstatement.[28]

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22 *Nel* (n 20) paras 11–12; *Equity Aviation* (n 14) para 36.

23 [2014] ZALCJHB 533 (12 November 2014).

24 *Themba* (n 23) para 20.

25 *Equity Aviation* (n 14) para 36.

26 *Themba* (n 23) para 22.

27 *Themba* (n 23) para 23.

28 In addition to *Equity Aviation*, the court referred to the following cases where reinstatement had been defined and its implications explained [*Themba* (n 23) paras 24–26]:

(*a*) *Nel v Oudtshoorn Municipality* (n 20) paras 6 and 8, where the old English and Scottish cases were cited with approval—*Jackson v Fisher's Foil Ltd* [1944] 1 All ER 421 and *Dixon (William) Ltd v Patterson* 1943 SC (J) 78—and Schoeman AJA for the SCA held that:

Reinstatement Contrasted with Re-employment[29]

Since reinstatement means restoration of the employee's old contract[30] and not making a new one,[31] re-employment or re-engagement means taking back the employee on a new contract, whether or not at the same status or level as the previous contract, or re-engagement by the new owner of the business in cases involving a transfer of business.[32] The UK Employment Appeal Tribunal (EAT) has held that the Industrial Tribunal could not, under the guise of ordering re-engagement or re-employment, order that an unfairly dismissed employee be re-employed to a specific position that carries a substantially higher salary and significantly more favourable terms than that which the employee enjoyed before dismissal, or that which the employee would have enjoyed if they had been reinstated to their former job. It is not desirable for the tribunal to order re-engagement in respect of a specific job as distinct from identifying the nature of the proposed employment.[33] It is a different issue, however, if the position to which the employee was being reinstated has, since their dismissal, been restructured to a higher position and salary and the employee, but for the dismissal, would have been the person occupying the higher position as restructured.[34]

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from the provisions of the LRA and the cases I have cited, it is clear that by reinstating a dismissed employee, the employer does not purport to conclude a fresh contract of employment. The employer merely restores the position to what it was before the dismissal.

(b) In *Mediterranean Textile Mills (Pty) Ltd v SA Clothing & TWU* (2012) 33 *ILJ* 160 (LAC) para 26, the court held that:
the term 'reinstatement' within the context of s 193(1)*(a)* of the LRA entails placing a dismissed employee back to his or her former position in employment as if he or she was never dismissed in the first place. This is the essence of retrospective reinstatement as envisaged in s 193(1)*(a)*, which, according a recent Constitutional Court decision, *Equity Aviation (Pty) Ltd v CCMA & Others* 2009 (1) SA 390 (CC), is the primary statutory remedy in unfair dismissal disputes (in that) [i]t is aimed at placing an employee in the position he or she would have been but for the unfair dismissal.

(*c*) And in *Myers v National Commissioner of the SAPS* (2014) 35 *ILJ* 1340 (LC) para 14, it was held that:
The Constitutional Court in *Equity Aviation* interpreted the word 'reinstate' to mean that the employee must be put back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is aimed at placing the employee in the position he or she would have been, but for the unfair dismissal.

29 Unlike under s 46(1)*(a)*(ii) of the Labour Act of 1992, s 86(15) of the Namibian Labour Act of 2007 does not include 're-employment' in its list of awards the arbitrator could make.

30 Otto Kahn-Freund, *Labour and the Law* (Stevens & Sons 1977) 26.

31 *Steel, Engineering and Allied Workers Union of SA v Trident Steel (Pty) Ltd* (1986) 7 *ILJ* 418 (IC) 437.

32 See, for example, *Kitching v Wood, Watson and Taylor* [1967] ITR 464 (DC); *Brown v Hamilton* [1967] 2 ITR 281; *Pilkington v Pickstone* [1966] ITR 363; *National Automobile and Allied Workers Union (now NUMSA) v Borg-Warner SA (Pty) Ltd* (1994) 15 *ILJ* 509 (A); *NUMSA v Aerial King Sales (Pty) Ltd* (1994) 12 BLLR 129 (IC).

33 *Rank Xerox (UK) Ltd v Stryczek* [1995] IRLR 568 (EAT).

34 *Myers v National Commissioner of the SAPS* (2013) 34 *ILJ* 1729 (SCA).

Take the Lesotho case of *CGM Industries (Pty) Ltd v Teleki*:[35] there, three dismissed employees had specifically asked for reinstatement but the Labour Court granted them re-employment. The Labour Appeal Court (LAC) held that the Labour Court had no jurisdiction to grant an order not sought for by the parties or to grant an order in terms different from those contemplated by section 73 of the Lesotho Labour Code 1992. Mosito AJ (as he then was) took the opportunity to explain the difference between the remedies of reinstatement and re-employment as they are known in labour law. He said:

> Re-employment and reinstatement are two different concepts in employment law. Re-employment is, on the one hand, the process of contracting whereby the employer and the employee enter into a fresh contract of employment. Re-employment does not necessarily result from a dismissal of the employee. When the parties enter into re-employment, there may or may not be new terms and conditions of such a new contract of employment. On the other hand, reinstatement is a process of contracting whereby an employee is put back into his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal. The applicant had therefore asked for the latter and not the former relief.[36]

The definition proffered by the Lesotho Acting LAC Judge captures the true meaning of the concepts as they are universally understood, except that both remedies come into play at the backdrop of unfair dismissal or some form of unfair employment termination such as retrenchment. Both re-employment and reinstatement could arise only where there has been an unfair dismissal, a constructive dismissal or a dismissal based on operational requirements or upon the transfer of a business as a going concern.[37] If, as the learned Acting Judge held, re-employment does not necessarily contemplate dismissal, it follows in line with this reasoning that the prefix 're' would be rendered otiose. Obviously, the use of 're' connotes that there was a previous employment which now entitles the employee to employment with that very same employer whether in a previous or a similar capacity or 'in other reasonably suitable work on any terms' as contemplated in the South African LRA.[38] The reason why either of these two concepts arises in the first instance is that the employer might have dealt with the contract of employment between it and the employee in a manner not permitted by the modern law of unfair dismissal. One can, therefore, employ someone who was not previously employed but re-employ only a previously employed person whose contract of employment was terminated unfairly. Reinstatement and re-employment are therefore two different ways in which the law seeks to fix the unfair labour practice perpetrated by the employer against the employee in such circumstances.

In some labour relations systems, the term used is 're-engagement'. This, like 're-employment', presupposes that there was previously an engagement from which the

35 [2008] LSLAC 4 (18 June 2008) para 12.
36 Paragraph 12.
37 See s 197 of the LRA.
38 Section 193(1)*(b)* of the LRA.

employer unfairly disengaged. Writing on re-engagement, which is the term popularly used[39] in the West Indian labour relations legislation, the authors of *Commonwealth Caribbean Employment and Labour Law*[40] quite rightly submit that 're-engagement is akin to reinstatement', except that 'the employee does not necessarily resume duties in his previous position.'

However, the employee is not expected to be disadvantaged in terms of his rank, benefits and allowances; it must not be a form of demotion, since the underlying expression in the enabling legislation is 'reasonably suitable' work and, 'as far as possible, comparable to the previous position.' On the other hand, it is not clear whether the pronouncement of the Privy Council in *Jamaica Flour Mills Ltd v The Industrial Disputes Tribunal*[41] totally represents the definition of 'reinstatement' in labour law generally, including that of South Africa, especially since this expression emanates from the International Labour Organization (ILO) Convention 158, or whether their Lordships were simply defining that term in the context of the Jamaica Labour Relations and Industrial Disputes Act 1975. Although their Lordships were of the view that the statutory language imposes the mandatory duty to order reinstatement if the statutory conditions are met, they nevertheless observed that there is some 'flexibility' about that term. Their Lordships observed that:

> Reinstatement does not necessarily require that the employee be placed at the same desk or machine or be given the same work in all respects as he or she had been given prior to the unjustifiable dismissal. If, moreover, in a particular case, there really is no suitable job into which the employee can be reinstated, the employer can immediately embark upon the process of dismissing the employee on the ground of redundancy, this time properly fulfilling his obligations of communication and consultation under the Code.[42]

It must be admitted that the UK Supreme Court case of *McBride v Scottish Police Authority*[43] posed problems for the adjudicatory institutions in that the issues of reinstatement and re-engagement which they were called upon to adjudicate on were not at all straightforward. In this instance, the complainant's original duties were reduced during the course of the employment not of the individual employee's or the employer's making but by dint of a third party's wish. In such a circumstance, would the employee be reinstated to the original duties or those she had been performing since the cut? Or would such a circumstance provide a proper setting for re-engagement or payment of compensation?

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39 See ss 2(3) and (4) and 13(2) and (3) of the UK Redundancy Act 1965 (see now s 115(1), Employment Rights Act 1996); s 15(2)*(b)*, Industrial Relations Act 1996 (eSwatini). See also the discussion by Chuks Okpaluba, 'Specific Performance and Reinstatement in Swazi Labour Law: English or South African Approach' (1999) 28(3) Anglo-American LR 287, 307–309.

40 Natalie Corthésy and Carla-Anne Harris-Roper, *Commonwealth Caribbean Employment and Labour Law* (Routledge 2014) 255–256.

41 [2005] UKPC 16 (23 March 2005).

42 Jamaica Flour Mills (n 41) para 24.

43 [2016] ICR 788 (UKSC).

Meanwhile, how do the British courts treat these two vital remedies of unfair dismissal? Simler J held in *British Airways Plc v Valencia*[44] that, whereas an order of reinstatement is an order that the employer shall treat the complainant in all respects as if they had not been dismissed, an order for re-engagement is more flexible and may be made on such terms as the tribunal may decide.[45] The learned judge of the EAT proceeded to contrast an order for reinstatement which places the complainant into the same job on the same terms as if they had not been dismissed[46] and an order for re-engagement, which may involve a change in the identity of the employer, the nature of the employment or the terms of remuneration.[47] The judge further observed that placing the complainant precisely on the same terms must include 'reporting to the same manager and working alongside the same colleagues as before'.[48]

While accepting that the basic dichotomy between reinstatement and re-engagement was, to a great extent, correctly captured by Simler J in *British Airways*, Lord Hodge disagreed with some aspects of the judge's definition. In *McBride v Scottish Police Authority,*[49] the Justice of the Supreme Court would not go as far as the EAT judge did as to say that a reinstatement order involved the employee having the same manager. According to Lord Hodge, while treating the employee in all respects as if they had not been dismissed, the employer could give the employee a new line manager to avoid further conflict. After all, it is the contractual rights, the terms and conditions of employment, which must be reinstated and the rights and privileges, such as seniority and pension rights, which must be restored to the employee under a reinstatement order. Counsel was therefore correct to challenge the view that a reinstatement order required the re-creation of the precise factual conditions at the point of dismissal. Therefore, the EAT has no power to order reinstatement in terms which alter the contractual terms of the complainant's employment.[50]

Distinguishing 'Instatement'

'Instatement' is not a term used or recognised anywhere in the LRA or, indeed, in any other labour legislation—not in the United Kingdom Industrial Relations Act (UK IRA) 1971, the Trade Union and Labour Relations Act (TULRA) 1974 or the current Employment Rights Act (ERA) 1996, or in the Namibia Labour Acts of 1992 or 2007.

As a remedy of labour law, it entered South Africa's labour glossary through the judgment of the Constitutional Court in *Hoffman v South African Airways*.[51] An applicant for the

44 [2014] IRLR 683 (EAT).
45 *British Airways Plc* (n 44) para 7.
46 Section 114(1) of the ERA 1996.
47 Section 115(1).
48 *British Airways Plc* (n 44) paras 25–26.
49 [2016] ICR 788 (UKSC).
50 *McBride* (n 43) paras 34–35.
51 2001 (1) SA 1 (CC); discussed extensively by Chuks Okpaluba, 'Extraordinary Remedies for Breach of Fundamental Rights: Recent Developments' (2002) 17(1) SAPL 98, 111–117.

position of cabin assistant had passed the employer's selection and screening processes but was refused employment when the employer discovered that he was HIV-positive. The Constitutional Court held that the conduct of the employer was a violation of the applicant's fundamental right to equality and non-discrimination. Further, that the denial of employment in the circumstances impaired the applicant's right to dignity; constituted an unfair discrimination; and it violated his right to equality under section 9 of the 1996 Constitution. Then the question of the appropriate remedy arose. At that point in the history of labour law, the only recognised remedy was reinstatement, which restores the parties to the status quo. In the cabin assistant's case, there was no status quo to restore since an employment relationship had not yet been entered into. Even if there were such a contract, the common-law courts would ordinarily not make an order in the form of specific performance of a contract of employment,[52] not to speak of a situation as inchoate as the stage at which the parties found themselves in *Hoffman.*[53] If that was the common-law position, 'it is therefore unimaginable that instatement of a person wrongfully denied employment could ever be contemplated' under the common-law regime.[54] On the other hand, if the cabin assistant was already in an employment relationship with South African Airways, then he could have brought his action alleging unfair discrimination in terms of section 9 of the Constitution on the ground of his being HIV-positive and could have claimed reinstatement as the appropriate relief.

Emboldened by the new labour legislative regime founded on a Bill of Rights that entrenches a right to fair labour practices,[55] a system that abhors 'unfair labour practices' and regulates the procedure for settling disputes arising from them,[56] and prohibits unfair discrimination in any shape or form,[57] the Constitutional Court took its cue from reinstatement and came up with 'instatement' as a remedy. This remedy applies at the engagement stage if an applicant, although duly qualified for the position advertised, is nonetheless denied employment through some unfair conduct on the part of the employer. Ngcobo J (later CJ), who delivered this novel opinion, held that instatement—an order that the applicant cabin attendant be appointed to the position which he was denied—was the appropriate and most practicable relief in the circumstances. Though 'carved out of the image of reinstatement', instatement is much nearer to an order of specific performance of a contract of employment[58] or the public-law equivalent of an order for '*mandamus*

52 See generally Okpaluba (n 39) 287–323.

53 The most that the common-law courts have done for the intending employee in the circumstances where the contract of employment has literally been concluded but subsequently repudiated by the employer has been to award damages for breach of such contract: *British Guiana Credit Corporation v Da Silva* [1965] 1 WLR 248 (PC); *Richardson v Koefod* [1969] 1 WLR 1812 (CA).

54 Okpaluba (n 51) 113.

55 Section 23(1) of the Constitution, 1996.

56 See ss 186(2) and 191 of the LRA 1995.

57 Section 9 of the Constitution.

58 Contra s 158(1)*(a)*(iii) of the LRA, read with s 77A*(e)* of the Basic Conditions of Employment Act 75 of 1997; and see *Santos Professional Football Club v Igesund* 2003 (5) SA 73 (C); *Ngubeni v National Youth*

compelling a public authority to employ the applicant in accordance with the tenets of the Constitution or any other law the respondent had breached.'[59]

In *South African Security Forces Union v Surgeon-General of the SAMHS*,[60] Claassen J set aside the defendants' blanket ban that no person who is HIV-positive may be recruited, deployed externally or promoted within the South African National Defence Force (SANDF) on the ground that it was unconstitutional in that it unreasonably and unjustifiably infringed the rights of aspirants and current HIV-positive members of the SANDF:

(*a*) not to be unfairly discriminated against in terms of section 9(3) of the Constitution;

(*b*) not to interfere with the right to privacy in terms of section 14 of the Constitution;

(*c*) not to infringe the right to dignity in terms of section 10 of the Constitution; and

(*d*) not to infringe the right to fair labour practice in terms of section 23(1) of the Constitution.

The respondents were also directed immediately to employ the third applicant, who was a very well-qualified musician and trumpeter and who went through all the medical tests and 'everything was in order until they found out that he was HIV-positive' and was thereupon refused entry to and membership of the SANDF.

When, six years later, the same matter came before Meyer J in *Dwenga v Surgeon-General of the SAMHS*,[61] the learned judge held that it was indisputable that by virtue of their new testing and health policy, the SANDF denied persons who were HIV-positive entry into the Military Skills Development System (MSDS) or the securing of a contract in the Core Service System (CSS) without regard to their health and fitness and ability to perform the duties required of them during MSDS or of the particular position they otherwise would have secured in terms of a CSS contract. This was an assault on their dignity[62] and the discrimination was not shown to be fair, therefore it violated the right to equality guaranteed by section 9 of the Constitution. However, Meyer J preferred to decide the matter on the basis that it was vexatious and frivolous and an abuse of process[63] for the SANDF to be seeking to re-litigate the same issues that had already been determined in

Development Agency (2014) 35 *ILJ* 1356 (LC); *Dyakala v City of Tshwane Metropolitan Municipality* [2015] ZALCJHB 104 (23 March 2015).

59 Okpaluba (n 51) 115.

60 [2008] ZAGPHC 217 (16 May 2008).

61 [2014] ZAGPPHC 727 (26 September 2014) para 21.

62 Per Ngcobo J in *Hoffman v South African Airways* (n 51).

63 *Dwenga* (n 61) para 23.

SASFU and to debar the SANDF from doing so.[64] Questions of equity and fairness did not require that the question of the constitutionality of the SANDF's practice of refusing to employ all persons living with HIV be re-litigated in these proceedings.[65] Apart from the declaratory and interdictory relief sought by the applicants, which was aimed at enforcing compliance with the order made by Claassen J in *SASFU*, instatement ('which requires an employer to employ an employee')[66] was the appropriate relief that should also be granted to the individual applicants in this case. Such an order would, inter alia, redress the wrong the first and second applicants had suffered and place them, as far as it is possible, in the same position they would have been but for the unfair discrimination against them.[67]

Resignation and its Effect on Reinstatement

One of the questions raised at the Constitutional Court in *Toyota SA Motors (Pty) Ltd v CCMA*[68] was this:

> whether, in the light of the meaning of the word 'reinstate' and the aim of reinstatement as articulated in the judgment of this Court in *Equity Aviation*,[69] 'an employee who would have left the employer's employ by reason of resignation at some stage after the dismissal but before the arbitration of the dismissal dispute may competently be reinstated.'[70]

Another question was whether an award for the payment of back pay in such a case was competent. The arbitrator had ordered that the employer must reinstate Makhotla and that he be paid six months' back pay, the arbitrator having found that his dismissal consequent upon his four days' absence from work was substantially unfair. The employer argued before the Constitutional Court that the employee's notice of resignation precluded the arbitrator from making an order of reinstatement, because his contract of employment would, in any event, have come to an end on 31 March 2011. Having upheld the Labour Court's dismissal of the review application on the basis of the excessive delay and that there was no merit on the other grounds raised, Nkabinde J declined to decide this 'new point' raised before the Constitutional Court for the first time.[71] Although Nkabinde J was of the view that it was a point the Labour Court 'ought not to have taken into account in its

64 See, for example, *per* Wallis JA in *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC* [2013] ZASCA 129 (SCA) para 45; *per* Milne J in *Cook v Muller* 1973 (2) SA 240 (N) 245H–246B.

65 Dwenga (n 61) para 13. See also *Prinsloo NO v Goldex* 15 (Pty) Ltd [2012] ZASCA 28 paras 10, 23–27; *Hyprop Investments Ltd v NSC Carriers & Forwarding* CC [2013] ZASCA 169 paras 13–20.

66 *Hoffman* (n (53) paras 50–61.

67 *Dwenga* (n 61) para 22.

68 (2016) 37 *ILJ* 313 (CC) para 50.

69 *Equity Aviation* (n 14) para 36.

70 *Per* Zondo J in *Toyota SA* (n 68) para 69.

71 At para 209, Wallis AJ, who concurred in the majority judgment, held that it was unnecessary and impossible to determine this issue in the present case.

consideration of Toyota's prospects of success as it was not raised before it', she nevertheless observed:

> [m]y colleague, Zondo J, is of the view that if the arbitration award is allowed to stand Toyota may end up paying Makhotla around R2 million or even more, and that this would be unjust.[72] I do not think this is correct. The arbitrator expressly limited the payment of back-pay to six months' salary in the amount of R218 400. There is no reason why Toyota would be required to pay any more than this.[73]

In dealing with resignation and its effect on remedy, Zondo J in his dissenting judgment reviewed[74] section 193(1) and (2) of the LRA on reinstatement, including the meaning of 'reinstate' as articulated in *Equity Aviation.*[75] He held that where a court or an arbitrator orders the reinstatement of an employee that, in effect, is an order that the employer put the employee 'in the position he or she would have been in but for the dismissal.'[76] This means that the Labour Court or arbitrator must ask itself or themselves this question: But for the dismissal, in what position would the employee have been? The court or an arbitrator must ask this question because it must ensure that it does not order the 'reinstatement' of an employee in the position in which they would not have been but for the dismissal. If that happens, that would not be reinstatement as defined in *Equity Aviation.* It is also important to highlight the fact that in that case the court made it clear that the remedy of reinstatement 'safeguards workers'' employment by 'restoring the employment contract'. By virtue of this statement, the Constitutional Court

> emphasised that the remedy of reinstatement is meant to restore the employment contract. Obviously, the only contract that can be restored would be the contract that the employee had with the employer at the time of dismissal.[77]

This case is not concerned with constructive dismissal but with the voluntary resignation of the employee. The point here is that the employee was dismissed a few days before his resignation took effect, that is, at the time when he had already indicated that he no longer wanted to continue in Toyota's employ beyond 31 March 2011. The commissioner therefore failed to apply his mind to the fact that, but for the dismissal, Makhotla would have left Toyota's employ on 31 March 2011; nor did he apply his mind to what the implications of the situation would have been for the remedy. He also did not apply his mind to the provisions of section 193(2)*(c)* of the Act.[78] In that instance, the remedy of reinstatement was not competent because, in terms of the jurisprudence of the Labour

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72 *Toyota SA* (n 68) *per* Zondo J para 161.
73 *Toyota SA* (n 68) *per* Nkabinde J para 49.
74 *Toyota SA* (n 68) paras 134–137.
75 *Equity Aviation* (n 14) paras 36 and 39.
76 *Equity Aviation* (n 14) para 36.
77 *Toyota SA* (n 68) *per* Zondo J para 138.
78 *Toyota SA* (n 68) para 154.

Court, reinstatement cannot be granted where the employee would not have continued in the employer's employ.[79] There was no basis for either a reinstatement order or the payment of back pay in this case. If the dismissed employee was entitled to anything, it was only the pay for the seven days from 25 to 31 March 2011.[80] Zondo J therefore held that:

> If an arbitrator grants an award for the employer to reinstate an employee whose resignation would have taken effect, or, whose fixed term contract would have expired, on a date between the date of dismissal and the date of the arbitration award, he makes an award with which the employer cannot practically comply. This is because, but for the dismissal, that employee would have been out of the employer's employ as a result of his resignation. So, bearing in mind the meaning of the word 'reinstate' in *Equity Aviation*, how does the employer comply with such an order?[81] In such a case it is not reasonably practicable for the employer to reinstate the employee within the meaning of section 193(2)(*c*) of the LRA as interpreted by this Court in *Equity Aviation.* Such an order is incompetent and cannot be practically given effect to. In my view, if an award of reinstatement is made in a case such as the present and the employer were not to comply with it on the basis that it cannot put the employee in the position in which he would have been but for the dismissal and contempt of court proceedings were instituted, the employer would have a complete defence of impossibility of performance.[82]

Automatic Reinstatement in the Form of a Declaration

The question before the LAC in *Edcon v Steenkamp, and Related Matters*[83] was whether non-compliance with the notice and procedural provisions of section 189A(2)*(a)* read with section 189A(8) of the LRA relating to dismissals based on operational requirements by employers with more than 50 employees resulted in the invalidity of the dismissals and an entitlement to reinstatement on that ground. This is where notice of termination was given before first referring the dispute to conciliation—a requirement that must be read into section 189A(8) of the Act—and also given prematurely, that is, before the period referred to in section 189A(8)*(b)* has lapsed. In breach of section 189A(8), the respondent (Edcon) had given dismissal notices prematurely during the thirty-day period to a number of employees, including Ms Steenkamp. She and other affected employees, together with their union, approached the Labour Court for orders declaring the dismissals invalid and of no force and effect, and for reinstatement orders. This action arose on the basis that section 189A(2)*(a)* of the LRA, which provides that for dismissals based on operational requirements by employers with more than fifty employees notice of termination of

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79 *Toyota SA* (n 68) para 149. See, for example, *Tshongweni v Ekurhuleni Municipality* (2010) 31 *ILJ* 3027 (LC); *Cash Paymaster Services, NW (Pty) Ltd v CCMA* (2009) 30 *ILJ* 1587 (LC); *Nkopane v IEC* (2007) 28 *ILJ* 675 (LC).

80 *Toyota SA* (n 68) paras 158 and 161.

81 *Equity Aviation* (n 69) para 36.

82 *Toyota SA* (n 68) paras 159–160, *per* Zondo J.

83 2015 (4) SA 247 (LAC). See Wilhelmina Germishuys, 'An Analysis of *Edcon v Steenkamp* with Reference to Its Effect on the *De Beers* Principle' (2016) 79(1) THRHR 38.

employment 'must' be given 'in accordance with the provisions of the section'. In this case, the provisions of section 189A(8) of the LRA applied, precluding an employer from giving dismissal notices during a period of thirty days from giving a section 189(3) notice and not before the periods mentioned in section 64(1)*(a)* had elapsed. The LAC heard the matter as a court of first instance and held that the dismissals were not invalid but that they might have constituted an unfair labour practice.

In a unanimous judgment, the LAC held, first, that the general principle that a thing done contrary to the direct prohibition of the law was void and of no effect no longer applied in all cases but depended upon the proper construction of the legislation in question. The crucial enquiry was whether the legislature had contemplated that the failure should be visited with a nullity. The fact that a statute provided for remedies in the event of a breach of its provisions was a significant factor counting against making an inference of invalidity, as was that a declaration of invalidity would have capricious, disproportionate or inequitable consequences.[84] Second, that a declaration of invalidity and consequential relief in the form of automatic reinstatement on the grounds of procedural non-performance were inconsistent with the intention of the legislature generally to limit relief for procedural lapses. Other remedies existed to deal with the problem of prematurity, which in their application would lead to more proportionate and less capricious consequences, in keeping with the aim of the LRA to promote orderly collective bargaining and the effective resolution of labour disputes.[85] Third, that it could, therefore, not have been the intention of the legislature that a failure to comply with section 189A(2) of the LRA would result in the dismissals being invalid.[86] To the extent that the court's earlier decisions in *De Beers Group Services (Pty) Ltd v NUM*[87] and *Revan Civil Engineering Contractors v NUM*[88] that section 189A(2)*(a)* of the LRA, read with section 189A(8), results in any ensuing dismissal being invalid are incorrect and an erroneous interpretation, non-compliance with these provisions therefore does not lead to an invalid dismissal.[89]

Steenkamp v Edcon at the Constitutional Court

In their application for leave to the Constitutional Court, the applicants relied on the peremptory word 'must' in section 189A(2)*(a)* and on the principle that anything done contrary to law was a nullity. As Cameron J, in his concurring judgment, put it:

> if an employer dismisses in violation of this injunction, are the dismissals invalid? The applicants (employee applicants), joined by the National Union of Metalworkers of South Africa (Numsa), say 'Yes'. The respondent, Edcon Ltd (Edcon), says 'No'. Contradictory

84 *Edcon* (n 83) paras 43–45.
85 *Edcon* (n 83) para 50.
86 *Edcon* (n 83) para 52.
87 [2011] 4 BLLR 319 (LAC).
88 (2012) 33 *ILJ* 1846 (LAC).
89 *Edcon* (n 83) paras 56 and 60.

> decisions of the Labour Appeal Court point in opposite directions. These proceedings seek an answer from this court.[90]

The Constitutional Court held that the approach that the use of the word 'shall' in a statutory provision means that anything done contrary to it is a nullity is neither rigid nor conclusive. The same could be said of the use of the word 'must'—its mere use is not sufficient to justify a conclusion that a thing contrary to it is a nullity. The proper approach is to ascertain the purpose of the legislation in this regard. This required an examination of the relevant provisions of the statute.[91] The court accordingly dismissed the appeal and gave a number of reasons for doing so, as discussed below.

Labour Relations Act does not Recognise Invalid Dismissals

The LRA did not contemplate invalid dismissals or an order declaring a dismissal invalid or of no force and effect and, therefore, whether non-compliance with a section 189A(8) procedure could result in the dismissals being unfair and not invalid. Before a court could declare that a dismissal was invalid, it first had to conclude that it was unlawful. The LRA created special rights and obligations that did not exist at common law, and also created applicable principles and special processes for those rights to be enforced. One such right was the right not to be unfairly dismissed, but no right not to be unlawfully dismissed featured in the LRA. This was an indication that the Act did not contemplate invalidity as a consequence of a dismissal effected in breach of a provision of the LRA. This conclusion was reinforced by the absence of 'unlawful dismissal' from the Act's definition of 'dismissal' and by the inclusion in the Act of the category of 'automatically unfair dismissal'.[92]

The legislature deliberately provided in the LRA for unfair dismissal and automatically unfair dismissals to attract a remedy, but did not make any provision for unlawful or invalid dismissals. The rationale for the policy decision to exclude unlawful or invalid dismissals from the Act was that the legislature sought to create a dispensation that would be fair to both employers and employees, with sufficient flexibility to do justice between employer and employee. Under the LRA, a dismissal was recognised as having taken place irrespective of whether it was held to have been unfair or automatically unfair because there was no fair reason for it or because there was no compliance with a fair procedure in effecting it. The exclusion of the remedy of an invalid dismissal under the LRA was deliberate because it did not fit into the legislative scheme of the Act, which required flexibility so as to achieve fairness and equity between employer and employee in each

90 *Steenkamp v Edcon* 2016 (3) SA 251 (CC) para 1.
91 *Steenkamp* (n 90) paras 99, 182–183.
92 *Steenkamp* (n 90) paras 104–108.

case.[93] Put differently, the language of 'invalidity' or 'unlawfulness' do not belong to the LRA, whereas the language of 'fairness' and 'equity' do.[94]

In line with the foregoing reasoning, if the procedural requirements of section 189 or section 189A were not complied with in circumstances where there were no acceptable reasons for non-compliance, the result would be that the dismissal was not effected in accordance with a fair procedure as contemplated in section 188(1)*(a)*(ii). It would therefore be procedurally unfair—certainly not unlawful, invalid and of no force or effect.[95] The orders that the Labour Court could make should an employer not comply with the procedural fairness requirements of section 189A(13) were so extensive as to make it unnecessary for the LRA to contemplate invalid dismissals or orders declaring dismissals to be invalid and of no force or effect. These included an order for reinstatement which could be with retrospective effect to the date of dismissal, therefore entitling the employee to full back pay and other benefits and to be treated as if they had never been dismissed.[96] Another factor was that the LRA spelt out the consequences of non-compliance with the procedural requirements of section 189A(8); it did not mention that the invalidity of the dismissal notices or of the resultant dismissals were part of such consequences.[97]

Declaratory Order in the Context of an LRA Breach

Enunciating the principle of 'LRA remedy for an LRA breach', Zondo J, delivering the lead judgment, held that a cause of action based on a breach of an LRA obligation compelled the litigant to use the dispute-resolution mechanisms of the LRA to obtain a remedy provided for in the Act itself. The litigant could not go outside the Act and invoke the common law for a remedy. If a litigant's case were based on a breach of an LRA obligation, the dispute-resolution mechanism used had to be that of the LRA, and the remedy had to be provided for in the Act.[98] This is in line with the judgment of Ngcobo J in *Chirwa v Transnet Ltd*[99] to the effect that where an employee alleges non-compliance with the provisions of the LRA, the employee must seek a remedy in the LRA. The

93 *Steenkamp* (n 90) paras 109 and 116.

94 The courts have, over the period, emphasised 'fairness' as contemplated in the labour adjudication process in so many words. For instance, the Appellate Division had stated in *NUMSA v Vetsak Cooperative Ltd* (1996) 17 *ILJ* 455 (A) 476D–E that:
fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances … And, in doing so, it must have due and proper regard to the objectives sought to be achieved by the Act.
See also Equity Aviation (n 69) para 39; Billiton Aluminium (n 19) para 42; Mediterranean Textile Mills (n 28) para 43.

95 *Steenkamp* (n 90) para 125.

96 *Steenkamp* (n 90) para 128.

97 *Steenkamp* (n 90) paras 134–136.

98 *Steenkamp* (n 90) paras 137 and 140.

99 2008 (4) SA 367 (CC).

employee cannot seek to avoid the dispute resolution established by the LRA by resorting to claim for breach of a right in the Bill of Rights.[100]

Section 189A Remedies are Specified Therein

As a general rule of construction, if it were clear from the language of a statute that in creating an obligation the legislature confined the party complaining of its non-performance, or suffering from its breach, to a particular remedy, such party would be limited to that remedy and would have no further remedies.[101] Subsection (18) of section 189A, read with subsection (13), provided extensive protection to employees where an employer failed to comply with a fair procedure.[102] The strike option permitted by section 189A gave employees a very strong weapon to deal with the employer and was a far-reaching remedy itself.[103] And by an order of reinstatement that operated with retrospective effect to the date of dismissal the same result could be achieved as by an order declaring a dismissal invalid.[104] These were adequate remedies and therefore there was no need to include the invalidity of dismissals as a consequence of non-compliance with the procedural obligations in subsection (8) on the basis that there would otherwise be no serious consequences for non-compliance.[105]

Is an Order of Reinstatement Competent in the Case of an Invalid Dismissal?

Finally, the court also provided an answer to the above question. It held, first, that an order of reinstatement is not competent where the dismissal is invalid and of no force and effect such that to speak of an order of reinstatement in such a case is a contradiction in terms.[106] Second, an invalid dismissal is a nullity. And if it is of no force and effect, it means that the dismissal did not take place. It is something totally different from the concept of unfair dismissal and reinstatement as understood in the *Equity Aviation* jurisprudence of the court.[107] Third, when a dismissal is held to be unfair, one can speak of reinstatement; but one cannot speak of it in the case of an invalid dismissal, which means that the order of reinstatement is not competent for an invalid dismissal.[108] Finally, it is an employee whose dismissal is unfair who requires an order of reinstatement, whereas an employee whose dismissal is invalid does not need such an order.[109]

100 *Chirwa* (n 99) paras 18 and 124.
101 *Steenkamp* (n 90) para 145.
102 *Steenkamp* (n 90) paras 158 and 164.
103 *Steenkamp* (n 90) para 171.
104 *Steenkamp* (n 90) para 180.
105 *Steenkamp* (n 90) paras 174–175.
106 *Steenkamp* (n 90) para 188.
107 *Steenkamp* (n 90) para 189.
108 *Steenkamp* (n 90) para 190.
109 *Steenkamp* (n 90) para 192.

Different Scenario Presented by the 'SABC 8' Case

In the light of the foregoing, can it now be said that the concept of an unlawful termination of the employment contract has been banished from the law of employment in every circumstance? What if the termination takes the shape of a violation of constitutional rights, rights which the LRA was not designed to ventilate? Put differently, what about a situation in which the termination of employment is incidental to a wider act of breach of fundamental freedoms and vital principles of democracy? Would the courts insist that the matter should be sorted out through the mechanisms of the LRA? Would the constitutional interpretation principle that once there is an alternative remedy available from another source the court must follow that approach[110] be applicable here? Or it is possible to decide the matter before court without having to decide a constitutional issue?

Bringing the matter closer to home, on what basis did Lagrange J uphold the applicants' case of unlawful dismissal for opposing the SABC's ban on their broadcasting violent protests in the recent *Solidarity v South African Broadcasting Corporation*[111] case? The grounds upon which the dismissed journalists of the corporation claimed that their dismissals were unlawful and invalid were two-pronged. First, they contended that it was unlawful to terminate their services without complying with their contractual rights to a disciplinary hearing before they were dismissed. If this were the only point, it is doubtful whether they would have succeeded in obtaining remedies of a public-law nature without showing that the conduct of their employer constituted an administrative action, and so PAJA would apply. But, then, the second allegation was that their dismissal was in breach of their constitutional right to freedom of expression and was unlawful for that reason.[112] For its part, the SABC, relying on *Steenkamp v Edcon*, contended that the dismissed journalists of the corporation were confined to the remedies for unfair dismissal and, presumably, for unfair suspension.[113]

The court in *Solidarity* began by observing that a consequence of the Constitutional Court's interpretation of the LRA is that the LRA does not provide remedies for unlawful or invalid dismissals. But does this judgment mean that the Labour Court has no jurisdiction to provide such remedies? It does not follow as a matter of logic that because the LRA does not provide such remedies, they do not exist or that the Labour Court cannot grant them if they do exist. The applicants maintained that they were entitled to enforce their contracts of employment and have their dismissals set aside.[114] The court was satisfied that the decision of the Constitutional Court did nothing to disturb the legal premises of the judgments in which orders of specific performance compelled an employer to honour contractual obligations to hold a disciplinary hearing and setting aside dismissals in breach

110 *S v Mhlungu* 1995 (3) SA 867 (CC) 895E.
111 2016 (6) SA 73 (LC).
112 *Solidarity* (n 111) para 37.
113 *Solidarity* (n 111) para 38.
114 *Solidarity* (n 111) para 44.

of such obligations, as was the case in *Ngubeni v National Youth Development Agency*[115] and *Dyakala v City of Tshwane Metropolitan Municipality*.[116] Consequently, the Labour Court is entitled to entertain the applicants' claims based on any alleged invalid termination of their contracts of employment and to make orders which are competent in claims based on breach of contract.[117] Quite apart from the contractual jurisdiction under section 73(3) of the Basic Conditions of Employment Act 75 of 1997 and section 157(2) of the LRA, the Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution and arising from: (*a*) employment and labour relations and (*b*) any dispute over the constitutionality of any executive act or 'any threatened executive or administrative act, or conduct, by the State in its capacity as an employer.' 'Plainly,' held the judge, 'the LRA did envisage and provide for this court granting relief for the violation of constitutional rights within the ambit of its sphere of operation in labour matters.'[118]

Lagrange J held that the SABC's disciplinary code, which was incorporated in the applicants' contracts of employment, plainly required an oral disciplinary hearing before an employee could be dismissed.[119] The Schedule 8 notices sent to the applicants required them to respond to the charges in vague terms, without offering the sort of hearing envisaged by the code.[120] It followed, therefore, that the applicants were entitled to a proper disciplinary enquiry in conformity with the SABC Disciplinary Code and Procedure and that their dismissal in breach of it was invalid. By parity of the reasoning with *Ngubeni* and *Dyakala* there was no reason not to declare their dismissals invalid for this reason alone.[121] But the dismissals were also invalid because they violated the applicants' constitutional right to freedom of expression under section 16(1) of the Constitution, a right which the SABC, as public broadcaster, had a particular duty to protect.[122] Since the dismissals for the stated reason of criticising an extraordinary censorship policy were plainly contrary to section 16(1) of the Constitution, the Labour Court could, in the exercise of its concurrent jurisdiction with the High Court under section 157(2) of the LRA, make an appropriate order under section 158(1) of the LRA.[123] Accordingly, the appropriate order was for the dismissals to be nullified, which in effect meant that they had never taken place and that the SABC had to allow the applicants back into the workplace to continue with their respective duties and responsibilities in accordance with their job descriptions.[124]

115 (2014) 35 *ILJ* 1356 (LC).
116 [2015] ZALCJHB 104 (23 March 2015).
117 *Solidarity* (n 111) para 47.
118 *Solidarity* (n 111) para 48.
119 *Solidarity* (n 111) para 49.
120 *Solidarity* (n 111) para 50.
121 *Solidarity* (n 111) para 51.
122 *Solidarity* (n 111) paras 60–65.
123 *Solidarity* (n 111) para 66.
124 *Solidarity* (n 111) paras 70–71 and 78.

The court further considered the question of the appropriate relief and the Constitutional Court's opinion on the invalidity of dismissal and the principle of law that it is an employee whose dismissal is unfair who requires an order of reinstatement.[125] Lagrange J held: first, that an order declaring the applicants' dismissal invalid will have the legal effect that their dismissals had never taken place and that it can be accompanied by an order that the SABC must allow them back into their workplace for the purposes of performing their duties. Second, as those incomplete enquiries which were initiated prior to the applicants' dismissals were essentially based on the same reason as the dismissal or because of the applicants' disagreement over adopting the policy, it would follow that those instructions and steps were unlawful because they were premised on the enforcement of an unlawful policy. Finally, if final relief is competent on the papers in respect of the dismissals and because the continuation of those other measures would be unlawful, it is appropriate to make an order for final relief in respect of the suspensions and pending disciplinary proceedings.[126]

Rationalising its approach on the basis of concurrent jurisdiction and finding against the SABC for not only breaching the contracts of the applicants but also violating their constitutional rights to freedom of expression, the judge found that the SABC had an 'exceptional feature': it is a public broadcaster with a special mandate,[127] it has a special function to perform[128] and 'the public has an interest in how it is run'.[129] For their part, journalists have ethical commitments and constitutional obligations 'which they must at least aspire to'.[130]

It is important to proffer further reasoning for distinguishing *Steenkamp v Edcon* from the *Solidarity* case. It must be borne in mind that the circumstances of the latter case were quite different from those of *Steenkamp*, where the claim involved a typical employment matter—unfair dismissal based on operational reasons—thoroughly regulated by two exhaustive sections of the LRA. No constitutional or even common-law claim was raised in that matter, whereas the present case concerned contractual but predominantly constitutional claims. The SABC is not only a statutory corporation but also a public corporation par excellence. It is the informer and educator of the public as to what is happening around them and the state of affairs in the polity. Its employees are not employees of a private enterprise but employees whose employment has both a statutory and a public flavour. The SABC's decision to prohibit its employees from practising what they know best—bringing current events to the knowledge of the citizenry without fear or favour—carries with it every tinge of public interest incorporating freedom of expression and freedom of information not only vital in the performance of the journalists' jobs but

125 *Steenkamp* (n 90) paras 189 and 192.
126 *Solidarity* (n 111) paras 72–74.
127 *Solidarity* (n 111) para 66.
128 *SABC Ltd v NDPP* 2007 (1) SA 523 (CC) paras 26–27.
129 *Solidarity* (n 111) para 61.
130 *Solidarity* (n 111) para 63.

also an integral aspect of fundamental rights vital to sustaining modern democracy. Employment aspects of this nature are surpassed by far by the interest of the state that democratic governance is not torpedoed by the clumsy and unlawful policies of a public corporation.

Can the Court Order 'Interim[131] Reinstatement' or 'Semi-urgent Interim Relief'?

The settlement of labour disputes under the LRA is a process, and unless the procedure laid down by the Act is followed, there might be a problem of jurisdiction. For instance, although the Labour Court is empowered in terms of section 158(1)*(a)*(i) of the LRA, inter alia, to grant a litigant appropriate 'urgent interim relief', this same court is equally not empowered to adjudicate an unfair dismissal dispute if that dispute was not first referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) or the relevant bargaining council for conciliation within the period specified. This is because the dispute must first be referred to arbitration by virtue of section 191(1) of the LRA. As the LAC held in *De Beer v Minister of Safety and Security*,[132] it is only after the bargaining council or the CCMA Commissioner has certified that the dispute remained unresolved, or a period of 30 days had elapsed since the referral and the dispute remained unresolved, that: (*a*) the council or the CCMA must arbitrate the dispute in terms of section 191(5)*(a)*; or (*b*) in terms of the LRA the employee may refer the dispute to the Labour Court for

131 Urgent interim orders having implications for reinstatement were made in the following two cases. First, in *Mashaba v SAFA* (2017) 38 *ILJ* 1668 (LC) paras 9 and 12–13, the employee had applied for an urgent interim order preventing the employer from filling his post pending the outcome of unfair dismissal arbitration proceedings. The Labour Court found that an employer could not thwart a dismissed employee's bid for reinstatement by replacing him and that the mere employment of a replacement should not influence the arbitrator when determining whether reinstatement of the dismissed employee was appropriate. It held, however, that the order of reinstatement 'pays no heed to other contractual arrangements that might have come into existence between the employer and a replacement.' The fact that the arbitrator or the court can order reinstatement does not necessarily mean that the court can dictate to the employer as to how to conduct itself in concluding employment contracts with other third parties. There is no provision in any of the statutes that empowers the Court to prevent the conclusion of private employment contracts. Lagrange J held further that the arbitration proceedings provide not merely a suitable alternative remedy but the primary remedy for any dismissed employee seeking reinstatement who has been dismissed for misconduct. In the light of these considerations, there was no need for this application intended to preserve the remedy as envisaged. Accordingly, the potential harm the applicant might suffer if a replacement were appointed before the CCMA resolved his case could not be irreparable and the remedy of reinstatement remained available as an alternative remedy notwithstanding such an appointment.
Second, in *Sihlali v City of Tshwane Metropolitan Municipality* (2017) 38 *ILJ* 1692 (LC), the Labour Court refused to grant an interim order restraining the municipality from continuing with the recruitment process pending the finalisation of a s 197 dispute between the employee's employer and the municipality. The court held, in terms similar to that in *Mashaba*, that it would not interfere with the conclusion of a private employment contract.

132 (2013) 34 *ILJ* 3038 (LAC) para 23.

adjudication—section 191(5)*(b)* of the LRA. Section 191(5) therefore makes it clear that referring a dismissal dispute to conciliation is not just the first stage in the process but also

> a precondition before such a dispute can be arbitrated or referred to the Labour Court for adjudication. In the absence of a referral to conciliation, or if it was referred, but there is no certificate issued as contemplated in section 191(5) of the LRA and the 30 days period has not expired, the Labour Court has no jurisdiction to adjudicate the dismissal dispute.[133]

If this is the process, then how did the LAC respond to an interim or temporary reinstatement order claimed by the appellant in *De Beer*? Before the court were a number of cases from the Labour Court, each heading in a different direction. In *SACCAWU v Shoprite Checkers (Pty) Ltd*,[134] Landman J started by assuming that the Labour Court has jurisdiction to grant such relief but refused to grant it while leaving the matter open in a subsequent case—*Rammekwa v Bophutatswana Broadcasting Corporation*.[135] Revelas J held in *Fordham v OK Bazaar (1929) Ltd*[136] that such an order would be tantamount to the status quo ante relief that was obtainable under the old labour relations regime but which was not available under the current system because the power to grant interim reinstatement in a case of unfair dismissal before the dispute has been referred to conciliation has been deliberately excluded from the Act. Mlambo J had no doubt that the court can, in terms of section 158(1) of the LRA, grant relief similar to the status quo orders that were available under the old legislative order and that the Labour Court, being equal in status to the High Court, could grant the same kind of relief that that court could.[137] Although Mlambo J did not order interim reinstatement in the case, he nevertheless reasoned that 'the Labour Court would be failing in its stated task if it were to deny such relief even in circumstances where the unfairness sought to be prevented is very glaring.' The learned judge observed further:

> Experience has taught us that even in this day and age one still encounters highhanded and unilateral conduct that ignored relevant provisions and any semblance of fairness. In certain circumstances the detrimental consequences of such conduct cannot be addressed by an award after arbitration and adjudication has taken place.[138]

When Revelas J had another occasion to address the matter in *SACWU v Sentrachem*[139]—where the applicants sought an urgent interdict compelling the respondent to reinstate the dismissed employees pending the completion of the retrenchment consultations as required by section 189 of the LRA—the learned judge capitulated somewhat, maintaining that there

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133 *De Beer* (n 132) para 23; *NUMSA v Driveline Technologies (Pty) Ltd* [2000] 1 BLR 20 (LAC) para 74, *per* Zondo AJP. See also *NUMSA v Intervalve (Pty) Ltd* (2015) 36 *ILJ* 363 (CC) paras 36–40.

134 [1997] 10 BLLR 1360 (LC).

135 [1998] 5 BLLR 505 (LC).

136 (1998) 19 *ILJ* 1156 (LC).

137 *UWC Academic Staff Union v UWC* (1999) 20 *ILJ* (LC) 1300.

138 *UWC* (n 137) paras 11–12.

139 [1999] 6 BLLR 615 (LC).

was no difference between the opinion she expressed in *Fordham* and those of Mlambo J in the *UWC* case because *Fordham*

> does not have the result that interim relief can never be granted by the Labour Court, but emphasises the reluctance of the Labour Court to grant *status quo* relief in dismissal matters, in other words, reinstatement of dismissed employees when there are alternative remedies available.[140]

Yet, again, the court did not grant the relief sought. Nevertheless, the contributions of Revelas J on this issue further manifested in *Hultzer v Standard Bank of SA (Pty) Ltd*,[141] where the applicant contended that he had been dismissed and sought an order restraining the respondent from carrying out the dismissal and compelling the respondent to restore his conditions of employment pending the resolution of a dispute which he had referred to the CCMA. The learned judge held that although the LRA does not make provision for the status quo relief as did the 1956 Act, the LRA makes provision under its section 158(1)*(a)*(i) for 'very wide powers to grant urgent interim relief.' The Labour Court

> is therefore empowered to grant relief tantamount to urgent reinstatement on an urgent basis. The court will, however, grant such relief only where an applicant is able to persuade the court that extremely cogent grounds for urgency exist.[142]

Once more, the relief sought was not granted.

Then it was Grogan AJ's turn to air his view on the matter. In *NUM v Elandsfontein Colliery (Pty) Ltd*,[143] in deciding an application for leave to appeal against a judgment in terms of which it was held that the issue raised was res judicata. This was because the matter had been decided by the court in an earlier application for interim relief. Grogan AJ therefore had to consider, inter alia, whether there was a reasonable prospect of another court coming to the conclusion that the earlier judgment was null and void, because that court had no jurisdiction to hear the matter concerning their dismissals in terms of section 158(1) of the LRA, as the employees had already been dismissed by the time of the hearing. After referring to the decisions in *Shoprite Checkers, Fordham, UWC, SACWU* and *Paledi v Botswana Broadcasting Corporation*,[144] Grogan AJ observed that the weight of judicial authority favoured the view that the Labour Court can, by virtue of its powers in section 158(1) of the LRA, in appropriate circumstances, grant urgent relief to a dismissed employee in the form of an interim reinstatement, pending the conciliation, adjudication or arbitration of the dispute in terms of section 191 of the LRA. After a careful analysis of the issue, Grogan AJ came to the conclusion that section 191 of the LRA did not preclude the

140 *SACWU* (n 139) para 18.
141 [1999] 8 BLLR 809 (LC).
142 *Hultzer* (n 141) para 9.
143 [1999] 12 BLLR 1330 (LC)
144 Unreported case no J323–324/98 3, 4 Labour Court Digest 184.

court from granting such relief pending the resolution of the dismissal dispute in the ordinary manner; nor were the powers conferred by section 158 limited by section 157 of the LRA, which was the provision that determined jurisdiction. It was held that there was no reasonable prospect of another court's coming to a different conclusion and the application for leave to appeal was dismissed.

Without having been referred to any case where an order of interim reinstatement was granted as a remedy in an unfair dismissal case before the dispute regarding the same had been referred to conciliation under the Act, the LAC, 'without deciding the issue', held that it is apparent from the existing decisions that even where the courts were of the view that such a remedy was feasible, they would not readily grant it. Moreover, they were, generally, of the view that such relief should be confined to the kind of case contemplated by Mlambo J in *UWC*, namely, a matter that is truly urgent and in which the substantive unfairness of the dismissal is glaringly obvious. Even then, Coppin AJA held that because of the nature of reinstatement, it must not be readily possible to grant 'interim reinstatement' without finally, albeit indirectly, deciding crucial issues pertaining to the dismissal and reinstatement.

What is apparent from the cases referred to is this: in deciding whether the court could grant 'interim reinstatement', the true nature of the remedy of reinstatement was not expressly considered or commented upon. Moreover, in particular, there appears to have been no consideration whether reinstatement, owing to its inherent nature, can be made interim. It is significant that, in terms of section 193(1) of the LRA, it is only if and when the Labour Court, or the arbitrator appointed in terms of the Act, finds that a dismissal is unfair that reinstatement may be ordered. Reinstatement ordinarily means that the period between the dismissal and the resumption of service is regarded as never having been broken. Explaining the nature of the remedy in *Kroukam v SA Airlink (Pty) Ltd*,[145] Davis JA stated: 'if an order of reinstatement is made, then the contract is restored and any amount due would necessarily be part of the employee's entitlement.' Again, without deciding the issue, the court noted that finality is inherent in the remedy of reinstatement that would make it difficult to adapt or refashion it to serve as true interim relief. Furthermore, in the light of subsequent decisions, such as, inter alia, the majority decision in the *Driveline* case,[146] particularly regarding the meaning of section 157(4) of the Act, and the decision in *Booysen v Minister of Safety and Security*[147] on the issue of the Labour Court's jurisdiction,

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145 (2005) 26 *ILJ* 2153 (LAC) para 59; confirmed by the SCA in *Republican Press (Pty) Ltd v CEPPWAWU* 2008 (1) SA 404 (SCA) para 19.

146 *NUMSA v Driveline Technologies (Pty) Ltd* (n 134) para 81, where Zondo AJP held that s 157(4)*(a)* provides no basis for the proposition that the Labour Court has jurisdiction to adjudicate a dismissal dispute which has not been referred to conciliation. It is only a basis for the proposition that, in a case where no certificate of outcome stating that a dispute remains unresolved has been issued but the dispute was referred to conciliation but no attempt was made to conciliate the dispute, the Labour Court may, in its discretion, refuse to determine the dispute.

147 [2011] 1 BLLR 83 (LAC) para 34.

the question of the court's power to grant interim reinstatement at all will have to be considered again in an appropriate case.[148]

In any event, the LAC held that the present case is not truly about whether the Labour Court may grant an order for interim reinstatement in terms of its powers under section 158(1) of the LRA. Even if it is assumed for present purposes that the court has such power, this is not a case in which interim relief was truly being sought. Instead, it is one in which the dispute is about the fairness of the appellant's dismissal and in which the fairness of the suspension of the appellant's salary was raised as a pertinent issue. It was also a matter in which, effectively,

> final reinstatement was sought by 'leap-frogging'[149] or 'by-passing' the procedural requirements of section 191 and section 24, respectively, of the LRA, *inter alia*, under the (rather thin guise) that the appellant did not know which forum to approach for relief, and alleged 'semi-urgency'.[150]

If the application had been brought in the ordinary course and if the relief were not tied to urgency and worded as if it were interim relief, the court's lack of jurisdiction would have been obvious. The appellant appears to have attempted to overcome the jurisdictional difficulties by bringing the application on a 'a semi-urgent basis' by wording the relief sought as if it were some kind of 'urgent interim relief' and by requesting reinstatement 'pending' one or other event or occurrence.[151] Pointing out that the Act does not refer to 'semi-urgent interim relief' even though section 158(1)*(a)*(i) of the LRA refers to 'urgent interim relief', Coppin AJA held that a matter is either urgent or it is not. The matter involved in the present application was not urgent within the contemplation of the Act or the rules of the Labour Court. The grounds for 'semi-urgency' which were primarily relied upon by the appellant were that he was not receiving a salary and had no other source of income, his savings were almost exhausted and he had ongoing financial commitments that he could not honour or had difficulty in honouring. However, the loss of salary and benefits, with the concomitant financial hardship, are not regarded as sufficient to establish urgency:[152] any urgency that might have existed in this case would have been self-created either by the appellant or his counsel by unreasonable delays and a failure to institute proceedings timeously. Interim relief must indeed be interim not only in form but also in substance. It is established that a court must look not only at the form of an order but also at its effect.[153] It is apparent from the notice of motion that the reinstatement which the

148 *De Beer* (n 132) para 27.

149 See per Grogan AJ, *NUM v Elandsfontein Colliery (Pty) Ltd* (n 144) para 21.

150 *De Beer* (n 132) para 28.

151 *De Beer* (n 132) para 31.

152 See, for example, *Hultzer v Standard Bank of SA (Pty) Ltd* (n 142); *UWC Academic Staff Union v UWC* (n 137); *Tshwaedi v Greater Louis Trichardt Transitional Council* [2004] 4 BLLR 469 (LC) para 9.

153 *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) 532I; *BHT Water Treatment (Pty) Ltd v Leslie* 1993 (1) SA 47 (W) 55; cf *NUMSA v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305 (CC).

appellant sought by implication was in fact final relief;[154] the reinstatement sought was 'in effect, a final order of reinstatement'.[155] It could not be construed as true and appropriate interim relief because, inherently, it contained 'all the hallmarks of finality'.[156] The appellant effectively sought reinstatement pending finalisation of his application for ill-health retirement or medical boarding; it was not an appropriate urgent interim relief and the court *a quo* had erred in holding to the contrary.[157]

Finally, the crucial and central issue in this matter was about the termination of the appellant's employment and its fairness, because for him to be reinstated to his full salary, benefits and emoluments he had first to be reinstated in his employment, and that could not happen unless the court found that his dismissal was substantively unfair. The court *a quo* should not have assumed that it had jurisdiction to adjudicate the termination of the appellant's employment with the South African Police Service (SAPS) where there was non-compliance with the jurisdictional requirements of sections 191 and 24 of the Act.[158]

In *Majake v Commissioner for Gender Equality*,[159] the plenary of the Commission for Gender Equality (CGE), instead of proceeding with the disciplinary proceedings against the applicant for misconduct, aborted them and summarily dismissed her without affording her a hearing. The applicant approached the High Court as a matter of urgency for an order reinstating her to her position as CEO of the commission with retrospective effect pending the final determination of an application to be instituted by her for the review and setting aside of the CGE's decision to terminate her appointment. The applicant's claim was founded on the primary cause of action that the decision of the respondents (who constituted the CGE's plenary) to terminate her employment was unconstitutional, unlawful and invalid because it constituted unlawful administrative action, a breach both of the principle of legality and of her contract of employment. For the respondents' part, it was argued that the applicant's dismissal was lawful and valid because the decision of the plenary to abort the disciplinary inquiry and summarily terminate her employment was based on the finding by the commission that there had been an irretrievable breakdown in the trust relationship between the applicant and the respondent or employer and, as a result of such irretrievable breakdown, it would have been extremely difficult for the applicant to continue discharging her duties and responsibilities as CEO.

Mokgoatlheng J held that the perceived threat to, or possible violation of, the applicant's constitutional right to dignity and to lawful, reasonable and procedurally fair administrative action, and her summary dismissal without being afforded a hearing, founded and justified the urgency in the application. The perceived violation of the applicant's constitutional

154 *De Beer* (n 132) paras 32–33.
155 *De Beer* (n 132) para 33.
156 *De Beer* (n 132) para 34.
157 *De Beer* (n 132) para 35.
158 *De Beer* (n 132) paras 38–39.
159 2010 (1) SA 87 (GSJ) paras 45, 67, 87–88, 96 and 104.

right to dignity is a constant and enduring phenomenon until the matter is resolved.[160] Further, that the conduct of the plenary in unilaterally aborting the disciplinary inquiry in order to effect the applicant's summary dismissal without affording her a pre-dismissal hearing was a gross manifestation of arbitrary conduct which negated the CGE's duty to conduct itself within the purview of the Constitution and the principle of legality. Consequently, the termination of the applicant's employment was unconstitutional and invalid.[161] As to the relief sought, it was held that since the contract of employment had been terminated unlawfully, the applicant was entitled to reinstatement:

> Although reinstatement is a discretionary remedy in employment law, it is awarded here because of the infringement of the applicant's s 10 constitutional right to dignity, and s 33 right to lawful, reasonable and procedurally fair administrative action.[162]

In these circumstances, the learned judge held, reinstatement was therefore an appropriate order to make. Even though the applicant sought only an interim order, she had, by proving that her dismissal was unlawful, established a clear right to secure a final order. Accordingly, an order that the applicant be reinstated with retrospective effect to her position as CEO of the CGE on the same terms and conditions applicable to her appointment prior to 25 March 2009 was made.[163]

Non-statutory Obstacles to Accessing the Remedy

Problems of Delay in the Adjudicatory Process

Apart from the idea of leaving labour dispute settlement to those who have the experience, training and expertise on the subject, another dominant concept of establishing a system of labour dispute resolution separate and apart from the ordinary courts is the fact that by their nature, labour disputes require a speedy and expeditious resolution, in so doing avoiding the high cost of litigation prevalent in the ordinary courts of the land.

Delay in Labour Disputes Resolution

Nkabinde J was therefore perfectly correct to have placed emphasis on the timely resolution of labour disputes as an essential ingredient of the system of labour-dispute settlement contemplated by the LRA in her judgment in *Toyota SA Motors (Pty) Ltd v CCMA*,[164] when she said:

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160 *Majake* (n 159) para 45.
161 *Majake* (n 159) para 67.
162 *Majake* (n 159) paras 87–88.
163 *Majake* (n 159) para 96.
164 (2016) 37 *ILJ* 313 (CC) para 1.

> The dispute resolution dispensation of the old Labour Relations Act[165] was uncertain, costly, inefficient and ineffective. The new Labour Relations Act[166] (LRA) introduced a new approach to the adjudication of labour disputes. This alternative process was intended to bring about the expeditious resolution of labour disputes which, by their nature, require speedy resolution. Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years.

The court went further to state that when assessing the reasonableness of a delay, sight must not be lost of the purpose of the LRA, which was articulated by Ngcobo J in these words:

> The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring about the expeditious resolution of labour disputes. These disputes, by their very nature, require speedy resolution. Any delay in resolving a labour dispute could be detrimental not only to workers who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have a detrimental effect on an employer who may have to reinstate workers after a number of years. The benefit of arbitration over court adjudication has been shown in a number of international studies.[167]

Effect of Systemic Delay on Remedy[168]

Froneman J explained what is meant by 'systemic delay' when, in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile*,[169] he said:

> It means nothing greater or less than a delay that occurs in the system of labour dispute resolution under the provisions of the LRA, such delay being one of the underlying problems that the LRA seeks to remedy. The participants in that system are employers and employees, their representatives (legal or otherwise), the officials tasked with conciliation, mediation and arbitration in the CCMA and last, but not least, the judges in the Labour Court, the Labour Appeal Court, the Supreme Court of Appeal and in this court. The delays in the 'system' are caused by any one or more of these actors. 'Systemic delay' is not an

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165 Act 28 of 1956.

166 Act 66 of 1995.

167 *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) paras 63–65. See also 'Explanatory Memorandum to the Draft Labour Relations Bill 1995' (1995) 16 *ILJ* 278, 318 and 326.

168 In *Zuma v Public Health & Social Development Sectorial Bargaining Council* (2016) 37 *ILJ* 257 (LC) paras 62–63, the bargaining council arbitrator had refused to award reinstatement for the substantially unfair dismissal of two employees merely because of the unexplained lengthy delay in finalising the matter; the Labour Court on review confirmed that a lengthy period of delay may not necessarily be a bar to reinstatement but it may affect its practicability. The court was, however, satisfied that there was no evidence of the impracticability of reinstatement in this matter and that the arbitrator ought to have ordered the employer to reinstate the employees.

169 (2010) 31 *ILJ* 273 (CC).

> impersonal, inevitable and independent force, it is simply a delay caused by the inaction of people within the labour dispute resolution process.[170]

The Constitutional Court has on at least three occasions commented adversely on institutional delays in the labour dispute-resolution process, while the Supreme Court of Appeal (SCA)[171] had done the same in two previous cases. Rather than upholding the system of expeditious disposition of labour disputes, the contrary is the case, in the result imposing burdens on both employers and employees;[172] the court deprecated the ten years the dispute took to reach finality in *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO*.[173] It was even more frustrating that, from the record before it, the court could not say where the blame lay. The court condemned the situation where it took the LAC some two-and-a-half years after oral argument to deliver judgment.[174] The answer to the question of what effect the systemic delay would have on reinstatement was answered, more or less, by Goldstone JA, who, while speaking for the Appellate Division on the previous Act of 1956, stated in *Performing Arts Council of Transvaal v PPWAWU*[175] that:

> Whether or not reinstatement is the appropriate relief, in my opinion, must be judged as at the time the matter came before the industrial court. If, at that time it was appropriate, it would be unjust and illogical to allow delays caused by unsuccessful appeals to the Labour Appeal Court and to this Court to render reinstatement inappropriate. Where an order for reinstatement has been granted by the industrial court, an employer who appeals from such order knowingly runs the risk of any prejudice which may be the consequence of delaying the implementation of the order.

It was argued in *Billiton Aluminium*[176] that the granting of an order of reinstatement to a date eight years earlier was not one that was just and equitable to make in terms of section 172 of the Constitution, particularly where it appeared that the employee had earned no income during that period.[177] The court then held in *Billiton Aluminium* that it was not any institutional delay beyond the control of the employer that had led to the section 172(1) constitutional issue whether reinstatement was a just and equitable order to make arising only at the late stage of the proceedings.[178] It was the employer's own conduct in causing the delay that had led to the state of affairs. Whether that conduct was motivated by a cynical 'playing of the system' or a genuine but belated recognition of its own misconception of the correct legal principles is of no moment. Neither the employee nor

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170 *Billiton Aluminium* (n 169) para 44.

171 *Republican Press* (n 145) paras 20–22; *Shoprite Checkers (Pty) Ltd v CCMA* 2009 (3) SA 493 (SCA) paras 33–34.

172 *Equity Aviation Services (Pty) Ltd v CCMA* 2009 (1) SA 390 (CC) para 52.

173 2010 (2) SA 269 (CC) paras 1 and 12.

174 *Strategic Liquor Services v Mvumbi NO* 2010 (2) SA 92 (CC) paras 12–13.

175 1994 (2) SA 204 (A) 219H–I.

176 *Billiton Aluminium* (n 169) para 11.

177 cf an employee's obligation to mitigate loss: *Billiton Aluminium* (n 169) para 38.

178 *Billiton Aluminium* (n 169) para 32.

the institutional part of the system was to blame for the unnecessary prolonging of the proceedings. If the employee had earned some income in the period of eight years before the order of reinstatement was made, it was because he had had to do so in order to survive and live a decent life. The employer could have prevented that necessity by implementing the reinstatement order.[179]

Employer's Non-compliance with the Order to Reinstate

In labour law, talk about the order of reinstatement is talk about an order of a superior court of record that enjoys the inherent powers and standing in relation to matters within its jurisdiction equal to that of the High Court of a provincial division.[180] The consequence of such inherent power would enable the Labour Court to commit the offending party for contempt of court and its processes or for disobedience of its orders. Accordingly, in *Pikitup Johannesburg (Pty) Ltd v SAMWU*,[181] the court found the union and its general secretary to be in contempt of the court that had instructed them to take steps to ensure that all the union members complied with an order interdicting their strike action. Again, in *Compensation Solutions (Pty) Ltd v Compensation Commissioner*,[182] the SCA held that the Compensation Commissioner's persistent and unexplained breaches of the settlement agreement which had been made an order of court (in accordance with the Constitutional Court's judgment in *Eke v Parsons*[183]) and the flouting of the court *a quo*'s directives in the various proceedings showed utter disdain on the part of the commissioner for the court, its procedures and orders. The commissioner in question was a senior state official entrusted with a vitally important social welfare responsibility and vast public funds (unnecessarily wasted by persistently contemptuous conduct). As the Acting Judge President put it:

> the worst affront to the court is that he could not even be bothered to explain himself why he repeatedly failed to comply with its order. Therefore, he placed no facts before the court *a quo* establishing reasonable doubt that his non-compliance with the settlement order was not wilful and *mala fide*. I can only agree with the appellant that the Commissioner's conduct was scandalous and deserving of the strictest censure possible. It proved its case warranting his committal to prison beyond reasonable doubt.[184]

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179 *Billiton Aluminium* (n 169) para 52. In *Foschini Group v Maidi* (2010) 31 *ILJ* 2051 (LAC) para 17, Revelas AJA held for the LAC that a delay of more than ten years between the date of dismissal and the hearing of the appeal was 'a serious indictment against the system of expedited adjudication aspired to in the LRA and by those involved in labour dispute resolution.'

180 Section 151(2) and (3), LRA.

181 (2016) 37 *ILJ* 1710 (LC) para 40(1)–(4).

182 (2016) 37 *ILJ* 1625 (SCA).

183 2016 (3) SA 37 (CC) paras 29–31.

184 *Compensation Solutions* (n 183) para 20, *per* Maya AP.

However, quite early at the turn of the twenty-first century, Nkabinde AJ had, in *SADTU v Head, Department of Education, Northern Province*[185] strongly expressed the court's disapproval of the attitude of the Education Department of the province which had 'demonstrated its intention to disobey the order' if the award of the arbitrator in a dispute between the department and the union representing its employees was made an order of court. The then Acting Judge had said:

> I shall have partly failed in my duty if I do not, upon consideration of the facts and the circumstances of this case, express this court's disapproval of the conduct of the Department. In an era of the constitutional supremacy and rule of law such as that which prevail in our country, conduct displayed by the Department should be discouraged. The Department has deliberately and blatantly disregarded the law and the underlying purpose and structure of the Labour Relations Act. It has stated in its statement of defence that if this court refuses its review application and make the award an order of court it will retrench the individual applicants. This is distasteful indeed. It goes in the face of the rule of law; it undermines the Constitution and is repressive. I am not aware of any authority that countenances behaviour of this kind. I need sound a *caveat* by referring to the well-articulated and famous speech, by Mr Justice Braindeis of the US Supreme Court, quoted with approval by the Honourable Acting Chief Justice Mr Chaskalson in his speech that:
>
> > In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously ... government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example ... if the government becomes a law breaker, it breeds contempt for the law, it invites every man to become a law unto himself, it invites anarchy.
>
> I could not agree more. The Provincial Department of Education in question needs to realise that it is the 'potent, the omnipresent teacher' to the people of this country. It must lead by example.[186]

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185 [2001] ZALC 49 (30 March 2001).

186 *SADTU* (n 185) para 26. Since the Acting Lady Justice Nkabinde spoke, the LAC has had occasion to address the importance of complying with court orders in *North West Star (Pty) Ltd v Serobatse* (2005) 26 *ILJ* 56 (LAC) paras 17–18. Quite recently, Lagrange J returned to the issue when, in *Pikitup Johannesburg (Pty) Ltd v SAMWU* (n 181) para 27, the learned judge had this to say:
when prominent public figures, civil institutions like trade unions, organs of state or private public bodies which exercise economic power are selective in the respect they display for court orders, that kind of conduct tends to promote a view that compliance with court orders is a matter of preference rather than an unavoidable legal obligation. When persons or institutions in positions of power or influence express those sentiments, such conduct can powerfully affect public sentiment and in turn undermine the rule of law as a foundational principle of our constitutional order. We no longer labour under an undemocratic order where the legitimacy of certain laws and court orders made under them were questionable. Obviously that does not mean courts are above criticism. Moreover, parties who are aggrieved by a court's decision are not remediless and may seek leave to appeal.

There can be no doubt that whenever the issue of the employer's attempting to take the labour relations law and practice back to its primitive days when it was the vogue that the law did not have a role to play, the Dog Unit wrangling cases immediately come to mind. The Superintendent Commander of the Dog Unit saw himself in and out of the Labour Court in long-running litigation involving a string of cases: four Labour Court,[187] two LAC[188] and one SCA.[189] The superintendent was dismissed for misconduct in 2007 for communicating with the press without permission about the poor conditions under which SAPS dogs were kennelled. Quite contrary to the conclusions arrived at by the LAC, the Labour Court and the arbitrator, the SCA, in its judgment of 29 November 2012, found that not only was the employee's dismissal substantially unfair but also ordered the employer to reinstate the employee to the position he had held before the first respondent's dismissal—and that the reinstatement was to operate with retrospective effect from the date of his dismissal.[190]

Declaratory Judgment to Enforce the Order of Reinstatement

Even with the SCA judgment six-and-a-half years after his dismissal, Myers' problem with his employer was not over by a long chalk: the SAPS would not reinstate him because, they contended, the position he held before his dismissal no longer existed. This is based on the alleged merger of the two dog units into one with the unit under Myers as the larger of the two. Myers argued that the position still existed but that it was then the bigger post of commander of the amalgamated dog unit; that he should have been reinstated in the position of commander of the Cape Town Dog Unit; and that if the position attracted a higher salary, so be it. He contended that the SAPS was in contempt of court for not reinstating him as ordered by the SCA.[191] As long as the employers were talking about Myers' reporting for duty as Visible Policing Commander at salary level 19 with the title of Lieutenant-Colonel, the SAPS had not complied with the order of the SCA. The question before Steenkamp J was how the SCA order should be interpreted in the light of the subsequent restructuring of the dog unit, the order being that the SAPS should 'reinstate' Myers into the position he had held before his dismissal.[192] After referring to the judgment of the Constitutional Court in *Equity Aviation,*[193] the learned judge held that reinstatement is aimed at placing the employee in the position they would have been in but for the unfair dismissal.[194] Having regard to the provisions of section 193(1) of the LRA, the judge held that what was immediately apparent was the distinction between an order to 'reinstate' and an order to

187 See, for example, *Myers v National Commissioner of SAPS* (2014) 35 *ILJ* 1340 (LC); *Myers v National Commissioner of SAPS* [2015] ZALCCT 68 (17 November 2015).

188 See, for example, *National Commissioner of SAPS v Myers* (2012) 33 *ILJ* 1417 (LAC).

189 *National Commissioner of SAPS v Myers* (2013) 34 *ILJ* 1729 (SCA).

190 *Myers* (SCA) (n 189) para 33(2)(i), (ii) and (iii).

191 *Myers (SCA)* (n 189) paras 3 and 5.

192 *Myers (SCA)* (n 189) para 13.

193 *Equity Aviation* (n 14) para 36.

194 *Myers (SCA)* (n 189) para 14.

're-employ'. A court may order the employer to re-employ the employee 'either in the work in which the employee was employed before the dismissal or in other reasonably suitable work.' In the case of reinstatement, there is no such discretion. In other words, the employee must be reinstated into the same position and not re-employed in some other position.[195] Given this scenario, the SAPS could, therefore, not give effect to the SCA's order by 'placing' Myers in the position of Visible Policing Commander at Ravensmead, which is another position that equates to 'other reasonably suitable work' as contemplated in an order to re-employ. But that is not what SCA ordered: it ordered the SAPS to reinstate Myers into the position he had held before the dismissal, that is, as commander of the dog unit.[196]

The dog unit was restructured in 2009 into a single unit still operating from Maitland, and it was headed by a superintendent at salary level 10. On 1 March 2010, a new commander was appointed after the post became vacant and was advertised and the new appointee, then a captain, was promoted to superintendent (Lt-Col at salary level 10) at the time of her appointment:

> SAPS says that the post was upgraded to that of Colonel at salary level 12 and, according to SAPS, 'will be implemented during the second phase of the restructuring process.' Yet it is common cause that the incumbent of the post, Lt-Col Du Plessis, is still employed at salary level 10. There is a difference between a 'job' or a 'position' and the salary level or grade that that position attracts. That much is confirmed by the distinction drawn in the SAPS Employment Regulations between a job, a grade and a salary level.[197]

Steenkamp J, therefore, held that there could be little doubt that had Myers not been unfairly dismissed, he would have continued in the post of commander of the Cape Town Dog Unit at Maitland, albeit in the guise of the restructured unit. His post might have been upgraded in terms of the SAPS Resources Allocation Guide, but he would have remained the incumbent.

In these circumstances, the SCA order must be interpreted to mean that he must be reinstated into the restructured post of commander of the Cape Town Dog Unit at Maitland at the current salary that the post attracts, coupled with retrospective back pay.[198] Not finding that the failure of the SAPS to comply with the SCA order to reinstate Myers was wilful or *mala fide*,[199] but was in contempt of court, the court considered that it would not bring 'this long-running dispute to a satisfactory conclusion, were the court simply to dismiss the application to hold the respondents in contempt of court'. Rather, it was in the

195 *Myers (SCA)* (n 189) paras 15–16.
196 *Myers (SCA)* (n 189) para 17.
197 *Myers (SCA)* (n 189) paras 19–20.
198 *Myers (SCA)* (n 189) para 21.
199 *Myers (SCA)* (n 189) paras 22–24.

interests of justice to order the respondents to comply with the SCA order.[200] The respondents were accordingly ordered to reinstate the applicant, Mr Myers, into the restructured post of Commander of the Cape Town Dog Unit at Maitland with retrospective effect from the date of his dismissal.[201]

The SAPS appealed this decision in the LAC, arguing that it would be impracticable to reinstate the applicant since his grade 10 position had been abolished and the new post had been created at grade 12. According to Whitcher J,

> a transcript of the proceedings shows that the judges of the LAC were less impressed with these arguments and seen as taking a semantic, literalist and overly bureaucratic approach to giving effect to the SCA's order. They also took issue with the new facts regarding abolishment of the post being supplied.[202]

The LAC held that it was at the SCA hearing in 2012, where the restructuring process which had already taken place was raised, that the appellants should have argued that reinstatement was an inappropriate remedy because the relevant post had been abolished. But the order of the SCA was clear: 'appellants were to reinstate the respondent to his former position. There was no qualification made to the order nor can one be implied.'[203] The LAC reasoned that when the appellants restructured and abolished the Maitland Dog Unit, replacing it with the Cape Town Dog Unit, they must have known that, were the respondent to have been successful in his litigation, the appellants would have been required to place him in his former position or one of a similar nature. That someone was appointed to be the Commander of the Cape Town Dog Unit meant that there was such a post and that it was the appellants who risked the possibility that successful litigation by the respondent would place them in a difficult position regarding reinstatement. In the circumstances, the appellants were under an obligation to reinstate the respondent; it was a legal duty which flowed from a clear and unequivocal order of the SCA.[204]

Mandatory Order to Compel Compliance with the Declaration

In the first place, the SAPS misconstrued the SCA order for it to reinstate its Dog Unit Commander. Then it became necessary to get a declaratory order to interpret that order and, as it were, to issue the order afresh or as a reminder. That is what Steenkamp J did in the application discussed above. The SAPS appealed that reminder order, raising impracticality before the LAC, which held that the SAPS had lost the opportunity to do so at the SCA, whose order was clear and which the SAPS had, as a matter of law, to comply with.

200 *Myers (SCA)* (n 189) paras 25–26.
201 *Myers (SCA)* (n 189) para 28.2.
202 *Myers (SCA)* (n 189) para 13.
203 *Myers (SCA)* (n 189) para 14.
204 *Myers (SCA)* (n 189) para 14.

Although the applicant was required to report to the Cape Town Dog Unit as Commander, but at post level 10, to the SAPS this was in full compliance with the earlier court orders.

Once more, Myers had to return to the Labour Court to seek an order to compel them to comply fully with the declaratory order of Steenkamp J and the final order of the LAC in that same matter. In this latest application before Whitcher J, the applicant sought to compel the respondents to absorb him in the higher-graded level 12 post of Commander of the Cape Town Dog Unit at Maitland retrospectively from the first day of the month following the upgrade of the post.[205] The question therefore turned on whether the effect of the earlier court judgments was that the applicant should be 'reinstated' at the grade of the post he had occupied when he was dismissed or at a higher one, retrospectively.[206]

In spite of the SAPS's misunderstanding of the true scope of the remedy of reinstatement even after the Labour Courts and the LAC had indicated in their judgments that they were wrong, they nonetheless tended to forget that it was their conduct of unfairly dismissing the applicant that had brought these problems about. But for that unfair dismissal, the applicant would have occupied the very post that was regraded when the two dog units amalgamated. Had the applicant not been unfairly dismissed, the commissioner possessed the powers, in terms of regulation 30(8), to have enhanced the applicant's grade in those circumstances.[207] Notwithstanding the options that were open to the SAPS, Steenkamp J correctly ordered that the SCA judgment meant that the applicant should be reinstated into the restructured position and this could only mean at the level of grade 12. Whitcher J accepted the submission that *Equity Aviation* is authority for the idea that reinstatement is aimed at placing an employee in the position they would have been in but for the unfair dismissal. Once an employee has established a particular benefit or promotion was plausibly within their grasp had they not been unfairly dismissed and this is not rebutted, reinstatement, in fairness, should include these enhancements to their remuneration or rank.[208] While the court was not prepared to rule on the contempt question, because it was not convinced of the wilfulness or *mala fides* of non-compliance, the judge did

> believe the sword of a future contempt order hanging over their heads is in order as any further delay in fully 'reinstating' the applicant would strongly suggest *mala fides* and therefore require the court's more robust intervention. The issues have been fully ventilated and space for misinterpretation of the SCA's judgment as explained by Steenkamp J is now well and truly over.[209]

In conclusion, Whitcher J made the following orders:

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205 *Myers (SCA)* (n 189) paras 1–2.
206 *Myers (SCA)* (n 189) para 4.
207 *Myers (SCA)* (n 189) para 20.
208 *Myers (SCA)* (n 189) paras 23 and 25.
209 *Myers (SCA)* (n 189) para 28.

- The first and second respondents are compelled to comply fully with the SCA order, the declaratory order of Steenkamp J in the Labour Court and the final order of the LAC.
- Specifically, this means appointing the applicant to the lowest notch at level 12 with associated increase in rank to colonel.
- The applicant must be paid the difference in salary between the lowest notch at level 12 and salary level 10, retrospective from the first day of the month following the upgrading of the post to level 12, that is, 1 March 2011.[210]

Is a Claim for Reinstatement Subject to the Prescription Act?

Since the claim for reinstatement and its accompanying arrear wages are labour matters, one might, at first blush, consider it to be outside the range of the prescription legislation. But, then, on further reflection, the questions are:

- Can such a claim linger indefinitely?
- Could the employee leave the issue, only to return to make a claim several years later?
- Or, rather, is there a civil claim arising from a contractual relationship that can be allowed to remain outside the prescription period?

Given the environment under which labour disputes take place, though, and the time frames within which parties to such disputes are meant to act in a regulated scheme of things, of which expedition is of essence, one could immediately conceive of reinstatement claims being caught by the limitations in lodging civil claims. After all, labour disputes are par excellence civil claims. The rationale for limiting the period during which civil claims could be made ought, mutatis mutandis, to apply to matters arising from employment, especially if it is borne in mind that speed is at the heart of the settlement of employment disputes.

It is therefore not surprising, that the applicability or otherwise of the prescription period of three years to reinstatement claims has been raised in a number of cases that have reached the Labour Court, the LAC, the SCA and even the Constitutional Court of South Africa. Prior to the recently reported case of *Myathaza v JHB Metropolitan Bus Service Soc Ltd t/a Bus* Metrobus,[211] where at least seven questions concerning the relationship between the law of prescription and the LRA were raised, the LAC had dealt with the prescription claims under the LRA in: (a) *Solidarity v Eskom Holdings*,[212] (b) *SA Post Office Ltd v*

210 *Myers (SCA)* (n 189) para 30.
211 2016 (3) SA 74 (LAC).
212 (2008) 29 *ILJ* 1450 (LAC).

CWU[213] and (c) *Sondorp v Ekurhuleni Metropolitan Municipality*.[214] In both the *Solidarity* and the *SA Post Office* cases it was held that the employees' claims brought in terms of the LRA had prescribed in terms of the Prescription Act 68 of 1969. In any event, these cases did not deal with arbitration awards and specifically with the situation where prescription was raised as a defence to defeat an employee's attempt to enforce an arbitration award after review had been brought to have it set aside.

In *Sondorp*, the question was whether the claim for reinstatement had prescribed in terms of the relevant provisions of the Prescription Act. Relying on the Labour Court judgment in *Gaoshubelwe v Pie Man's Pantry (Pty)*,[215] it was held that any claim of an unfair dismissal is a debt contemplated by the Prescription Act. It was, however, argued that the Labour Court was wrong to have held as it did in *Gaoshubelwe* that prescription was interrupted by the initiation of the process through referral to the CCMA in that the Labour Court had failed to take into consideration the provisions of section 15 of the Prescription Act, which dealt with the interruption of prescription under certain conditions.[216] Ndlovu JA (Zondi and Musi AJJA concurring) held that the issue before the court was about the application for an amendment of the original statement of claim and not whether the claim for reinstatement had become prescribed or whether the running of prescription would have been interrupted in terms of section 15 of the Prescription Act. As with the allegation of discrimination raised by the appellants in the proposed amendments, the defence of prescription raised by the municipality is a triable issue which also deserves proper ventilation and consideration at trial; accordingly, they were premature to deal with at that stage.[217] Even so, the additional facts proposed to be introduced in terms of the amendments were part and parcel of the original cause of action and merely represent a fresh quantification of the original claim.[218] It followed that the amendments would not render the appellants' claim a new right of action and therefore the defence of prescription would probably not succeed.[219] In effect, the running of prescription would have been interrupted because the right of action sought to be enforced by the appellants in the proposed amended statement of case is recognisable as the same or substantially the same right of action as that disclosed in the original statement of case.[220] Since the amendments were a mere

213 [2013] 12 BLLR 1203 (LAC).

214 [2013] ZALAC 13 (26 June 2013).

215 (2009) 30 *ILJ* 347 (LC) para 17.

216 *Sondorp* (n 214) paras 67–68.

217 *Sondorp* (n 214) paras 70–71.

218 Per Corbett JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) 836D–E; *Dladla v President Insurance Co Ltd* 1982 (3) SA 198 (A) 199E–G. See also *Wigan v British Traders Insurance Co Ltd* 1963 (3) SA 151 (W); *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 (1) SA 517 (W); *Lampert-Zakiewicz v Marine and Trade Insurance Co Ltd* 1975 (4) SA 597 (C).

219 *Sondorp* (n 214) para 73.

220 *Sondorp* (n 214) para 74. See also *FirstRand Bank Ltd v Nedbank (Swaziland) Ltd* 2004 (6) SA 317 (SCA) para 4; *Churchill v Standard General Insurance Co Ltd* 1977 (1) SA 506 (A) 517B–C; *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) 26H–27B; *Mntambo v RAF* 2008 (1) SA 313 (W).

elaboration of allegations in the original statement of case, the appellants had demonstrated that they had something deserving of consideration[221] such that the court *a quo* had erred in not allowing their proposed amendments.[222]

Four main issues revolve around the jurisprudence of the Prescription Act and the LRA which cannot be discussed in any detail here owing to space constraints. Another reason for not engaging in any further discussion of the application of the provisions of the Prescription Act to the LRA issues is that the present authors have since extensively developed that jurisprudence in a companion article[223] so that repetition is not necessary at the present moment. Suffice it to mention those four questions without discussing them.

- First, is a claim for reinstatement subject to the Prescription Act? In answering this question, the seven questions concerning the relationship between the Prescription Act and the LRA answered by the LAC in *Myathaza v JHB Metropolitan Bus Service Soc Ltd t/a Metrobus*[224] remain relevant despite the subsequent judgment of the Constitutional Court arriving at a contrary conclusion in that case.
- Second, does the Prescription Act trump an arbitration award? Here, although the Constitutional Court delivered three separate opinions on the question posed in *Myathaza v JHB Metropolitan Bus Service (SOC) Ltd t/a Metrobus*,[225] all three judgments agreed to the final order made in the lead judgment.
- Third—and this arose in the most recent case of *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[226]—does the Prescription Act apply to unfair dismissal claims under the LRA?
- And, finally, the question which the courts had to answer in *NUMSA obo Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings) (Pty) Ltd*:[227] Should arrear wages be recovered as a judgment debt?

Reinstatement and the Retirement Age Limit

The recent decision of the Labour Court of Namibia adds an interesting dimension to the reinstatement discussion. In *Negonga v Secretary to Cabinet*,[228] two employees had, in terms of section 37(2) of the then new Public Service Act 13 of 1995, elected to remain with the public service under the now-repealed Public Service Act 2 of 1980, including the extension or not of their contracts. In terms of section 10A*(c)* of the 1980 Public Service

221 *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* 2002 (2) SA 447 (A) 462J–463B, 464E–F/G.
222 *Sondorp* (n 214) paras 75–76.
223 'Does the Prescription Act Apply to Claims under the Labour Relations Act?' (forthcoming).
224 2016 (3) SA 74 (LAC).
225 2018 (1) SA 38 (CC) (*Myathaza v Metrobus*).
226 [2018] ZACC 7 (20 March 2018).
227 [2017] 6 BLLR 539 (CC).
228 2016 (3) NR 670 (LC).

Act, the retirement age of the appellants was sixty, unless the appellants were retained on the recommendation of the Public Service Commission, subject to cabinet approval. Their previous five-year contracts expired on 20 March 2015 and 22 March 2015, respectively. They continued to be employed until 2 April 2015, when their employment was terminated. Both appellants complained of having been unfairly dismissed and sought to be reinstated on the ground that the new employment contracts came into existence when they continued to be employed after 20 and 22 March 2015. The arbitrator did not agree that the appellants' fixed-term contracts had been tacitly extended for another five years. With regard to the period during which the appellants continued to work after the expiry of those contracts in March, he found that the appellants were both substantively and procedurally unfairly dismissed. The arbitrator awarded each of them the equivalent of six months' salary. At the time of the award both appellants had already turned sixty.

Meanwhile, the appellants contended on appeal that they were entitled to be reinstated.[229] The respondents argued that the arbitrator was prevented from granting the appellants reinstatement because they had both reached the retirement age and that reinstatement would be contrary to the statutory provisions applicable to the appellants under the 1980 Act.[230]

The main questions upon which the appeal turned were whether the decision to award six months' compensation was based on the application of a wrong principle; whether the arbitrator, in making the award, did not act for substantial reasons; whether he exercised his discretion capriciously or wrongly, or whether the award was based on a material misdirection which are the grounds upon which a court of appeal would interfere with an award of an arbitrator.[231] The appellants admitted that 'any extension or non-extension' of their employment agreements would be in terms of the repealed 1980 Act. It was accepted by the parties that the terms of that statute would apply to them and were superimposed on their employment agreements. When the two new employment agreements came into being during March 2015, these statutorily superimposed terms again formed part of the new employment contracts of the appellants, which were unlawfully terminated on 2 April 2015.[232] The arbitrator could not disregard the fact that the statute retired public servants in a mandatory manner in terms of section 14(1) upon reaching the age of sixty. Since at the time the award was made the appellants had reached that age, the arbitrator was in the circumstances faced with 'a statutory bar' against awarding reinstatement. The granting of compensation was the only appropriate remedy that was available in the circumstances.[233] The remedy of reinstatement sought was inappropriate as it would have been in breach of the doctrine of separation of powers. The court had to recognise, uphold and apply the

229 *Negonga* (n 228) paras 4, 6 and 8.
230 *Negonga* (n 228) para 9.
231 *Negonga* (n 228) paras 59–60.
232 *Negonga* (n 228) paras 78 and 85.
233 *Negonga* (n 228) paras 90–91.

seemingly applicable valid statutory provisions, 'after all the courts of this country are, fundamentally, obliged through the judicial oath of office "to administer justice in accordance with the laws of the Republic of Namibia".'[234]

Bearing in mind that the awards that an arbitrator could make are, under the Namibian Labour Act, on the same scale of importance and none has primacy over the other, could it make any difference if this issue had arisen under the South African LRA where reinstatement is the primary remedy for unfair dismissal? It does seem that the arbitrator or the Labour Court would be similarly inhibited by the statutory provision imposing mandatory retirement age and would not order reinstatement where the agreement reached by the parties does not state otherwise.

Another factor to bear in mind is that under the LRA there are statutorily non-reinstatable conditions which would compel the arbitrator not to make an order of reinstatement even if the employment contract could legally run beyond the retirement age—age not being one of those conditions.[235]

Conclusion

This analysis set out to explore what can be described as the 'side issues' arising from the exercise by the arbitrator or the Labour Court of the power to grant the remedy of reinstatement in unfair dismissal circumstances, therefore they are referred to as 'preliminary, jurisprudential and sundry matters'. Although the unfairly dismissed employee would, in a practical world, be interested in ascertaining whether their application for an order of reinstatement would be successful or not, the realities of litigation show that sometimes issues other than the merits of a case may dominate the process. For this reason, this enquiry, not by any means underrating that aspect, has nonetheless skipped the substantive issues of whether the order is granted or refused on the ground(s) laid down in

234 *Negonga* (n 228) paras 105–106.

235 Namibian courts have themselves constructed their own judicial non-reinstatable conditions. In laying down those conditions in *Swartbooi v Mbengela NO* 2016 (1) NR 158 (SC) para 46, Smuts JA held:
The appellants had been dismissed in May 2010, nearly five-and- a-half years before this appeal was heard. Their positions with the third respondent would no doubt have been filled in the intervening period. The Labour Court has declined to order reinstatement in cases of delay, given that prejudice could result to innocent third parties who have positions held by successful appellants—*Edgars Stores (Namibia) Ltd v Olivier* LCA 67/2009 (18 June 2010); *Shiimi v Windhoek Schlachterei (Pty) Ltd* NLLP 2002 (2) 244 NLC. Other factors to be taken into account in declining to order reinstatement have been where the employment relationship has broken down or trust has been irredeemably damaged—*House and Home (A Trading Division of Shoprite (Pty) Ltd v Majiedt)* 2013 (2) NR 333 (LC) para 12. These factors are not exhaustive. Plainly the remedying award is to be fair not only to employees but also to employers. In this instance, the delay of more than five years from the dismissal renders a reinstatement impractical, inappropriate and unfair to an employer as was understandably accepted … on behalf of the appellants.

the LRA, owing to the volume of case law involved; those aspects of the problem are therefore canvassed elsewhere.

One thing is clear from this study. It is that the meaning of, the context in which and the scope of application of the term 'reinstatement' as severally pronounced by the courts in the past two decades of labour adjudication have brought clarity to literally every aspect of its operation in South African labour law. The meaning and context in which the word is used, its implications and all those instances where the employer contested the implementation of the order all point to the clarification of its meaning and import. In other words, for a proper appreciation of the meaning, implications and understanding of 'reinstatement', it will not be sufficient simply to gloss over the paragraph of part 1 of this article dealing with the meaning of reinstatement. The reader will need to read further so as to garner the full meaning and intendments of 'to reinstate'. The wealth of the case law accumulated over the period of this enquiry has made possible a comprehensive unravelling of the rich jurisprudence embedded in the remedy of reinstatement in all its ramifications over the past two decades of labour adjudication and jurisprudence in South Africa. This has meant digging deeper into all aspects of the law of unfair dismissal, whether the issue of unfairness arose from a constructive dismissal situation; or that the dismissal in a given instance is statutorily automatically unfair; or that the proposed retrenchment arising from the operational requirements of the business or enterprise is unfair. The enquiry has led us to investigate whether there is an order known as 'interim reinstatement' or 'semi-urgent interim relief'—these being issues arising from an interpretation of the statutory guidelines. There is also the question whether a claim for reinstatement can be subjected to the operation of the Prescription Act.

There is the problem of complying with the order, an issue not dealt with at all by the Act but which the courts encounter in real-life situations. Often a self-inflicted problem, employers come face to face with this after having resisted implementing an order by resorting to appeals from one court to another until the appellate process is exhausted. Then, in the turnaround, a great deal of time might have passed, and the plea of impracticability becomes a handy obstacle to carrying out the order. Systemic delays in resolving labour disputes caused by one party or the other, though contrary to the Act's objectives and delays, has not daunted the courts' efforts in making the objectives of labour dispute resolutions a success, especially in ensuring justice between the parties. Employees, for their part, have tended to try their luck in some instances—such as when asking the court to carve out a peculiar form of reinstatement that will suit the individual employee whose fixed-term contract had a few months to run;[236] or an employee who had resigned but who was dismissed while their employment had some months to run.[237] From the angle of the employee, however, problems have been encountered not where a dismissed employee decided not to continue to work for the particular employer but where the employer

236 *Tshongweni v Ekurhuleni Municipality* (2010) 31 *ILJ* 3027 (LC).
237 *Toyota SA Motors (Pty) Ltd v CCMA* (2016) 37 *ILJ* 313 (CC).

discovers that the act of dismissing the employee was unfair and then seeks to make amends by offering the employee to have their position back and the employee turns that offer down. In these circumstances, the courts have found it problematic to order either reinstatement or award compensation in such cases.

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