IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no. JA 113/13

In the matter between:

DB CONTRACTING NORTH CC **Appellant**

and

NATIONAL UNION OF MINEWORKERS **First Respondent**

SIPHO NKABINDE & 105 OTHERS **Second and Further Respondents**

Heard: **19 February 2015**

Delivered: **2 July 2015**

Summary: Dismissal for operational requirements – sectoral determination for industry published in the government gazette increasing hourly rate of employees – employer unable to afford increased rate – employer consulting with union and offering to maintain old rate or effect an retrenchment – common cause between parties that such offer was reasonable - Union representative undertaking to obtain an mandate as to whether or not to accept such offer to avoid retrenchment – agreement between Employer and union that if offer not accepted retrenchment would be effected on a stipulated date – no acceptance of the offer communicated to employer– employer issuing notice of dismissal – Union contending that the employees had accepted the offer but acceptance not communicated at any time – on the facts the version of the union that offer was accepted rejected – Labour Court's judgment finding dismissal unfair and reinstating employees set aside- appeal upheld with costs.

Minority: *Onus* on employer to prove fairness of dismissal and not on employees to prove otherwise – employer alleging its attorney received phone call from union representative with message that employees rejecting employer's offer – attorney not testifying and not filing confirmatory affidavit or letter – attorney's alleged message inadmissible hearsay - however employer issuing letters of dismissals on strength of the said message and prior to final consultation meeting – employees disputing they rejected the offer but alleging they accepted it - Disputes of fact – Appeal Court not to lightly interfere with trial court's credibility finding unless there is misdirection or finding clearly wrong - Retrenchment was premature and, on the facts, probably inspired by employer's desire to re-employ employees through labour broker – Dismissals were therefore unfair – Reinstatement ordered.

Coram: Ndlovu, Landman *et* Sutherland JJJA

JUDGMENT

NDLOVU JA

Introduction

[1] This appeal is against the judgment of the Labour Court (Lallie J) handed down on 3 August 2012, in terms of which the Court *a quo* held that the second to further respondents, comprising a total of 106 employees listed in Table A annexed to the statement of claim (the employees), were unfairly dismissed by the appellant; and ordered that the employees be reinstated to the appellant's employ. Leave to appeal was refused by the Court *a quo* on 13 September 2013 and only granted by this Court on 19 February 2014, upon petition.

[2] The appellant, DB Contracting North CC carried on the business of digging trenches on the ground, laying cables and restoring the affected areas with backfill. The employees were members of the first respondent, the National Union of Mineworkers (the union) which, on their behalf, instituted an unfair

dismissal claim in the Court *a quo* against the appellant.[1] They were formerly employed by the appellant as general workers until their dismissals on 4 December 2009, on the ground of the appellant's operational requirements.

The issue

[3] The issue for determination by the Court *a quo* was two-fold, namely:

3.1 Whether the dismissals of the employees were substantively and/or procedurally fair.

3.2 Whether the employees refused an alternative reasonable offer put forth by the appellant to avoid retrenchment and that, by doing so, the employees rendered their dismissals fair.

[4] However, as agreed between the parties, the issue was crystallized into the terms as formulated in paragraph 2 of the respondents' heads of argument, cited below, which essentially did not change the substantive character of the one presented before the Court *a quo*:

> 'If it is found that indeed the respondents (the employees) refused the offer, which was reasonable, then the appeal ought to succeed and conversely, if it is found that the respondents (the employees) were amenable to the offer and in fact accepted same however the appellant terminated their employment even before their acceptance could be communicated then it should follow that the retrenchments were premature and therefore unfair with the result that the appeal ought to be dismissed with costs.'

The factual background

[5] On 13 March 2009, a collective agreement[2] was concluded in the National Bargaining Council for the Electrical Industry of South Africa (the bargaining council) in terms of which, among other things, all electrical assistants' remuneration had to be increased from R11-55 per hour to R16-98 per hour. It was common cause that the collective agreement was binding to all the

[1] In terms of section 200 of the Labour Relations Act 66 of 1995 (the LRA). See also *National Union of Mineworkers v Hermic Exploration (Pty) Ltd* (2003) ILJ 787 (LAC) at paras 37-- 41; *Amalgamated Engineering Union v Minister of Labour* 1949 (4) SA 908 (A) at 910.
[2] Published in the Government Gazette No. 31988 of 13 March 2009.

parties who operated within the registered scope of the bargaining council, including non-members, such as the appellant, presumably in terms of section 32(1) of the LRA. It may be noted that a copy of the said collective agreement was not included in the papers presented to the Court. However, nothing turned on this omission since the parties agreed on the material terms of the collective agreement, relevant for the present purpose.

[6] Initially, the appellant sought to resist the collective agreement on the basis that it was not a party to the agreement. Consequently, the union referred a dispute to the CCMA for conciliation.[3] The dispute remained unresolved as at 8 June 2009 and a certificate of non-resolution was issued on the same day. Thereupon, the union referred the matter to arbitration.[4] However, whilst notification of the date of arbitration was being awaited, the appellant issued a notice to the union dated 30 July 2009, purportedly in terms of section 189 of the LRA (the retrenchment notice), which read thus:

> 1. This notice is intended to advise the National Union of Mineworkers, being the trade union which represents the majority of the our (sic) employees of the need to commence with retrenchment consultations due to the Close Corporation's financial problems.
>
> 2. This notice is issued in accordance with the provisions of section 189 (2) and (3) of the Labour Relations (Act No 66 of 1995) wherein the purpose of our consultation will be to discuss all relevant information and to engage (the employees and the Union) in a meaningful joint consensus seeking process to attempt to reach consensus on appropriate measures which are:
>
> 2.1. To avoid the dismissals;
>
> 2.2. To minimise the number of dismissals;
>
> 2.3. To change the timing of the dismissals; and
>
> 2.4. To mitigate the adverse effects of the dismissals.

[3] In terms of section 24(2) of the LRA.
[4] In terms of section 24(5) of the LRA.

3. We will further attempt to reach consensus on the method for selecting the employees to be dismissed and the severance pay applicable to dismissed employees.

THE CAUSE OF THE FINANCIAL CONSTRAINTS

4. The reasons for the expected retrenchments are due to the fact that the Close Corporation is experiencing severe financial constraints. The Close Corporation is well aware that the salary increments were due 01 February 2009 in terms of the existing collective agreement.

4.1. The Close Corporation had a contract with J & J Cable Jointing which lost its Eskom contract in November 2008.

4.2. The Close Corporation is relying on subcontractors from municipalities. DB Contracting have no active contracts presently.

ALTERNATIVES

5. The Close Corporation intends to find, in consultation with the union and employees, suitable alternatives to the termination of the employment (retrenchment) of the employees. The Close Corporation considered the following alternatives:

5.1 It proposes that employees will work at J & J Cable Joining through labour brokers.

5.2 **After retrenchment, the Close Corporation intends to employ [the employees] through labour broker services**.

(Emphasis added)

THE PROVISIONS OF SECTION 189 (3)(i) AND (j)

6. The Close Corporation has employed 128 (One Hundred and twenty eight) employees and there has been no dismissals for reasons based on operational requirements in the preceding 12 months.

THE AFFECTED EMPLOYEES

7. The positions likely to be affected by the retrenchment are:

7.1 General Workers which (sic) consists of 82 (eighty two)[5] employees.

THE SELECTION CRITERIA

8. In the selection criteria the Close Corporation intends to make use of a fair and objective criteria of selecting the affected employees, and it proposes to use last in first out criteria. The proposed criteria will be discussed on our first consultation meeting, which will be arranged.

TIME PERIOD

9. The period of consultation process will be arranged between the Union, employees and the Close Corporation (employer). Notice of termination in terms of the Basic Conditions of employment will only be given after consultation process is complete and only where all issues relevant to such terminations are exhausted.

SEVERENCE PACKAGES

10. The employees who rendered services to the Close Corporation for a completed year or longer will be entitled to a severance package of (1) one week of each completed year of service. The packages will be discussed during our consultation process.

DB Contracting North CC

Per: Peter Mueller'

[7] It was not in dispute that prior to 30 November 2008,[6] the appellant generated most of its profit from its sub-contract with a corporate entity known as J & J Cable Joining CC (J & J Cable), which in turn had a substantial contract with Eskom (the Eskom contract). J & J Cable was accredited with a Black Economic Empowerment (BEE) status, which the appellant did not have. According to the appellant, due to its lack of the BEE status, it did not qualify to conclude a business contract directly with Eskom hence it got the Eskom

[5] It later transpired that the employees who were retrenched were 106 in number and not 82 as appearing in paragraph 7 of the retrenchment notice. This position became common cause between the parties.

[6] The significance of this date will become apparent in the next paragraph.

work through its contractual association with J & J Cable. However, it was also conceded by the appellant, through the evidence of Mr Magagula (under cross-examination), that both the appellant and J & J Cable were co-owned by one and the same person, namely, Mr Peter Mueller, [7] the author of the retrenchment notice.

[8] There was also no dispute that on 30 November 2008, the Eskom contract was terminated by Eskom and that this development had a huge negative financial impact and implications, not only on J & J Cable but, naturally, also on the appellant. A subsequent contract which the appellant concluded with Ekurhuleni Municipality (the Ekurhuleni contract) was worth far less in comparison to the Eskom contract. According to the appellant, it was as a result of the economic downturn in its business operation, occasioned by the termination of the Eskom contract, that it was not economically feasible for the appellant to afford paying the employees at the increased remuneration rate in terms of the collective agreement. Hence, according to the appellant, there was a need for section 189 consultations to be embarked upon. It is to be noted at this point that the appellant opted not to follow the procedure of applying to the bargaining council for exemption from the operation of the collective agreement on the ground of the appellant's alleged financial incapacity or distress. If, in that event, the application for exemption was declined by the bargaining council, the appellant would have been entitled to lodge an appeal in terms of section 32(3)(e)(i) of the LRA. I will return to this issue in due course.

[9] Consultative meetings were held between the union's and the appellant's representatives on 13 August, 24 August, 13 November and 4 December 2009. At all these meetings, the appellant's team was led by its Human Resources Manager, Mr Jonas Magagula and the union's team was led by its legal officer, Mr Melusi Bengequla.[8] It was common cause that at the meeting of 24 August, the parties discussed only about the applicability of the

[7] Record, vol 3, at 253 line 22.

[8] It is noted that, in the transcript of the record, the name of Mr Bengequla was apparently inadvertently misspelt as Mr Bengi Nxulu. However, both in the judgment of the Court *a quo* and the handwritten notes taken at the meetings, the name "Bengequla" is reflected which, to me, appears to be the correct spelling.

collective agreement on the appellant and the monies owed to the employees by the appellant in terms of the collective agreement. In other words, at that meeting nothing was discussed pertaining to finding ways of avoiding the imminent retrenchment of the employees.

[10] At the meeting of 13 November 2009, the appellant presented to the union an offer to the effect that all the affected employees would be retained in the appellant's employ and not retrenched, provided they would accept to be remunerated at the unchanged pay rate of R11.55 per hour, instead of the new increased rate of R16.98 per hour. It would appear (from the handwritten minutes or notes taken at this meeting of 13 November) that the parties had initially agreed to have that meeting as their final consultative meeting. In other words, the understanding was that, unless some agreement was reached by 4 December, the implementation of retrenchment would commence on that day. It was not in dispute between the appellant and the union that the appellant's offer was reasonable in the circumstances.

[11] However, it was then agreed that the union would take the appellant's offer to the employees for their necessary mandate, i.e. whether they accepted or rejected the offer. The last entry in the minutes of the meeting of 13 November read: *"Parties agreed to change the termination date of 13 October 2009 to be 4th December 2009."* I must hasten to point out: It was common cause between the parties that the date 13 October 2009 was a typographical error, which was intended for 13 November 2009. So, the 4th of December was to be the deadline for the consultation process to be concluded. On that day the employees would either be retained at R11.55 per hour or be retrenched forthwith, depending on their response to the appellant's offer. The employees would be retrenched only if they rejected the offer and this position was agreed to by both parties[9] and further confirmed by the appellant's counsel during argument.

[12] The handwritten notes taken at the meeting of 4 December 2009 are so patchy and scanty that they hardly offer any helpful and reliable forensic information, in relation to what really took place at that meeting, save some

[9] Record, vol 3, at 270 line 3.

blurred indication of a few topics which were purportedly discussed, including something about the appellant's "financial statement"; the complaint by the appellant's representative that the matter had been dragging for too long; the remuneration rate at which the retrenched employees would be paid retrenchment packages. Otherwise, one would virtually have to guess in order to figure out what actually happened at the meeting.

[13] It was common cause between the parties that at the meeting of 4 December 2009 nothing was discussed in connection with the issue of whether the appellant's offer was accepted or rejected by the employees. Neither the union nor the appellant raised the issue. Of significance that day was the fact that final payslips were issued to the employees, confirming their dismissals with effect from the same day, that is, 4 December 2009. The significance of the timing of issuance of the final payslips is discussed in more detail later in this judgment.

[14] On 7 December 2009, Mr Bengequla addressed a letter to the appellant in which he said the following:

> 'I refer to the above matter and our third consultative meeting of the 4th of December 2009 herein.
>
> We have received information from our members that employer gave them notices of their dismissal on the 4th December after the third consultative meeting. Kindly be informed that, as you know, this process has not being (sic) finalized yet, as we are still awaiting employer's offer of retrenchment which stipulates all calculations to be made regarding severance pay and the payment of the outstanding amounts owed to our members in terms of the collective agreement.
>
> Take notice further that, should employer continue with giving our members premature notices of their dismissal, we will have no option but to approach the court for an appropriate remedy.'

[15] Consequently, the union referred an unfair dismissal dispute for operational requirements to the bargaining council for conciliation. The dispute remained unresolved as at 23 March 2010 and a certificate to that effect was issued on

the same day. Hence, the union referred the matter for adjudication by the Labour Court.

Proceedings in the Labour Court

[16] In its statement of case, the union summed up the events that culminated in the alleged unfair dismissal of the employees as follows:

> '2.26 The next meeting was on the 13th November 2009. In these meetings the [appellant] issued the [union] with its counter proposal regarding the proposed frame work agreement of retrenchment.
>
> 2.27 The [appellant] did not organise a facilitator as agreed. The 13th November 2009 was supposed to be the termination date of all the affected employees' contracts of employment according to the [appellant] but the [union] persuaded the [appellant] to change this date as there was no progress made regarding consultation process.
>
> 2.28 The [appellant] reluctantly changed the [termination] date to the 4th December 2009.
>
> 2.29 The next meeting was on the 4th December 2009 and the [appellant] indicated that the consultation meetings have been dragging on for too long and terminated the services of all affected employees, on the same day.
>
> 2.30 The [employees] were accordingly dismissed on the 4th December 2009. After the retrenchment of the [employees], the [union] on behalf of its members declared a dispute of unfair dismissal to the [bargaining council].'

[17] Mr Magagula testified that prior to 4 December 2009, the appellant's attorney received a telephone message from the union representative to the effect that the employees had rejected the appellant's offer. As a result, the appellant had then embarked on the process of preparing final payslips for the employees, which the appellant did prior to 4 December – albeit the payslips aforesaid reflected the same date. According to Mr Magagula, the appellant felt that it was no longer necessary to raise the issue of the appellant's offer

again when the parties met on 4 December, but only to discuss about payment of severance packages. Indeed, on 4 December the employees' final payslips and severance packages were ready for delivery to the employees, which was done. Mr Magagula was the only witness for the appellant.

[18] To the contrary, Mr Bengequla told the Court that whilst on his way to the meeting on 4 December 2009 he received a telephone call from the leadership of the employees to the effect that the appellant had already started dismissing the employees. He further said that the employees accused him of being a sell-out. Consequently, when he arrived at the meeting he raised the query with Ms Nkadisha, who was part of the appellant's team, about the appellant having prematurely implemented the retrenchments. However, he said he did not expressly indicate to Ms Nkadisha that the employees had actually accepted the appellant's offer, which he testified that the employees had actually done. Ms Nkadisha was presumably the appellant's attorney who it was alleged had received a call from Mr Bengequla. I say so in the light of Mr Bengequla's further evidence when he denied the allegation that he ever phoned the attorney concerned. He said[10]: "*No, that is not true, My Ladyship, I never telephoned Nkadisha. The results of the consultation with the [union] members were to be discussed on 4 December*. *I was supposed to tell them [the appellant's representatives] whether that has been accepted or not."* Mr Bengequla further testified that, in the circumstances, he felt it was then pointless to raise the issue of the appellant's offer again at the meeting, but rather to focus on the calculation formula of the severance packages.

[19] In any event, it was submitted by Ms Nkutha, counsel for the employees, that any claim of the appellant's attorney having allegedly received a telephone message from the union - purportedly rejecting the appellant's offer on behalf of the employees - was inadmissible hearsay, given the fact that the attorney in question was not called as a witness. Hence, Mr Bengequla accused the appellant of having acted prematurely in its retrenchment of the employees, thus rendering the retrenchments to be substantively and procedurally unfair.

[10] Record, vol 3, at 273 line 3.

[20] The second witness for the employees was Mr Nkosiyabo Gumede (company clock number 463), one of the further respondents who testified on behalf of himself and all other retrenched employees. He confirmed that all retrenched employees received their final payments on 4 December 2009 which were calculated on the basis of the unchanged pay rate of R11.55 per hour and that any suggestion that they were paid at the new increased rate of R16.98 per hour would be untrue. He further confirmed that all employees were seeking reinstatement in the event of their dismissals being found to be unfair. This witness was not cross-examined at all by counsel for the appellant, Mr Hutchinson.

[21] After considering the evidence adduced and submissions made on behalf of both parties, the Court *a quo* accepted the version of the union and rejected that of the appellant. Pertinently, the following appears in the judgment of the Court *a quo*:

> '[9] The cause of the respondent's financial difficulties and the alternatives to retrenchment proposed by the respondent paint a different picture for the real reasons for retrenchment from the one the respondent (sic) attempted to paint. When the evidence of the reasons for retrenchment is considered in its totality it proves that when the respondent could not pay the increment prescribed in the collective agreement, instead of engaging the first applicant [the union] in finding a solution which could keep the respondent in business and protect the jobs of the employees, it opted for dismissing [the] employees. Under cross-examination, Magagula testified that had the [first] applicant not insisted on its members being remunerated at the rate prescribed in the collective agreement, the respondent would have afforded to keep them in employment. … I have accepted that there was an agreement between the respondent and the first applicant that Bengequla would inform the respondent at a meeting scheduled for 4 December 2009 whether the second to further applicants [the employees] would accept the hourly rate of R11.55 and forfeit the increment as an alternative to retrenchment. The respondent dismissed the second to further applicants before the scheduled meeting could be held and denied Bengequla the opportunity to

convey the second to further applicants' acceptance of the hourly rate of R11.55 which the respondent could afford.

[10] …The real reason for the second to further applicants' retrenchment was that the respondent wanted to get rid of them as employees and use employees of labour brokers.

[11] …No evidence was led by the respondent to prove that the second to further applicants were dismissed for the respondent's operational requirements. Dismissing employees solely to use those same employees as employees of a labour broker falls outside the realm of operational requirements. …

[17] The applicants' version and the concession made on behalf of the respondent reflect that the respondent failed in its duty to engage with the first applicant in a meaningful joint consensus-seeking process, because although the parties reached consensus that Bengequla would communicate the second to further applicants' response to the respondent on 4 December 2009, the respondent reneged on that agreement and dismissed the second to further applicants before giving Bengequla an opportunity to convey their response. The respondent's premature and unfair conduct rendered the second to further applicants' dismissal for operational reasons both substantive[ly] and procedurally unfair.'

[22] Thereupon the Court *a quo* ordered that the employees be reinstated into the appellant's employ and further that the appellant must pay the costs of the application. It is against this judgment of the Court *a quo* that the appellant has now appealed to this Court.

The appeal

[23] As stated earlier, the issue in this appeal was crystallised and agreed between the parties to be the one as formulated in paragraph 2 of the respondents' heads of argument, which I repeat hereunder:

'**If it is found that indeed the respondents (the employees) refused the offer**, which was reasonable, then the appeal ought to succeed and

> conversely, **if it is found that the respondents (the employees) were amenable to the offer and in fact <u>accepted same</u>** however the appellant terminated their employment even before their acceptance could be communicated then it should follow that the retrenchments were premature and therefore unfair with the result that the appeal ought to be dismissed with costs.'
>
> (Emphasis added)

[24] In my view, it is clear that the first part of the crystallised issue seeks this Court to determine first and foremost whether the employees did in fact refuse the offer. The appellant made this allegation and the appellant was obliged to prove it. This was besides the overall *onus* borne by the appellant, as the employer, to prove that the retrenchments of the employees were fair.[11]

[25] Obviously, the issue here necessitated a factual finding on credibility which had to be determined on inherent probabilities and civil inferential reasoning. Based on the evidence of the witnesses for both parties and the other evidentiary material presented at the trial, the Court *a quo* had to determine which of the conflicting versions was more probably true. Having done so, the Court *a quo* accepted the evidence on behalf of the employees and rejected that of the appellant.

[26] Indeed, the fact of the appellant having prepared the employees' final payslips already by 4 December 2009, called for a plausible explanation from the appellant, which would confirm its *bona fides* and quell the union's claim that the final decision on the implementation of retrenchments was a *fait accompli*.

[27] Strangely though, in its argument, the appellant pretended as if it never made the allegation about Mr Bengequla having phoned its attorney relaying the employees' rejection of the offer. Instead, the appellant sought to rely on the conduct allegedly exhibited by the union, which the appellant submitted created sufficient ground from which to draw an inference that the employees did not accept the offer. Pertinently, the following aspects were referred to, on

[11] Section 192(2) of the LRA.

behalf of the appellant, in substantiation of its contention in this regard, namely:

1. That at the meeting of 4 December 2009, the issue of acceptance or non-acceptance of the appellant's offer was never raised by the union representative but, instead, the issues deliberated upon were mainly about the calculation formula of the employees' severance packages.

2. In the union's letter of 7 December 2009, referred to above, the union again appeared only concerned about the calculation formula of the employees' severance pay, as well as reminding the appellant about *"the outstanding amounts* [totalling R632 310.30] *owed to our members in terms of the collective agreement",* as duly confirmed in the arbitration award dated 8 November 2009.[12]

3. In the union's statement of claim (in the Court *a quo*), the issue of the employees having accepted the appellant's offer was not pleaded, despite it being the employees' apparent main ground on which they sought to rely.

4. In the parties' original pre-trial minute dated 7 December 2010[13] the issue of acceptance or rejection of the appellant's offer was never raised by the union. It appeared only for the first time in the supplementary pre-trial minute dated 10 August 2011[14] – some 20 months later, since the meeting of 4 December 2009.

[28] On the basis of these points, the appellant sought to depart from the premise that the employees did not accept the appellant's offer and thus refuting Mr Bengequla's claim that the employees accepted the offer. However, it seems to me that this approach is misguided. I say so for the simple reason that the approach tends to shift unduly the *onus* onto the employees to prove that they accepted the offer and that, therefore, their dismissals were unfair. As I see it, the approach conveniently disregards completely the appellant's failure to

[12] Arbitration Award, at 87-90 of the indexed record.
[13] Pre-trial Minutes, at 53 – 58 of the indexed record.
[14] Supplementary Pre-Trial Minute, para 10.3, at 75 of the indexed record.

prove its allegation that the employees rejected its offer, thus rendering their dismissals to be fair. This was the first part of the parties' crystallised issue for determination by this Court. In my view, the appellant dismally failed to prove this allegation. As for the employees, it seems to me that only if the appellant had presented credible and reliable evidence establishing that the employees indeed rejected its offer, would the employees then bear the evidential burden of proving that they accepted the offer.

[29] It does not appear to me that by their denial of the appellant's allegation and, instead, alleging that they had accepted the offer, the employees thereby attracted the *onus* of proving such acceptance by them, regardless whether the primary and material allegation by the appellant (that they rejected the offer) was proved by the appellant. In my view, that would be tantamount to burdening the employees with a duty to prove that their dismissals were unfair. Indeed, generally-speaking, any denial of an allegation (by the party against whom the allegation is made) does not necessarily relieve the party alleging from its duty to prove the allegation.

[30] In its attempt to proving its case, the appellant denied that it issued the employees' final payslips (which also served as notices of their dismissals) prematurely. It was submitted on the appellant's behalf that the following reasons served as the basis for the appellant's conclusion that the employees indeed rejected its offer:

1. As far as the appellant was concerned, the union was supposed to transmit the employees' response on the issue of acceptance or non-acceptance of the appellant's offer any time prior to 4 December 2009, in order for the employees' position to be clearly known when the consultative meeting resumed on 4 December. In other words, if the response was not communicated to the appellant, at the latest by 3 December, then the retrenchments would be implemented on the following day (i.e. 4 December 2009).

2. The appellant further relied on the telephonic report that was allegedly received by its attorney from Mr Bengequla to the effect that the

employees had rejected the offer. In this regard, the appellant's case was not merely to allege that the employees did not accept its offer, but that they in fact expressly rejected it.

[31] As stated, the appellant bore the *onus* to prove its aforesaid allegations. Having considered the matter, I am not persuaded that the appellant discharged its *onus* in this regard, for the reasons that follow.

1. Mr Magagula conceded, under cross-examination, that there was no evidence on record to support his claim that the agreement between the parties (at the meeting of 13 November) was that the employees' response to the appellant's offer had to be communicated to the appellant strictly prior to 4 December. Actually, he conceded that the 4th of December was the deadline on which the employees' reaction to the offer was to be communicated to the appellant, not necessarily before then.[15]

2. There seemed to be ample evidence on record to support the conclusion that the appellant relied mainly, if not entirely, on the alleged telephonic information from its attorney about the employees having rejected the offer. The following extracts from the record illustrate how Mr Magagula responded to questions under cross-examination:

'… Okay, now it is common cause that the employment of the second to further respondents (sic) was terminated on 4 December. Is that correct? … That is correct.

And yet the date at (sic) which the offer had to be accepted, was the very same date, 4 December. Is that correct? That is correct.

Now exactly when … were the applicants [employees] supposed to communicate [their response to the] offer, … if as you have already agreed, if 4 December was the date at (sic) which they ought to have accepted or rejected the offer? … As I have said actually … the union, they dragged their feet … to engage themselves … in this retrenchment …, to engage

[15] Appellant's statement of defence para 17.4; See also: Record, vol 3 at 218 line 20 et seq

themselves in consulting with the employee (sic). On 4 December, it was agreed between the NUM and the company, then all of a sudden after that, we discussed with Mr [Bengequla] the offer, so that we can maybe not carry on with dismissal, retrenchment. … the date was something like 13 October [November?], then we had to extend it to 4 December.

Then by 4 December, before 4 December we got the response from Mr [Bengequla]. **We know (sic) before 4 December that these guys, they do not want the offer, right, before the 4th**.

Right. Mr [Bengequla] said, I mean he communicated to you before the 4th that the guys, the workers rejected the offer? … Telephonically. I cannot prove it, telephonically he did talk to … (intervenes) …

Well that is very convenient. That is very convenient, Mr Magagula. I mean you cannot prove, because let me tell you why you cannot prove it, is because it does not exist, is because it never happened. It is because Mr [Bengequla] would come here and state that having received your offer on 13 November when he was in the meeting and said that he was going to consult [the] workers and revert to you on the 4th and actually advise whether the workers accept or not, he went to the workers, he put the offer and the workers actually said, "As much as we are not happy with the offer that the respondent is putting on the table, but in order to avoid the retrenchment so that we can save our jobs, we accept the offer of R11.55 per hour". … That is not true.

… You cannot say that is not true, because that was the communication between him and the workers. You have got no way of knowing whether it is true or not. …. … **As I said actually, we got the report back from Mr [Bengequla] before 4 December.**

By telephone, you say? … Yes, that is right.

He telephoned. Did he telephone you or somebody else in your company? … No, [he] did telephone the lawyer, Ms (inaudible).

He telephoned the lawyer? … Yes, from Mogaswa Attorneys.

Okay, and **do we have anything in this bundle that points to that effect?** Because that is so important. I mean **if an employer puts an offer [about]**

the measure of avoiding dismissal and the employee rejects it, that is being unreasonable. Now that is a very important document. Can you locate it in the bundle of documents … No, I cannot.

And is the lawyer by the way, here to testify to that effect? … No, she is not."[16]

"COURT: I need to understand your response to the question. The question that Mr Zondo has put to you, is that you agreed with Mr [Bengequla] that on the 4th, Mr [Bengequla] would approach the employer,… and say, "This is what the workers say. They either say they accept your offer or they reject it". **Why then issue on the same date, on the same 4th , the letters of dismissal before hearing from Mr [Bengequla] … Because we already got the respond (sic) from Mr [Bengequla] telephonically. …**

MR ZONDO: A response which unfortunately you cannot prove, correct? … That is correct.[17]

"… Had the company waited for the acceptance of the offer of R11.55 to be communicated to it on the 4th and know that the employees accept R11.55, we would not be here today. Is that correct? … Well I will say that is not correct, because **actually we did get a respond (sic) before 4 December**.'[18]

(Emphasis added)

[32] However, it was common cause that the appellant's attorney, who allegedly reported to the appellant that she received a telephonic report from the union advising her that the employees had rejected the appellant's offer, was not called as a witness. There was not even an affidavit deposed to by the attorney concerned verifying and confirming the appellant's allegation attributed to her. As a matter of fact, there was not even written correspondence (produced by the appellant) from the said attorney to the appellant, purportedly informing the appellant of the alleged telephone conversation and the contents thereof; and then advising the appellant to proceed with the retrenchments. To make things worse, the appellant did not

[16] Record, vol 3, at 219 line 15 to 222 line 4.
[17] Record, vol 3, at 226 lines 12-22.
[18] Record, vol 3, at 247 lines 2-7.

even attempt to explain why it elected not to substantiate its allegation in this regard. In this situation, I am left with no option but to infer negatively against Mr Magagula's credibility and honesty as a witness.

[33] Indeed, notwithstanding Mr Magagula's concession that he could not prove the existence of the alleged telephone conversation, there was still no attempt on the part of the appellant to cure this material evidential defect. Nor was there any attempt by the appellant, which was legally represented, by the way, to have sought to have the hearsay evidence admitted, for whatever other permissible reason, in terms of any of the statutory exceptions to the hearsay rule, as laid down in the Law of Evidence Amendment Act.[19] In my view, the reason is clear: There was no valid ground for any of the exceptions to apply. Therefore, it stood to reason that any reference, in Mr Magagula's evidence, to the alleged attorney's telephonic report, was inadmissible hearsay and fell to be treated as *pro non scripto,* which the Court *a quo* correctly did.

[34] Consequently, with the exclusion of the appellant's two grounds aforesaid, there was nothing else left for the appellant to rely on as basis for its assertion that the employees rejected its offer, which was evidently the basis for the appellant to have prepared the employees' final payslips prior to 4 December, as to be ready for delivery on the same day.

[35] In any event, I have no reason to fault the Court *a quo* in its factual findings on credibility. In my view, Mr Bengequla (on behalf of the employees) appears to have performed far much better in the witness stand than Mr Magagula (on behalf of the appellant). Mr Magagula's evidence was littered with several material discrepancies, including contradictions and inconsistencies; and at times he even made some serious concessions. The following examples, which include extracts from the record, illustrate some of these discrepancies:

1. Mr Magagula was initially adamant that Mr Bengequla said he would phone the appellant **before 4 December** and advise of the employees' response to the appellant's offer. This is what he said: ***"… He [Mr***

[19] Section 3(1)(c) of Act 45 of 1988.

Bengequla] said he is going to phone us. That means before 4 December …"[20] However, when Mr Magagula was presented with evidence pointing to the contrary, he conceded that in fact the 4th of December was the deadline, in the sense that the employees' response was to be communicated to the appellant on that day: ***"So it would seem that the deadline for either rejection or acceptance of that offer would have been 4 December. Is that correct? … That is correct."***[21]

2. Further, on his own volition, Mr Magagula conceded that his claim that the appellant's attorney allegedly received a telephonic message from Mr Bengequla, saying that the employees had rejected the appellant's offer, was something that he (Mr Magagula) could not prove.[22] As already discussed above, no other admissible evidence was tendered to prove this allegation, which was seemingly the main basis for the appellant to implement the retrenchments.

3. Hence, on the basis of Mr Magagula's concessions there was, in my view, simply no plausible explanation why the appellant decided to go ahead and issue the final payslips to the employees, even before the meeting of 4 December. Obviously, whatever might have happened either at the meeting of 4 December or post 4 December could not possibly have been the cause for the appellant to have issued the final payslips before that date. It follows without doubt that, in this regard, the appellant mainly, if not solely, relied on the alleged telephonic report from its attorney, Ms Nkadisha, which constituted inadmissible hearsay.

[36] Mr Magagula also appeared to concede that the dismissals of the employees were indeed a *fait accompli,* after all. The following passage from his evidence (under cross-examination) is pertinent:[23]

[20] Record, vol 3, at 218 line 14.
[21] Record, vol 3, at 218-219.
[22] Record, vol 3, at 220, line17.
[23] Record, vol 3, at 225 line 21 to 226 line7.

'… Can you agree with me that even before you could hear what the…Applicants had to say, you decided to terminate because these meetings had been dragging for far too long? I can refer you to, I mean to where actually, I mean in the minutes of the 4th where the respondent actually said that the meetings have been dragging for far too long. I think you have alluded to that as well…Yes.

So that was the reason why you terminated. You said no, it has been dragging for far too long. Whether they accept or not, we are terminating now because we had said that is the 4th. Is that correct? … That is correct, because we agreed that the 4th was the termination date.'

(Emphasis added)

[37] It is significant to note that even the appellant's accusation that the union had been dragging the consultation process for far too long was factually incorrect. If anyone was to blame for any delay in the process, it was the appellant itself. There were only three meetings scheduled by the parties to discuss the retrenchment issue, namely, on 13 August, 13 November and 4 December 2009 – it having been agreed that the meeting on 24 August 2009 was only for discussing the issue of the collective agreement and the moneys owed to the employees by the appellant in terms of that collective agreement. At all these three meetings, the union was represented, even the one of 13 November when most of its representatives were attending a training course; and on that day Mr Bengequla attended the meeting alone. It transpired that the only single long delay was the 60 day period – from 13 August to 13 October – during which the appellant had proposed to request the CCMA to appoint a facilitator to try and assist the parties in the consultation process.[24] However, the appellant apparently failed to have such facilitator appointed,[25] thus considerably contributing to the delay. Mr Magagula's responses to further questions under cross-examination:

[24] Presumably in terms of section 189A(3) read with section 189A(7) of the LRA.
[25] Record, vol 3, at 229 line 2 to 238 line 8.

> 'So if then the respondent fails to appoint a facilitator and the matter drags as a result of the respondent's failure to appoint a facilitator, whose fault is it? Speak up, I cannot hear you. … The company's fault[26] ….
>
> …Okay, and do you perhaps have any minutes that indicate that for instance there were meetings that were meant to be attended by the applicants which were never attended, which then resulted in these meetings dragging? Have you got any minutes … No.'[27]

[38] The fact of the union having failed, a couple of times, to communicate the employees' acceptance of the appellant's offer much earlier than it did, was the basis on which the Court was implored to draw an inference that the employees never accepted the offer. However, the same could be said of the appellant. No explanation was proffered as to why the story - about the attorney (presumably Ms Nkadisha) having received a telephone call from Mr Bengequla - was kept secret until disclosed at the trial. For instance, at the meeting of 4 December, none of the appellant's representatives disclosed that the employees had actually rejected the appellant's offer. According to Mr Bengequla's evidence, Ms Nkadisha (who was part of the appellant's team) was present at the meeting of 4 December and he even spoke to her. Yet neither Mr Magagula nor Ms Nkadisha ever mentioned anything about the alleged telephone call from Mr Bengequla to Ms Nkadisha. Indeed, the handwritten minutes of the 4 December meeting bore testimony that such matter was never raised by any of the appellant's representatives. In confirmation hereof, I propose to refer to some of the exchanges during the evidence-in-chief of Mr Bengequla:[28]

> 'All right. What happened?….On the 4th, the day of the meeting, while I was walking towards the meeting as it was held at our head office conference room, I received a call from the branch leadership, one of the branch (sic), asking me why are we selling the employees out. I wanted to know why is he saying that. He said, "But the employer has already issued the employees with their payslips, where he has paid them amounts of money", whereas I told them that we are meeting again on the 4th. I said to them, "I am on my

[26] Record, vol 3 at 230 lines 14-17.
[27] Record, vol 3 at 231 lines 5-13.
[28] Record, vol 3, at 270 lines 7-24.

> way to the meeting" and when we got to the meeting on 4 December, **I raised this issue with Nkadisha. [She] was representing the respondent. My Ladyship, and she just said to me this whole process has been dragging. I said to him (sic), "But we have not even discussed, this was the issue we were to discuss, whether the applicants will accept the 11.55 instead of the, …. 16.98, and already they had taken a decision. We could not say anything on 4 December, because the letters [of dismissal] were given to the employees already.**' **….**

And further:[29]

> 'Okay, all right. I interrupted you. You carried (sic) on, you were taking us through as to what happened **when you were to communicate their acceptance? … And remember I raised it with Nkadisha** and said, "I have just received a call that the respondent is already paying out the applicants"…(intervenes)
>
> COURT: "Who is Nkadisha?….**Nkadisha was the representative of the respondent from Mogwase Attorneys**.'

Mr Bengequla proceeded in his evidence[30]:

> 'Right. Now it was the respondent's evidence that you actually telephoned their attorney to the effect that, or let me put it this way, that after they had put an offer to you on 13 November and you have said that you were going to go to your members and communicate with them and get the mandate and then revert to the employer, that you then telephoned the lawyer and said that no, the workers were rejecting that offer. So I want you to take us through it. …. No, that is not true, My Ladyship, **I never telephoned Nkadisha. The results of the consultation with the members were to be discussed on 4 December. I was supposed to tell them whether that has been accepted or not.**'
>
> (Emphasis added)

[39] Whilst the union, in its letter of complaint (about the dismissals) dated 7 December 2009, failed to mention that the employees were dismissed despite

[29] Record, vol 3, at 271 lines 19-25.
[30] Record, vol 3 at 272 line 22 to 273 line 6.

having accepted the offer, the same could be said of the appellant, in that it also failed, in its reply of 8 December, to state that employees were dismissed because they had in fact rejected the appellant's offer.

[40] The appellant had another opportunity in its statement of defence to have pleaded the fact that it implemented the retrenchments on the strength of the employees having, through their union representative, expressly rejected the appellant's offer. Nor was this aspect mentioned by the appellant in both the original and supplementary pre-trial minutes. In response to the union's allegation (as reflected in the supplementary pre-trial minute) that *"[t]he applicant requested adjournment to take instruction from the members and ultimately accepted the offer but still [they were] dismissed anyway"*, the appellant only stated, in reply: *"An offer was put forward by the respondent but was never accepted by the applicants"*. In other words, the appellant sought to focus its response only to the alleged acceptance of the offer by the employees and avoided completely – and conveniently so – to disclose that the employees had actually rejected the offer. It begs the question why.

[41] As indicated elsewhere in this judgment, logically-speaking, the appellant could not possibly have issued the employees' final payslips prior to 4 December and claim to have done so on the basis of the events of 4 December and/or subsequent to that date. As we know, Mr Magagula ultimately conceded that there was indeed no agreement between the parties to the effect that the employees' acceptance or rejection of the offer was bound to be communicated to the appellant prior to 4 December. It followed, therefore, that the only reason left with the appellant to have issued the payslips prior to 4 December was the alleged telephone message from Mr Bengequla to the appellant's attorney. Admittedly, this was precisely the reason why the appellant issued the payslips prior to 4 December. It was also the moment when the appellant made its final decision to dismiss the employees. In my view, therefore, the alleged incident of the telephone call from Mr Bengequla to the appellant's attorney was materially and crucially important for the appellant's case. The appellant was obliged to lead evidence on the issue to prove this allegation, which the appellant failed to do.

[42] I think it would also be fair to take regard of the fact that throughout the consultation process between the parties, the appellant was always represented by an attorney, whereas the union was represented by its officials who were presumably not legally trained. Hence, their performance during the consultation process should also be viewed and assessed in that context.

[43] It is trite that, due to the fact of a trial court having the advantage of observing the performance and demeanour of witnesses in the witness stand, the factual findings on credibility made by that court are presumed to be correct and the court of appeal will not lightly interfere with such findings, unless it is satisfied that, *ex facie* the appeal record, the trial court materially misdirected itself or was clearly wrong.[31] On this basis, there seems to be no justifiable ground, in the present instance, to fault the Court *a quo* for having accepted the evidence of Mr Bengequla over that of Mr Magagula. In this regard, the learned Judge *a quo* observed:[32]

> 'The respondent did not call the attorney who conveyed Bengequla's purported response on the [proposed] remuneration rate and provided no explanation for such omission. Bengequla led clear evidence on the issue which was not challenged under cross examination. The same cannot be said about Magagula who contradicted himself. For these reasons I accepted Bengequla's version that he did not tell the respondent, either directly or through its attorneys, that its offer had been declined by the second to further applicants …
>
> Magagula conceded under cross-examination that had the respondent received the information that the second to further applicants had accepted its offer to keep the remuneration rate unchanged, the reason for the retrenchment would have fallen away and the second to further applicants would not have been retrenched. He further conceded that the respondent did not apply LIFO in selecting employees for retrenchment, but retained [only] those employees who accepted the respondent's offer to keep the rate of remuneration unchanged.'

[31] See *Manhattan Motors Trust v Abdulla* (2002) 23 ILJ 1544 (LAC) at para 7 and *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 ILJ 340 (LAC) at para 39.
[32] Record, vol 4, at 344 lines 5-12 and 22-28.

[44] Clearly, the collective agreement essentially changed the terms and conditions of the employees' employment to the extent that their remuneration rate was increased from the hourly rate of R11.55 to R16.98. Therefore, the appellant's proposal of reversing the implementation of the provisions of the collective agreement amounted to a change to the employees' terms and conditions of their employment. However, what the appellant sought to do was neither unilateral nor impermissible, given the fact that it wanted to do so with the employees' consent. In *Mazista Tiles (Pty) Ltd v National Union of Mineworkers and Others,*[33] this Court stated that:

> 'An employer who is desirous of effecting changes to terms and conditions applicable to his employees is obliged to negotiate with the employees and obtain their consent. A unilateral change by the employer of the terms and conditions of employment is not permissible. It may so happen, as it was the position in [this] case that the employees refuse to enter into any agreement relating to the alteration of their terms and conditions because the new terms are less attractive or beneficial to them. While it is impermissible for such [an] employer to dismiss his employees in order to compel them to accept his demand relating to the new terms and conditions, it does not mean that the employer can never effect the desired changes. If the employees reject the proposed changes and the employer wants to pursue their implementation, he has the right to invoke the provisions of section 189 and dismiss the employees provided the necessary requirements of that section are met.[34]'

[45] Due to its professed inability to afford the increased remuneration rate, the appellant would ordinarily have been expected to apply to the bargaining council for exemption from the collective agreement. If the exemption was refused it would have been entitled to lodge an appeal against the refusal.[35] However, the appellant did not lodge such application with the bargaining council. Instead, it opted to embark on the section 189 retrenchment procedures. This begged the question why that route was preferred. In my view, the following supplies the probable answer to this question:

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[33] (2004) 25 ILJ 2156 (LAC).
[34] *Mazista Tiles*, above, at para 48. See also: *Motor Industry Staff Association and Another v Silverton Spraypainters & Panelbeaters (Pty) Ltd and Others* (2013) 34 ILJ 1440 (LAC) at para 32.
[35] In term of section 32(3)(e)(i) of the LRA.

1. Applying for exemption from the collective agreement would necessarily have required of the appellant to submit proof to the satisfaction of the Minister that it was in such dire financial straits that it was not in a position to afford to pay the employees at the increased remuneration rate in terms of the collective agreement, and its representations in this regard would have had to include production of its financial statements for the relevant periods. Therefore, in the event of the Minister being not satisfied with its representations, the appellant would then have been obliged to comply with the dictates of the collective agreement and to remunerate the employees in terms of the prescribed increased rate.

2. The appellant was desperate to having the employees retrenched from its employ at all costs and, soon thereafter, have them employed by J & J Cable via a labour broker service.[36] That scenario would in turn benefit the appellant when the same employees were then to be deployed by J & J Cable (as their employer) to work for the appellant (being J & J Cable's client) at a lower rate than the one prescribed in the collective agreement. On the facts, I am inclined to conclude that this is what the appellant wanted to happen. Indeed, there could be very little doubt that, for all practical intents and purposes, J & J Cable and the appellant were virtually one and the same corporate entity, given the fact that Mr Peter Mueller co-owned both entities, as alluded to above.

[46] In any event, if the appellant claimed (as they did) that all along, since 4 December 2009, it was prepared to take back the employees at the unchanged remuneration rate, which the employees claimed (as they did) that they were also prepared to accept, then it begged the question why this matter is before the Court, in the first place. Assuming the parties were initially not *ad idem*, as to who rejected what or who accepted what, but once it became clear to the appellant that the employees' position was that they were accepting its offer, it was reasonably expected of the appellant to have taken

[36] Judgment of the Court *a quo*, at para 11.

whatever steps necessary to have the employees reinstated without further delay; and thus avoiding this litigation. To that extent, the appellant was to blame for the delay.

[47] For these reasons, the Court *a quo* was, in my view, not wrong in holding that the dismissals of the employees for operational requirements were premature and, therefore, substantively and procedurally unfair.

[48] Since the parties elected to crystallise and restrict the issue for determination by this Court as stated above, it is no longer necessary to deal in detail with other issues, such as the impact of termination of the Eskom contract on the appellant's financial standing and capacity and the effect of the subsequent conclusion of the Ekurhuleni contract in terms of allegedly ameliorating the appellant's financial position after termination of the Eskom contract.

The appropriate relief

[49] This brings me to the question of the appropriate relief. In their statement of claim, the employees sought an order for their retrospective reinstatement; alternatively, an order for compensation in an amount which the Court would deem fair and equitable in the circumstances. It is trite that unless the conditions referred to in section 193(2)(a),(b) or (c) of the LRA are present, a substantively unfair dismissal entitles the dismissed employee to reinstatement, that is, to be placed in the same position that the employee concerned would have been, but for the unfair dismissal.[37] It was the appellant's case that all along the appellant was prepared to retain the employees in its employ on the unchanged remuneration rate of R11.55 per hour. On this basis, it follows that trust relationship was never an issue between the parties. Of further significance, in his evidence in the Court *a quo*, Mr Nkosiyabo Gumede was steadfast that the employees were seeking reinstatement;[38] and not a single question in cross-examination was put to this witness by counsel for the appellant.

[37] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 2507 (CC); Also reported as [2008] 12 BLLR 1129 (CC) (*Equity Aviation Services*) at para 36.
[38] Record, vol 4 at 310 lines 5-8.

[50] Hence, in my view, the Court *a quo* was also not wrong in ordering the employees' reinstatement. However, I note that the Court *a quo* did not specify the extent of retrospectivity of the reinstatement, particularly the issue of arrear wages, i.e. the so-called back-pay. I propose to deal with that aspect hereunder.

[51] In considering the issue of back-pay, the particular circumstances of this case should be taken in to account in order to ensure that, at the end of the day, fairness is served to both sides. In *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others*,[39] the Appellate Division (as the Supreme Court of Appeal was then known) had this to say:

> '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.'[40]

[52] Accordingly, I have considered the following factors, in this regard:

1. The employees were dismissed on 4 December 2009 and the judgment of the Court *a quo* was handed down on 3 August 2012 – almost three years later. There is no indication that either of the parties was responsible for this delay. In particular, the delay cannot be attributed to the appellant.

2. Although there was no forensic evidence presented by the appellant in support of its claim that it was, at the time, in dire financial distress, it seems to me that the employees' decision to accept the appellant's proposal to retain them at the unchanged remuneration rate, which was clearly to their detriment, served to show that the union and the

[39] (1996) 17 ILJ 455 (A) (*National Union of Metalworkers)*, also reported as 1996 (4) SA 577 (A)
[40] *National Union of Metalworkers,* above, at 476 D-E. See also *CWIU and Others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC), also reported as [2003] 11 BLLR 1081 (LAC) at para.69. See also *Equity Aviation*, above, at para 39; *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* 2010 (5) BCLR 422 (CC) at para 43.

employees did recognise, as a fact, that the appellant's unfavourable financial condition did exist.

[53] Therefore, it seems to me that an order for payment of arrear wages with effect from the date of dismissal (i.e. 4 December 2009) in respect of 106 employees would be unduly financially burdensome on the appellant. However, it would not be unfair, in my view, for such order to take effect from the date of the judgment of the Court *a quo.* Indeed, I consider that it was within the appellant's right to take the matter on appeal. Having said so, however, I hasten to point out that such right had to be balanced up with the employees' rights to protection against any form of unfair labour practices,[41] including unfair dismissals; and to effective and expeditious resolution of their labour dispute.[42] I have no doubt in my mind that some, if not most, of these employees were sole breadwinners who were left completely impecunious and destitute by their untimely unfair dismissals. Therefore, any delay occasioned by the appellant exercising its right to appeal should not prejudice the employees' right of entitlement to the benefits of the order of the Court *a quo,* as at the time the order was made. On this point, I am mindful of the remarks by Goldstone JA in *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others*,[43] where the learned Judge of Appeal said the following:

> '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 [now the labour court], an employer who appeals from such an order knowingly runs the risk of any prejudice which may be the consequence of delaying the implementation of the order.[44]'**

[41] Section 27(1) of the Constitution of the Republic of South Africa Act 108 of 1996. See also: section 185 of the LRA
[42] Section 1(d)(iv) of the LRA.
[43] 1994 (2) SA 204 (A).
[44] *Performing Arts Council*, at 219H-I.

(Emphasis added)

[54] Given the employees' acceptance of the offer to be retained in the appellant's employ at the unchanged remuneration rate of R11.55 per hour, it would follow that their reinstatement, as well as the calculation of their individual arrear wages, must be based on the same rate. In accordance with the requirements of law and fairness, there should not have been a costs order made in the Court *a quo,* given the need to encourage and promote the harmonious working relationship between the appellant and the employees.

The order

[55] In the result, the following order is made:

1. The appeal is dismissed; save that the order of the Court *a quo* is amended to read as follows:

   (1) The dismissal of the second to further applicants (the employees) - whose names are listed in Table A annexed to the statement of claim - was substantively and procedurally unfair.

   (2) The respondent is ordered to reinstate the employees retrospectively from the date of their dismissals and on the same terms and conditions as they existed then, save that the employees shall be entitled to back-pay calculated only from the date of the order of the Court *a quo* (i.e. 3 August 2012) to the date of this Order; and at the remuneration rate of R11.55 per hour.

   (3) The date of resumption of duty by the individual employees shall be arranged between the appellant and the union (or the individual employees, as the case may be) but it must not be later than 30 days from the date of this Order.

   (4) No costs order is made.

2. There is no order as to costs of the appeal.

_____

Ndlovu JA

SUTHERLAND JA

[56] I have read the judgment of my brother Ndlovu JA, and am unable to agree with the result. In my view, the appeal should succeed.

[57] The Labour Court found that the appellant employer had unfairly retrenched its workers. The appeal seeks to upset that finding.

[58] The parties have agreed that the sole question to decide on appeal is whether the union, on behalf of the workers, accepted an offer put to the union on 13 November 2009, that a retrenchment would be avoided if the workers agreed to a wage rate at the current rate of R11.55 per hour and they forwent the bargaining council stipulated increase at a rate of R16.98 per hour. Precisely how an agreement in these terms could be implemented at less than the bargaining council rate was not disclosed, but it is not a question the court is required to decide. This offer is agreed by the parties as being reasonable; ie a reasonable alternative to retrenchment. If the finding of fact is that the workers refused the offer, the retrenchment is fair; if they accepted the offer, there would be no rationale for a retrenchment and accordingly the retrenchment was unfair. The exact formulation of the question, which seems to have some bearing on the difference in the views adopted in the respective judgments in this case, was articulated thus:

> 'If it is found that indeed the respondents (the employees) refused the offer, which was reasonable, then the appeal ought to succeed and conversely, if it is found that the respondents (the employees) were amenable to the offer and in fact accepted same however the appellant terminated their employment even before their acceptance could be communicated then it should follow that the retrenchments were premature and therefore unfair with the result that the appeal ought to be dismissed with costs.'

[59] Accordingly, in my view, this Court must address the respective cases which the parties have agreed to contest; other aspects of their dispute are irrelevant.

[60] The relevant factual context is common cause:

60.1. The appellant conducted business solely in terms of civil works sub-contracts to JJ Cables Jointing CC, which Business in turn concluded main contracts with the principals. Its income was a function of the volume of contracts at any time, and how lucrative they were. Different contracts were struck at various rates.

60.2. A particular contract with Eskom was lost, and the appellant's volume of work was reduced to a perilous level. Although other work was awarded, that work was less remunerative. The impact was that the appellant struggled to meet the overhead expenses and the wage bill became a strain, exacerbated by an industry level increase.

60.3. A retrenchment process was formally engaged in. Four meetings were ultimately held over a period from 30 July to December 2009. Notes of these meetings were recorded by the union negotiator, Melusi Stephen Bengequla, a union legal officer. (These notes are not "proper" minutes, do not purport to be comprehensive, but are the only contemporaneous record of the events; the parties agree they are an accurate reflection of what they state).

[61] The parties' consultations trundled on in a desultory fashion until the third meeting on 13 November 2009. What passed between them is noted by Bengequla, albeit imperfectly. Among the agreements reached and actually noted is this:

> 'Parties agreed to change the termination date of 13 October to be 4th December 2009.' (It is common cause that the reference to October should have been November.)

What was not noted, but is common cause, is that the appellant put to the union a proposal that the wage rate be kept at R11.55 and if so, the retrenchment would be abandoned. Bengequla undertook to put this proposal

to the workers. Significantly, the shop stewards were not at this meeting, an astonishing circumstance, given the importance of the topic. Their absence was explained by their engagement on a union training course.

[62] The really controversial question arises from what the parties expected to happen next. On this, there is a substantial dispute of facts. According to the union, Bengequla was to canvass the workers and report back at the next meeting scheduled for 4 December 2009. The appellant's expectation, according to its main witness, Magagula, the Human Resources Manager, was that an acceptance or rejection of the offer would be communicated before 4 December. Which version is more probable?

[63] The note of the meeting, written by Bengequla, does not even record that a further meeting is to be held, merely that the termination date is agreed as 4 December. Notwithstanding that, it is common cause that the parties did agree to meet on 4 December, at the union offices, as had hitherto been their practice. However, the primary meaning of the words noted undoubtedly suggest strongly that the dismissals would take place on that day. Equally self-evident, having regard to the offer put up for acceptance or rejection, the "termination" must have been contingent upon a need to retrench; ie the appellant would not "terminate" on that date if the offer was accepted. Presumably, to avoid the deadline on 4 December to trigger the retrenchment, *at least by 4 December* an answer had to be communicated.

[64] On 4 December, the appellant dismissed the workers. Why? The appellant's case is that the offer was not accepted. The union's case is that Bengequla went to the 4 December meeting to report an acceptance, but to his amazement, the dismissal process commenced before his arrival.

[65] The appellant had wanted to present a case that on some day prior to the 4 December meeting, it had been told by Bengequla that the offer was rejected. Magagula claimed that the appellant's attorney had been telephoned by Bengequla to inform her of the rejection. She was not called to testify. Magagula's evidence was plainly hearsay. Bengequla flatly denied making any such communication. Quite correctly, in the face of Bengequla's denial,

the evidence tendered of his alleged conversation with the attorney was excluded and ignored by the court *a quo*. Accordingly, there was no direct evidence of a positive rejection of the offer. In my view, the absence of evidence of an express rejection ought not to be accorded undue significance in an assessment of the evidence that was, indeed, adduced, especially having regard to the probabilities. It is this regard that I differ from the approach taken by Ndlovu JA.

[66] Bengequla's evidence was that he was not due to announce the outcome of the workers' response to the offer until he met with the management of the appellant on 4 December. Is this consistent with the probabilities? First, on his own evidence, he noted on 13 November, the "termination" was set for 4 December. Even assuming that for reasons of proper record keeping and prudent formalities, the parties would on 4 December meet to conclude an agreement reflecting the agreement by the workers to accept the lesser wage rate, if the workers had truly mandated an acceptance, why wait until the meeting to report that fact? Self-evidently, if a mandate to accept had been given by the workers at any time during the three weeks since the offer had been made, at least one gathering of the workers must have occurred to furnish such a mandate to the union. Common sense indicates that an immediate report of an acceptance would have followed. Indeed, how such a mandate could have remained a secret from the managers of those workers is, in my view, inconceivable. On Bengequla's evidence, the acceptance was given although he does not say when, and but his conduct must be understood that it was kept confidential until the day of the 4 December meeting, when he intended to reveal it. No rationale is offered to explain why this was the case.

[67] A significant morsel of evidence from Bengequla is that *en route* to the meeting, he says he was phoned by a worker. The worker accused him of selling them out because they were receiving dismissal notices; ie *before* the meeting even started. This remark was understood by Bengequla to refer to the belief by the workers that if workers were being given their dismissal notices, it meant that, contrary to the mandate given by them to Bengequla to

accept the offer to avoid the retrenchment, Bengequla had agreed to a retrenchment. This accusation was the very antithesis of Bengequla efforts. Curiously, he does not state what answer he gave to the anonymous caller. If this account of Bengequla were to be true, then it would imply two significant circumstances: first, that he arrived at the meeting in the full knowledge that despite the report he was about to deliver it would render the retrenchment definitively unnecessary, and second, that the management had not waited to hear from him and had, as foreshadowed by the agreement reached on 13 November, implemented the retrenchment effective on that day, 4 December. His actions which followed had to be conditioned by those circumstances.

[68] What happened at the meeting of 4 December? Bengequla, once more, made a note. The topics noted allude to back pay arising from an arbitration award on the correct rate of pay, and the drawing up of a list of retrenchees which should reflect the higher rate of pay that triggered the retrenchment exercise in the first place. One notation is made thus: “Instructions are that this matter has been dragging” This is an odd way of expressing a frustration with delays. Bengequla’s evidence is that the attorney said this to him, and the allusions to “instructions” on the probabilities bears out that the phraseology was likely to have been that of a lawyer advising the appellant, who was herself present at the meeting.

[69] However, the most astounding aspect is that no protest was made by Bengequla that the retrenchment was unnecessary and no discussion took place about the acceptance or rejection of the offer. In my view, if Bengequla really had a mandate of acceptance to present, the probability that he would not call for a reversal of the retrenchment he alleges was already in progress is so far-fetched as to be quite unbelievable. He had the ultimate and complete answer to close down the retrenchment and save the workers’ jobs, but so he says, he did not play that card. Instead, he remained silent on that score and engaged in discussing other aspects of the implementation of the retrenchment decision, moreover, he did so, despite a fellow union member having inaccurately called him a sellout. His efforts to explain away his silence are incredible; ie, it was too late to do anything about the retrenchment

decision and it was therefore not even mention-worthy! In the judgment of Ndlovu JA at paragraph 9 it is suggested that, Bengequla, by the turn of events as described by him, was "deprived of an opportunity" to present or disclose the acceptance. With this view, I am unable to agree. In my view, the probabilities are against such a meek, if not spineless, response. Bengequla was a union legal officer, accustomed to negotiating to protect worker's interests, not a rank and file worker who might have been confused or bewildered by the turn of events. Indeed, the probabilities suggest, in my view, that his entirely righteous anger would have been uncontainable in the face of such duplicity as he claims was perpetrated by the Management.

[70] However, a credibility finding against Bengequla need not rest on those circumstances alone. There are several more *induciae*. The first is a letter penned by Bengequla on 7 December, three days later. In it, he accuses the appellant of giving notices to the workers after the meeting, an allegation, incidently, which contradicts his evidence that the dismissal notices were distributed before the meeting took place. In the letter, this act of giving dismissal notices was improper, he alleges, because financial details were still being worked out; ie the tenor of the letter is that the principle of retrenchment is implicitly affirmed, but the date of termination is merely premature, because of details about the package to be paid. On such grounds, he threatens legal action. Again, missing from this letter, after three days to reflect and confer with colleagues, is the killer-point on which to stop the retrenchment dead in its tracks; ie the improper persistence with a retrenchment because the workers accept the job-saving offer, rendering retrenchment unnecessary. In my view, the omission, on two occasions to protest against the need for a retrenchment because the offer was accepted is a material impediment to believing that an acceptance of the offer existed.

[71] What the evidence discloses, up to this stage of the evolution of events, ignoring the belief of the appellant that the offer was rejected, is the signal fact that Bengequla never communicates an acceptance. To the extent that the agreed termination was contingent on it being displaced by an acceptance of the offer, no acceptance is ever given. Accordingly, the resolutive condition,

which would stop the retrenchment, as noted by Bengequla on 13 November, it is common cause, is never met.

[72] The mendacity of Bengequla on the question of the existence of a mandate to accept the offer is further manifested by an examination of the evolution of the pleadings. The union's Statement of case is bereft of the slightest hint of the offer that is central to the controversy. It alleges that on 4 December, the appellant ended the consultation process merely because it had dragged on so long. The Statement of defence in paragraphs 6.2, and 17 set out the case of the offer and the resolutive condition expiring on 4 December. The first pre-trial conference recorded nothing of any use. The parties were then ordered to hold a fresh meeting. In paragraph 10.3 of the minute of that conference, the union alleged that the offer was accepted but the workers were dismissed anyway. The appellant responded by denying that an acceptance was forthcoming.

[73] From this traverse of the pleadings, it is plain that the union did not initially seek to rely on a breach of trust by the appellant to abandon the retrenchment if the offer was accepted; only at the very end, was an alleged acceptance raised. The appropriate inference to be drawn, from all of these facts and circumstances is that the claim of an acceptance is opportunistic and false.

[74] In the result, Bengequla cannot believe that he had a mandate to accept the offer. The appropriate factual finding on this body of evidence must be that the offer was not accepted.

[75] It has been suggested in the judgment of Ndlovu JA at paragraph 28 that the *onus* to prove a fair dismissal, which rests on the appellant, has not been met by it because it could not present admissible evidence of an express rejection, and no *onus* can rest on the union to prove an acceptance. With this approach, I cannot agree. The *onus* of proof is not shifted. The real issue is the burden to adduce evidence of facts upon which the litigants rely. The common cause facts include an agreed termination date, subject to an acceptance of an offer to halt the dismissal. The party who alleges an acceptance must adduce that evidence, regardless of the incidence of the

onus. Paradoxically, the absence of a communication of an acceptance is common cause. As such, it is merely a semantic question whether it is an absence of an acceptance or an absence of a rejection which has been established by the evidence. Moreover, in my view, that is not the determinative consideration.

[76] The critical issue is *why* Bengequla never communicated an acceptance when no plausible explanation exists for not doing so. In my view, his explanation on this score is incredible, for the reasons already given. Moreover, the conduct of the appellant is consistent with a belief that by 4 December there had been no acceptance, even disregarding the hearsay evidence of a rejection.

[77] Accordingly, the question put to the court must be answered in favour of the appellant. There was no acceptance of a reasonable offer to avoid the retrenchment. The retrenchment was accordingly, not unfair.

[78] As to costs, once a finding of scheming untruthfulness is made, the usual factors which incline this Court to refrain from making costs orders evaporates. The union should bear the costs of the matter.

The order

[79] The appeal is upheld with costs.

[80] The order of the Labour Court is set aside and substituted as follows.

80.1. The retrenchment of the persons whose names are listed in table A was fair.

80.2. The application is dismissed.

80.3. The Applicant shall pay the respondent's costs.

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Sutherland JA

Landman JA concurs in the judgment of Sutherland JA

FOR THE APPELLANT:	Mr WJ Hutchinson
	Instructed by Fluxman Incorporated,
FOR THE RESPONDENTS:	Ms P Nkutha
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