IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO:
LAC CASE NO: JA 12/05
SCA CASE NO: 405/07

In the matter between:

EQUITY AVIATION SERVICES (PTY) LTD Applicant

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION First Respondent

W FERREIRA N.O. Second Respondent

NELSON MAWELELE Third Respondent

THIRD RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

REYNAUD NEIL DANIELS

do hereby make oath and state that:

1. I am an attorney of the High Court of South Africa employed as a director by the third respondent's attorneys of record, Cheadle Thompson and Haysom. I am duly authorised to depose to this affidavit.

2. The contents of this affidavit fall within my personal knowledge, except where the context indicates otherwise, and are, to the best of my knowledge, correct.

Condonation

3. This application was served on the respondents on 28 November 2007. In terms of Rule 19(4)(a) of this Court, this answering affidavit was due on 12 December 2007. Due to the complexity of the issues under consideration, the impending festive season and the fact that the application itself was considerably out of time, the third respondent sought an agreement from the applicant in relation to the delivery of this affidavit. It was agreed between the parties that, in exchange for not opposing the applicant's application for condonation, the applicant would not oppose this application for condonation, provided that this affidavit was served by 22 January 2008. The relevant correspondence is attached hereto as annexures "**RND1**".

4. The third respondent accordingly seeks condonation for the late delivery of his answering affidavit.

Third Respondent's Submissions

5. This affidavit is deposed to on behalf of the third respondent in opposition to the application for leave to appeal to this Court by the applicant. I will specifically address the applicant's founding affidavit below. However I believe that before doing so it is appropriate to set out the grounds upon which the third respondent contends that the application for leave to appeal is utterly without merit and should be dismissed with costs.

6. It is submitted that the applicant's entire case is premised on a fundamental misreading of the principals as enunciated by the Labour Appeal Court in the matter of *Chemical Workers Industrial Union & Others v Latex Surgical Products*[1]. In essence the applicant's case on appeal amounts to the following:

6.1. This appeal relates to the constitutional issue of the correct interpretation of section 193(1)(a) of the Labour Relations Act 66 of 1995 ("the LRA") and specifically the degree of permissible retrospectivity which may accompany a reinstatement award made in terms of this section;

6.2. *Latex Surgical Products* established a principal that the maximum permissible retrospectivity of a reinstatement award was 12 months;

6.3. This was the principal applicable at the time that the current matter was heard and decided upon by the Labour Appeal Court;

6.4. On the applicant's view of these principals, the third respondent was only liable to the third respondent for twelve months backpay notwithstanding the order of the Labour Appeal Court that the third respondent was reinstated with

[1] 2006 (27) *ILJ* 292 (LAC)

effect from the date of the arbitration award, a period of more than five years;

6.5. The Supreme Court of Appeal, in the matter of *Republican Press (Pty) Ltd v CEPWAWU and Gumede & Others*[2] held a contrary view, namely that a reinstatement award could always be made retrospective to the date of a dismissal regardless of the length of time between the dismissal and the decision to reinstate;

6.6. The *Republican Press* principle operates to the applicant's detriment in that the third respondent now becomes entitled to more than 12 months backpay. The applicant was deprived of its opportunity to make any representations in this regard as the *Republican Press* judgement was handed down after judgement in the current matter;

6.7. The applicant is accordingly left with no option but to approach this Court to make its submissions that the principles as set out in *Latex Surgical* should be applied rather than those in *Republican Press.*

7. It follows that the applicant's entire case is premised on its view as set out in paragraph 4.4 above namely that on a correct reading of *Latex Surgical Products* the applicant would never be liable for more than 12 months

[2] Unreported, copy attached to founding papers

backpay to the third respondent. In order to determine whether this view is correct it is necessary to consider the facts in the *Latex Surgical Products* case as well as the relief ordered by the Labour Appeal Court and what the Labour Appeal Court stated in respect of that relief.

8. The individual appellants in *Latex Surgical Products* were dismissed with effect from March 1999[3]. The Labour Court handed down judgement in their matter on 19 June 2002[4]. This was more than three years after their dismissal. The matter went on appeal and the Labour Appeal Court handed down judgement on 25 November 2005. The Labour Appeal Court ordered the reinstatement of the individual appellants with effect from 19 December 2001[5] in other words with six months retrospectivity from the order of the Labour Court and almost four years retrospectivity from the order of the Labour Appeal Court.

9. The Labour Appeal Court made the following comments in respect of the relief it ordered[6]:

> "*Even though in a case such as this one that it is not competent to make a reinstatement order that operates with retrospective effect beyond 12 months from the date of the delivery of the order of the court a quo backwards, the fact that the individual appellants were without income during that period remains and must be taken into account in the exercise of the discretion. Their having been without*

[3] At pg 327 paragraph 111
[4] At pg 332 paragraph 117
[5] At pg 334 paragraph 125
[6] At pg 332 paragraph 117

income for that period was a direct consequence of the respondent's unfair conduct in dismissing them when they should not have been dismissed. In this case, as the reinstatement order can only operate with retrospective effect from the date of the order of the court a quo to 19 June 2001, this means that the respondent keeps whatever money it otherwise may have had to pay the individual appellants were it not for the legal impediment relating to the period of 12 months. The respondent already benefited by a period of more than two years in this case in respect of which the law does not place an obligation upon it to pay backpay to the individual appellants even though it has been found that they should not have been dismissed in the first place. That is the period from March 1999 to June 2001. That is a period of over two years for which the individual appellants get penalized even if they are not in any way to blame for their dismissal"

10. Given these remarks by the Court, it is impossible to understand on what basis the applicant contends that *Latex Surgical Products* is authority for the proposition that an employer in a dismissal dispute can never be liable for more than twelve months backpay, regardless of what has happened following a decision by an arbitrator or the Labour Court on a dismissal. If that were the case, the Labour Appeal Court :

10.1. Would not have ordered that the reinstatement be retrospective to 19 December 2001 but to 25 May 2005;

10.2. Would not have made reference to 12 months retrospectivity dating from the order of the Court *a quo;*

10.3. Would not have made reference to the individual applicants being penalised for a period of two years wages and the employer benefiting to a similar degree.

11. In the current matter the Court made the following remarks in relation to the relief ordered[7]:

> [51] *What the Court a quo did not deal with in its judgement is whether or not the order of reinstatement that the commissioner ought to have made should have been one operating retrospectively and, if so, up to what date retrospectively. While it may be argued that an order of reinstatement is necessarily implied in the order that the Court a quo made, it cannot be said that the reinstatement was ordered to be retrospective is also implied in the order of the Court a quo. Since the third respondent did not note a cross appeal against the Court a quo's failure to make such implied order of reinstatement retrospective, I do not think that it is open to this Court to consider that issue. The retrospectivity that I am referring to does not relate to the period between the date of the issuing of the arbitration award and the date of the order of the Court a quo or indeed the date of this order. It relates to the period*

[7] At page 26 paragraph 51 to page 27 paragraph 52

between the date of dismissal and the date of the issuing of the award.

[52] *In the light of this the reinstatement order that is implied in the order of the Court a quo as the reinstatement order that the commissioner should have made would have run from the date of the issuing of the arbitration award. I shall make an order that reflects this. That means that the third respondent would have lost out on remuneration covering the period from the date of the dismissal to the date of the award*.

12. It is once again impossible to understand how the applicant can have interpreted this to mean that they only owed the third respondent twelve months backpay.

13. It is in fact apparent that the applicant has completely misconstrued the principles as set out in *Latex Surgical Products*. The Court in that matter held that in applying section 194 the Labour Court or an arbitrator determining a dismissal dispute could not order reinstatement with retrospectivity in excess of 12 months from the date of the Labour Court order or the arbitration award. Quite clearly from the judgement the Labour Appeal Court did not find that its powers on appeal, in a dismissal dispute, were limited to ordering reinstatement with 12 months retrospectivity from the date of its order as the applicant seeks to suggest.

14. The situation in the present case is even further removed from the powers of the Labour Appeal Court on appeal in a dismissal dispute. The present case deals with the powers of the Labour Court on review and the powers of the Labour Appeal Court on appeal in such a review. The applicant has not even attempted to address these powers in the current application for appeal let alone made out any cogent case that these powers have been used in an unconstitutional fashion in the current matter.

15. The applicant was obviously at liberty to have presented arguments on the powers of the Court on review before the Labour Court and the Labour Appeal Court. They did not do so. Their heads of argument in these Courts are attached as annexures "**RND2**" and "**RND3**" respectively. Nor did they attempt to raise these issues in their application for leave to appeal to the Supreme Court of Appeal, a copy of which is annexed hereto as "**RND4**". These powers were not at issue at any stage in the current litigation. It would be impermissible for the applicant to attempt to raise them at this stage, and, in any event, as pointed out above they have not done so in the current application. The application for leave to appeal is without any merit whatsoever.

16. On a proper reading of *Latex Surgical Products* it now becomes apparent that the position of the applicant did not in any way change as a result of the judgement in *Republican Press* and their arguments in that regard are equally fallacious.

Founding Affidavit

17. I will now turn to deal briefly with the applicant's founding affidavit. Insofar as any allegation contained therein is not directly addressed hereunder but is in conflict with the contents of this affidavit it is denied.

18. **Ad paragraph 1**

The contents of this paragraph are admitted.

19. **Ad paragraph 2**

Save to deny that the contents of the founding affidavit are true and correct insofar as they are in conflict with the contents of this affidavit the contents of this paragraph are admitted.

20. **Ad paragraphs 3 to 6**

The contents of these paragraphs are admitted.

21. **Ad paragraph 7**

Save to emphasise that section 193 of the LRA relates to the powers of the Labour Court or an arbitrator when first deciding on a dismissal dispute the contents of this paragraph are admitted.

22. **Ad paragraph 8**

The contents of this paragraph are admitted with the following provisos:

22.1. The lengthy delays which occur in dismissal disputes are often not attributable to any fault on the part of the employee either,

22.2. The Labour Appeal Court, in *Latex Surgical Products* held that an arbitrator or the Labour Court in deciding a dismissal dispute had to limit the retrospectivity of any reinstatement order to twelve months. It did not pronounce upon the powers of the Labour Court on review or its own powers on appeal.

23. **Ad paragraph 9**

The contents of this paragraph are noted. For the reasons set out above, even if the approach of the Labour Appeal Court in *Latex Surgical Products* is correct this does not avail the applicant in the present matter.

24. **Ad paragraph 10**

The contents of this paragraph are denied. The order granted by the Labour Appeal Court in this matter is compliant with any interpretation of sections 193, read with section 194, of the LRA.

25. **Ad paragraph 11**

The contents of this paragraph are admitted. For the reasons set out above, the application for condonation is not opposed.

26. **Ad paragraphs 12 to 15**

The contents of these paragraphs are admitted.

27. **Ad paragraph 16**

The applicant was at liberty to bring an application dismissing the review for lack of prosecution, alternatively to argue at the hearing of the review that the review be dismissed for non compliance with the rules alternatively to argue that the Labour Court, in the event of finding merit in the review should consider the delay in deciding what order to make. The applicant took none of these steps. In any event, the third respondent and his representatives were not responsible for the delays before or after 15 December 2003. Save as aforesaid, the contents of this paragraph are not disputed.

28. **Ad paragraph 17**

The contents of this paragraph are admitted.

29. **Ad paragraph 18**

Both parties clearly understood that the order of the Labour Court implied reinstatement. The order makes no sense if reinstatement is not implied as a non employer can hardly issue a warning to a non employee. That is why the applicant sought to appeal the order and did not simply implement it.

30. **Ad paragraphs 19 to 20**

The contents of these paragraphs are admitted.

31. **Ad paragraphs 21 and 22**

Save to admit that there was nothing in the judgement of the Labour Court to indicate the degree of retrospectivity with which the order of reinstatement should operate, the contents of this paragraph are denied. The following submissions are made in that regard:

31.1. Once the Labour Court had reviewed and set aside the order the Learned Judge was then in a position to determine the matter as if she was sitting as the arbitrator. It is not entirely clear how the arbitrator could order reinstatement retrospective to a date post the award. It is significant that the applicant refers to no authority in support of its proposition

that a Labour Court, on review could order reinstatement to a date after the award;

31.2. Assuming the Labour Court had these powers the applicant was obviously at liberty to make out an argument at the hearing of the matter that, should the Court order reinstatement it should do so to a date after the issuing of the award. The applicant did not do so. Nor did they attempt to make out any such argument before the Labour Appeal Court.

31.3. As the Labour Court was silent on the degree of retrospectivity, and applying the principles of *Latex Surgical Products,* the Labour Court could have intended to reinstate the third respondent with effect from 18 March 2001, 12 months prior to the arbitration award. That would have been full retrospective reinstatement. As correctly pointed out by the Labour Appeal Court the third respondent did not cross appeal in respect of the order or bring an application to clarify the Labour Court order. The third respondent accordingly lost out on 12 months compensation.

32. **Ad paragraph 23**

The contents of this paragraph are denied. If anything the Labour Appeal Court order was to the detriment of the third respondent as it may well have been the intention of the Labour Court to order reinstatement o a

time prior to the award. Either party was at liberty to seek clarification from the Labour Court as to the exact degree of retrospectivity. Neither party did so. It is them impossible for the applicant to assert that the Labour Appeal Court order was to their detriment as opposed to the Labour Court order.

33. **Ad paragraph 24**

The contents of this paragraph are denied for the reasons set out above. It is impossible to understand how, on a proper reading of the judgements in both *Latex Surgical Products* and the current matter the applicant could have understood that it owed the third respondent only twelve months in back pay.

34. **Ad paragraph 25**

Save to state that the current issues were not raised at all in the application for leave to appeal to the Supreme Court of Appeal, the contents of this paragraph are admitted.

35. **Ad paragraph 26**

Save to state that the *Republican Press* judgement did not in any manner affect the applicant's position the contents of this paragraph are admitted.

36. **Ad paragraph 27**

The contents of this paragraph are denied. For the reasons set out in the third respondent's submissions, the *Republican Press* judgement has not affected the position of the applicant at all, let alone detrimentally.

37. **Ad paragraphs 28 to 30**

The contents of these paragraphs are admitted.

38. **Ad paragraph 31**

Save for what is stated in the paragraphs hereunder the contents of this paragraph are denied:

38.1. The applicant's submissions amount to a major contradiction. Earlier the applicant has contended that a Court could not make fully retrospective reinstatement awards, now it contends that it can but that "*An order fully retrospective to the date of dismissal should only be made in the most exceptional of circumstances"*. It appears that the applicant is not only confused about the legal principles set out in the various judgements it refers to but also about its own case;

38.2. Many of the arguments raised in the sub paragraphs of this paragraph may or may not be legitimate arguments, in a

specific case, for refusing or limiting retrospectivity of a reinstatement award. For the purposes of the current application it is unnecessary to express any view in this regard. However, it was incumbent on the applicant to raise these issues much earlier in the litigation so that they could have been properly explored in evidence and in argument.

39. **Ad paragraph 32**

Save to re-emphasise that *Latex Surgical Products* found that the Labour Court or an arbitrator making the decision in a dismissal case could not order retrospectivity of more than 12 months, and made no such finding in respect of reviews or appeals; the contents of this paragraph are admitted.

40. **Ad paragraph 33**

The contents of this paragraph are noted. For the purposes of this application there is no need to express a view on the correctness of the view of the Labour Appeal Court in *Latex Surgical Products*. I re-emphasise that the application of the principles of *Latex Surgical Products*, does not, in the current matter, mean that the applicant owes the third respondent only twelve months in back pay.

41. **Ad paragraph 34**

It is denied that the finding in *Republican Press* is unconstitutional. In any event, as has already been indicated, this judgement did not in any manner affect the position of the applicant in the current matter.

42. **Ad paragraph 35**

The contents of this paragraph are denied. As repeatedly stated the judgement in *Republican Press* has not affected the applicant's position one jot. If the applicant had legitimate arguments in respect of limiting retrospectivity, and assuming that the Labour Court on review can order reinstatement to a date later than the award under review, which is not admitted, it was incumbent on the applicant to raise these issues before the Labour Court. It is entirely impermissible, in what appears to be nothing more than an attempt to avoid the consequences of its unfair dismissal of the third respondent, for the applicant to raise these issues for the first time in an application to appeal to this Court.

43. **Ad paragraph 36**

For the reasons set out in full above it is denied that the constitutionality of the approach in *Latex Surgical Products* has any affect on the position of the applicant in the current matter. Even if this Court were to favour the approach in *Latex Surgical Products over* that of *Republican Press* it would not change the applicant's current position. The third respondent

has no knowledge of the other matters pending in the Labour Court and cannot comment thereon other than to say that the *Republican Press* case makes it plain that the retrospectivity of a reinstatement award lies fully within the discretion of the Court or arbitrator. If there are factors which indicate that the employees in the other matters against the applicant are not entitled to full retrospective reinstatement, in the even of an unfair dismissal finding, the applicant is at liberty to place these before the Court in argument and to present argument in that regard.

44. **Ad paragraphs 37 and 38**

The third respondent concedes that the issue of the retrospectivity of an award of reinstatement is an important issue in labour law. However it is not, and never has been, an issue in the current matter.

45. **Ad paragraphs 39 to 45**

As indicated above the third respondent does not oppose the application for condonation. However, for the reasons dealt with at length above, the third respondent denies that the judgement in *Republican Press* could have been a legitimate catalyst for the launching of the current application.

46. The third respondent submits that the application for leave to appeal is without any merit and has been resorted to by the applicant solely in an attempt to escape the consequences of the third respondent's unfair

dismissal. The third respondent accordingly submits that the application for leave to appeal should be dismissed with costs.

_____
DEPONENT

Thus signed and sworn to before me at JOHANNESBURG on this the 17th day of JANUARY 2008 the deponent having acknowledged that he knows and understands the contents of this affidavit, has no objection to taking the prescribed oath and considers the oath to be binding on his conscience.

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COMMISSIONER OF OATHS