REPUBLIC OF SOUTH AFRICA
THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: DA17/10

In the matter between:

SAFCOR FREIGHT (PTY) LTD t/a

SAFCOR PANALPINA **Appellant**

and

SOUTH AFRICAN FREIGHT AND DOCK WORKERS

UNION ("SAFDU") **Respondent**

Heard: **25 August 2011**

Delivered: **17 September 2012**

Summary: **Appeal – Bargaining Power – Differentiation in Wage Increase – Whether the employer has a right to bargain with employees who are not members of a bargaining unit represented by a recognised trade union leading to differentiation in wage increase - Whether the appellant through its conduct infringed the protections accorded by the right to freedom of association enshrined in Chapter II of the LRA. – Held that the employer's conduct led to the**

bargaining unit employees being prejudiced/discriminated against because of their membership of the union - Remuneration increase declared to be in contravention of section 5(2)(c)(i) and section 5(3) of the Labour Relations Act 66 of 1995

JUDGMENT

MURPHY AJA

1] This is an appeal against a judgment of the Labour Court (Cele J) in which it declared that the award of a wage increase by the appellant to certain of its non-unionised employees was discriminatory and prejudicial in violation of section 5 of the Labour Relations Act 66 of 1995 ("the LRA") and sections 9 and 23 of the Constitution. The appeal raises important questions of principle and policy in relation to the right of an employer to bargain with employees who are not members of a bargaining unit represented by a recognised trade union.

2] The appellant is a freight forwarding business with branches in all of South Africa's major ports, as well as in Johannesburg. At the time that the dispute arose, it employed more than 1100 employees throughout the country. The present dispute concerns the Durban operation where the appellant employed 277 employees, of whom 31 were managerial employees.

3] The respondent is a registered trade union which was recognised as the bargaining agent for its members employed by the appellant at the Durban branch.

4] On 25 October 2006, the appellant and the respondent concluded a collective agreement described by them as "a relationship agreement"

which manages their relationship in detail. The respondent has been recognised as a bargaining agent by the appellant since 1996; the relevant relationship agreement, however, was applicable only from late 2006.

5] Clause 4.1 of the agreement confers recognition on the respondent as the bargaining agent of the members of the bargaining unit. The pertinent part of Clause 4.1 reads:

> 'The Company shall recognize the Union as being a registered Trade Union within the workplace, and as the representative of its members within the bargaining unit for the purpose of collective bargaining for so long as the Union maintains a membership level of 50% (fifty percent) plus 1 of the employees within the workplace. In this respect, the Union shall negotiate wages and substantive conditions of employment for its members in the bargaining unit on an annual basis ….'

The "bargaining unit" is defined in clause 1.3 of the agreement to mean:

> '… permanent employees of the Company who are members of the Union with the exclusion of the following categories of employees:
>
> 1.3.1 Managerial staff (Grade B and D and upwards);
>
> 1.3.2 Financial Accountants;
>
> 1.3.3 Payroll and Human Resources Administrators.'

6] It is common cause that at the relevant time the respondent's members at the Durban operation numbered 111 of the total of 277 employees. The remaining 166 employees were not union members and therefore fell outside of the bargaining unit. The union thus represented about 40% of the employees working at the Durban operation. The appellant has not challenged the union's level of representation in these

proceedings. One may infer, accordingly, that the employees that the union represented made up more than 50% of those employees who qualified to be members of the union and the bargaining unit. In terms of clause 4.1 of the agreement, the bargaining unit is defined by and based on union membership.

7] The respondent is also recognised at the appellant's Johannesburg branch, but neither the respondent nor any other agent or union is recognised at the operations in Cape Town, Port Elizabeth, East London and Richards Bay.

8] The wages and terms of employment of employees employed at the appellant's branches where the respondent does not enjoy recognition are determined by the appellant after consultation and consideration of any applicable provisions of the Main Agreement of the National Bargaining Council for the Road Freight Industry.

9] With the exception of the Durban branch, wage adjustments within the appellant's operations have been effected annually with effect from 1 July to 30 June of each year. In Durban, the wage year has run from 1 January to 31 December of each year.

10] In January 2007, shortly after the relationship agreement was concluded between the appellant and the respondent, the parties agreed to a wage increase of 6,75% per annum in respect of employees earning above R6000 per month, and an increase of 7.25% per annum in respect of persons earning below R6000 per month. The respondent maintains that this increase was extended and applied to the employees who did not fall within the bargaining unit. The appellant did not deny that this level of increase was indeed granted to the non-unionised employees, but denied that the increase "was unilaterally extended to non-union bargaining unit members". More accurately, the appellant "applied a performance based increase based on CPI and a scored performance in respect of each of the individual employees". It

is nonetheless not clear from the evidence whether the non-union members received more or less than the 6,75 – 7,25% granted to the union members in January 2007.

11] In mid 2007 the appellant decided to change the wage cycle for the 166 employees who did not belong to the bargaining unit in Durban. As an incentive it proposed to grant the non-bargaining unit employees a 4.5% across the board wage increase, subject to them accepting a change making their wage cycle run from 1 July to 30 June of each year on a par with the cycle applicable at the appellant's other branches.

12] On 8 August 2007, the appellant's Financial Manager for Kwa-Zulu Natal addressed a letter to all non-union members employed in the Durban branch. The letter's importance and centrality to the dispute requires that it be cited in full. It reads:

> 'CHANGE IN PAYCYCLE FROM JANUARY TO JULY
>
> The company's consultations and previous correspondence with you in respect of the above matter have reference.
>
> The company would like to change the annual salary review date for all non-union staff from January to July.
>
> In order to facilitate the changeover from January to July, the company would like to award all non-union staff an increase back-dated to 1 July 2007. This increase, together with the increase you received in January 2007, is intended to carry you through to 1 July 2008, which will be your next annual salary review date.
>
> The increase you will be awarded with effect from July 2007 will be 4,5%, which is based on the CPI for the six months ending June 2007.....
>
> Acceptance of this increase is on the express understanding that your

annual increase date is changed to July.

In addition, please take careful note of the further conditions pertaining to this increase, the details of which are outlined below.

CONDITION PRECEDENT

1 The increase in remuneration referred to above is subject to you not at any time during the period 1 July 2007 to 30 June 2008 ("the 2008 non-union staff wage cycle") becoming a member of the South African Freight & Dockworkers Union ("the Union") and thereby becoming part of the Union Bargaining Unit established in terms of the Relationship Agreement between the Company and the Union dated 25 October 2006 ("the Relationship Agreement")

2 In the event that you elect to join the Union during the 2008 non-union staff wage cycle and become part of the Union Bargaining Unit you agree that:

2.1 The increase in remuneration referred to in 1 above shall cease at the end of the calendar month that you elect to join the Union Bargaining Unit ("the transfer date").

2.2 You will be entitled to retain all increases paid to you in terms of 1 above up to the transfer date but not thereafter.

2.3 After the transfer date, you will be paid the remuneration you received immediately prior to the commencement of the 2008 non bargaining unit staff wage cycle.

2.4 You will be entitled to receive after the transfer date

any increase in remuneration which may be negotiated by the Union on your behalf as part of the Union Bargaining Unit, with effect from the transfer date up to and including the 31 December 2008, being the end of the Union 2008 wage cycle.'

13] The consequence of the change was that the non-bargaining unit employees in Durban would from July 2007 operate on a wage cycle which was the same as the wage cycle operating at the appellant's other branches throughout the country and received a 4.5% wage increase from that date that was not extended to union members.

14] On 2 November 2007, the attorney for the respondent addressed a letter to the appellant alleging unfair discrimination on the grounds of union membership and claimed that the 4.5% increase had been granted to the non-bargaining unit employees as an inducement for changing the wage cycle without consulting the respondent. The letter recorded that the respondent had met with the appellant and conveyed to it that the bargaining unit employees were "agreeable to having their incremental date similarly changed to 1 July". The appellant's attorney responded to this in a letter dated 15 November 2007 as follows:

'4.5 Our client is under no obligation in terms of the relationship agreement or in law to negotiate or consult with your Union in respect of non-bargaining unit employees and may, subject to not acting in an unfairly discriminatory manner in respect of your union, arrange its affairs in keeping with its own best interests.

4.6 Our client has a lawful binding wage agreement with your client which is valid up to 31 December 2007. Your client is at liberty to propose a change to the bargaining unit wage cycle in the forthcoming negotiations and to propose a 6 month, 12 month or even 12 month substantive agreement should it choose to do so. Our client will respond to such a proposal if and when it is made at such negotiations.

4.7 Our client notes that you have advised that your client is 'agreeable to having their incremental date similarly changed to 1 July'. We assume from you letter that you are proposing to amend the 2007 wage agreement. Our client will not agree to this.

4.8 There is nothing inherently unlawful or unfairly discriminatory in the fact that bargaining unit and non-bargaining unit members have separate wage cycles.'

15] The parties were unable to resolve their differences, and on deadlock the respondent brought an application to the Labour Court for a declarator that the appellant was in breach of the provisions of sections 5(1), 5(2)(a)(ii) and (iii), 5(2)(c)(i), 5(3) and 5(4) of the LRA; and further declaring the award of increased remuneration to the non-bargaining unit employees to be inconsistent with sections 9 and 23 of the Constitution. In addition, it asked the court either to reverse the payment of the increased amounts or to grant the bargaining unit employees a similar increase back-dated to 1 July 2007.

16] Given the nature of the relief sought, it was necessary for the respondent to join the non-bargaining unit employees. This was accomplished by an order of the Labour Court dated 19 January 2009, after the appellant had raised a preliminary objection in that regard in its answering affidavit.

17] The Labour Court, without distinctly analysing or commenting upon the provisions of section 5 of the LRA or section 9 and 23 of the Constitution, concluded, in effect, that the appellant's wish to adjust the wage cycle did not provide sufficient justification for the unequal and discriminatory wage increases which had the effect of discouraging employees from joining or remaining a member of the union and resulted in unequal treatment by the appellant of its employees without a valid and fair reason. The learned judge consequently granted the declaratory relief and directed the appellant to grant the bargaining unit

employees a 4,5% increase back-dated to 1 July 2007.

18] The central, if not sole, issue in this appeal is whether the appellant through its conduct infringed the protections accorded by the right to freedom of association enshrined in Chapter II of the LRA. In my view, the Labour Court erred in declaring the award of increased remuneration inconsistent with section 9 (equality) and section 23 (fair labour practices) of the Constitution. Where legislation has been enacted to give effect to a constitutional right, a party may not bypass that legislation and rely directly on a provision of the Constitution, without challenging that legislation as falling short of the constitutional standard.[1] Insofar as the right to fair labour practices is given effect to by the LRA, the respondent is obliged to found its cause of action on the relevant provisions of the LRA, and may not rely directly on the general provisions of constitutional right to fair labour practices in section 23 or the equality clause in section 9 of the Constitution. In any event, as far as the anti-discrimination clause (section 9(3)) is concerned, it prohibits discrimination on the grounds listed therein or on analogous grounds. Union membership is not a listed ground and it is unlikely to be considered an analogous ground because such discrimination does not involve the requisite level of injury to human dignity; and adequate legislative protection is in any event available in section 5 of the LRA. There was for those reasons no need to declare the appellant's conduct unconstitutional. The Labour Court accordingly erred in that regard.

19] The germane provisions of section 5 of the LRA read:

> '(1) No person may discriminate against an employee for exercising any right conferred by this Act.
>
> (2) Without limiting the general protection conferred by sub-section (1) no person may do, or threaten to do, any of the following –

1 *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC) at para 41.

(a) require employee or person seeking employment –

(i) not to be a member of a trade union or workplace forum;

(ii) not to become a member of a trade union or workplace forum; or

(iii) to give up membership of a trade union or a workplace forum;

(b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or

(c) prejudice an employee or person seeking employment because of past, present or anticipated –

(i) membership of a trade union;

…

(vi) exercise of any right conferred by this Act;

…

(3) No person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute. . . '

20] The provisions must be read, *inter alia*, with section 4 of the LRA which guarantees every employee the right to freedom of association, in particular the right to join a trade union and to participate in its lawful activities.

21] Simply put, the provisions of section 5 of the LRA constitute a prohibition against "anti-union discrimination". Although section 5(1) does not qualify the term "discriminate" with the adverb "unfairly", our constitutional and anti-discrimination jurisprudence generally require that discrimination be unfair and/or unjustifiable in order to constitute an infringement or violation. Differentiation which is fair and/or reasonable will not amount to discrimination. A contravention of section 5(1) therefore comprises two elements: discriminatory conduct or action and such being unjustifiable because it is irrational, lacking in proportionality, unreasonable or actuated by improper or illegitimate motives.

22] The party alleging discrimination (or violation of the specific protections in section 5) must establish the facts of the allegedly objectionable behaviour, in which event the onus of justifying it shifts to the party who engaged in the conduct.[2] Moreover, the existence of differentiation or disparate treatment is not enough; generally, it must be established that the reason for the differentiation relates to a proscribed ground, in this case union membership or union activities. Where there is more than one reason for the differentiation, the requirement normally will be met where it is shown that the prescribed ground has an element of predominance. The general prohibition against discrimination in section 5(1) is given content, without its generality being limited, by the provisions of sections 5(2) and 5(3) which impose stricter liability in respect of specific forms of anti-union discrimination. Two of these are of greater significance in the present appeal, namely: section 5(2)(c)(i) which prohibits prejudicing an employee because of past, present or anticipated trade union membership; and section 5(3) which proscribes advantaging an employee in exchange for not exercising any right conferred by the LRA.

23] The appellant has advanced a number of submissions in justification for the change in wage cycles and the condition precedent in the letter

2 Section 10 of the LRA.

of 8 August 2009 rendering the wage increase dependant on non-membership of the bargaining unit. It stated that it has always maintained a distinction between the terms and conditions of employment of bargaining unit members which are negotiated and non-members whose terms are set after consultation. It sees a business advantage in having all non-bargaining unit employees throughout the country on the same wage cycle. The basis of the justification is vague. It is hard to discern the precise nature of the advantage achieved from the limited evidence presented. What the appellant has not explained satisfactorily, in my opinion, is why it was imperative to exclude the 111 bargaining unit members in Durban from the arrangement that applied to every other employee throughout the country, especially when the union employees were willing to make the change and fall in line. The only reason advanced at the time was that put forward by the appellant's attorney in his letter of 15 November 2007 that the appellant was unwilling to consider amending the wage agreement of 2007 until the next round of annual negotiations. Yet, for reasons that remain opaque, it was willing to do exactly that for the non-bargaining unit employees. The salary terms of the non-bargaining unit employees agreed to and implemented for the year 2007 were adjusted generously without compunction. As the Labour Court perceptively observed, differentiation of that order would invariably risk causing tension. The appellant's expressed hope to be "able to plan its industrial relations strategy to avoid the disruption of industrial action if it has peace obligations with one group with which it has settled" is difficult to understand in the light of its actual behaviour in the peculiar context. The bargaining unit employees in Durban, out on a limb, represented about 10% of the appellant's nationwide workforce.

24] The increase afforded to the non-bargaining unit members was stated to be intended to compensate them for the fact that unlike the union members they would receive no increase in January 2008. The respondent was able to negotiate a 7.5% increase for its members with effect from 1 January 2008. That meant union members may have

been paid more than their equally situated non-union colleagues for the period 1 January 2008 until 30 June 2008. The record does not disclose the amount of the increase granted to non-union members in July 2008. Moreover, neither party has adduced evidence substantiating the actual financial consequence of the differential treatment. However, the rates of increase awarded to the two different categories of employees for the 18 months from 1 January 2007 to 30 June 2008 probably resulted in a discernible advantage for non-union members over the complete period. Thus, for example, a union member earning above R6000 per month would have received an increase of 6,75% for 2007 and an additional 7.5% for the first 6 months of 2008, while a non-union member (assuming the January union increase was extended) would have received 6.75% in January 2007 plus an additional 4,5% from July 2007 for the 12 months of the new wage cycle. On these figures a non-union employee earning R10 000 per month would receive an additional amount of about R5000 over the entire 18 month period. Furthermore, the bargaining unit members would not have been disadvantaged for the period 1 July 2007 – 31 December 2007 but for their union membership and the condition precedent. Had they resigned from the union they would have had the benefit of an additional 4.5% for the period.

25] On that basis, one may conclude that the bargaining unit employees were *prima facie* prejudiced or discriminated against because of their membership of the union, while the non-union employees were advantaged in exchange for not exercising the right to join the union, albeit most starkly only for the 6 month period between 1 July and 31 December 2007.

26] The question then is whether that discrimination or prejudice was unfair or unjustifiable, and whether the (possibly temporary) advantaging of the non-union members was fair and justifiable in the circumstances.

27] The strongest argument advanced by the appellant to justify its conduct

and the condition precedent is that the LRA permits and encourages industrial relations pluralism and multiple bargaining agents. The structure of the LRA is such that employees are free to choose their bargaining agent and to conclude agreements on different terms to other employees represented by other agents or not at all. There has been surprisingly little judicial comment on the implications of a system of plural representation in our labour relations system. Counsel referred only to one case, *National Union of Mineworkers v Henry Gould (Pty) Ltd and Another*,[3] where the Industrial Court stated:

> 'Where a system of plural representation is in existence, as in this case, it necessarily holds within it the possibility that the principle of equality will be sacrificed. Plural representation, I apprehend, would also encompass a group of employees who elected to continue settling terms and conditions of employment on an individual basis. Where the members of a labour unit of equals elected to belong to different groupings they, in fact, elect to go their separate ways and this at the expense of the former equality. The result is that it becomes legitimate for the employer to bargain or deal separately with these two or more groups. It follows that equals performing the same work may be subject to different terms and conditions of employment.
>
> In these circumstances, one group cannot be heard to complain about the absence of equality between their terms and conditions of employment and that prevailing as regards the other group. The potential for inequality and unfairness is inherent in their arrangement.'

There is undoubtedly merit in the proposition that a system allowing a plurality of bargaining agents or units may lead to unequal outcomes that depending on the justification may or may not be legitimate and fair. However, as always in the evaluation of fairness, reasonableness and equality, much will depend on the circumstances. I pause to interpose here that the prejudice or disadvantage contemplated by section 5(2)(c) and 5(3) of the LRA, in the nature of things, is expected

3 (1988) 9 ILJ 1149 (IC) at 1158G-J.

to be unfair.

28] The respondent has not disputed the commercial advantages of the change in the work cycle. Presumably, that is why its members were prepared to agree to it. The respondent's chief concern, understandably, was that it had been undermined as a bargaining agent. For the period 1 July 2007 to 31 December 2007, the appellant created a strong financial inducement for employees not to join the union, and for members to consider terminating their membership. The wage agreement in February 2008 (effective from January 2008) was reached while the present dispute was in process and possibly signified a tactical retreat by the appellant aimed at partly ameliorating the situation of the members of the bargaining unit. Plural representation, as already stated, means that there will indeed be times when wages and terms of employment may be more favourable for one segment of the workforce. But, in order to pass the test of legitimacy, rationality and fairness, the differentiation must be supported by a commercial rationale. The only commercial rationale offered by the appellant was the aspiration to more efficiently use managerial resources and the need to hold the union to its agreement. Both lose force (legitimacy and rationality) in the present circumstances, as I have said, in view of the union's willingness to agree to a change in cycle, and the appellant's inconsistency in amending the terms of the non-bargaining unit members while refusing to do likewise for the bargaining unit members. It is hard to see how persisting with a redundant separate wage cycle for 10% of employees located in a single branch would achieve greater efficiency. Nor would it logically advance any industrial relations objective.

29] The present state of affairs therefore is different to one in which an employer, at the conclusion of negotiations and a power play with different bargaining agents, has conceded to a proposal introducing more favourable terms for one segment of its workforce at variance with those applicable to the others. Here we have to do with a disparity

advantaging non-union members which was proposed, formulated and unilaterally implemented by the employer, justified somewhat vaguely, if not speciously, as a more efficient use of management resources, which efficiency it was curiously not prepared to enhance by similarly adjusting the wage cycle of the union members despite their willingness to sign up to the proposal. In such circumstances it is legitimate to infer that the employer was engaged in a tactic aimed at weakening the bargaining position of the union. If not calculated or designed to undermine the union as a bargaining agent, objectively it had the potential to do so. Non-members would in effect be discouraged to join the union and members indirectly induced to resign. Had members resigned to benefit from the increase awarded or perceived promise of more favourable treatment in the future, the union risked losing its representative status and the concomitant right to act as a bargaining agent in terms of the collective agreement. There is no onus on the respondent to prove that the appellant acted intentionally. Anti-discrimination law is concerned with the effect of discriminatory conduct, irrespective of the intention or motive of the perpetrator.

30] The appellant's conduct was therefore a form of anti-union discrimination as proscribed by section 5(2)(c) and section 5(3) of the LRA. I agree thus with the submission of counsel for the respondent that whatever gloss the appellant may wish to place on what it chose to do and its reasons for doing so, and for why it was not willing to accommodate the respondent to adjust the annual wage cycle for union members, there is no getting away from the impact of its actions, which would have been self-evident, and that was to provide a strong inducement to non-union members not to exercise their right to join the union for the relevant six month period, or for union members to resign. The fact that the disadvantage or prejudice was ameliorated later does not detract from the harmful effects. The measurement of the impact of the discrimination must be made when the prejudicial or disadvantageous behaviour takes place. On 1 July 2007 and until 31 December 2007, the appellant differentiated prejudicially between its

employees on the basis of the rights they respectively chose to exercise in terms of the LRA to join or not join a trade union. It is no defence to argue, as the appellant has sought to do, that the differentiation is based on bargaining unit membership, not union membership, when the applicable agreement defines the bargaining unit as synonymous with union membership. All the more the case, when the introduced differentiation was subject to the condition precedent that the non-union members were paid more on the express understanding that their monthly remuneration would revert to what it was before the increase if they chose to exercise their fundamental right to join the union during the six month period.

31] The respondent does not seek unfairly to prevent the employer from liaising or negotiating with employees not represented by the union and thereby to impose the equivalent of a closed shop or agency shop without meeting the requirements of the Act. What it hopes to do is to prevent the employer from undermining its position as a sufficiently representative bargaining agent by resorting to unacceptable and unfair tactics aimed at prejudicing or disadvantaging its members.

32] In the premises, the Labour Court did not err in issuing a declarator that the appellant's conduct infringed the protections afforded by section 5 of the LRA. The formulation of the order is open to the criticism of being overly broad. It declares that the conduct infringed section 5(1) and other provisions of section 5(2) of the LRA. It will be sufficient to declare that the conduct of the appellant contravened section 5(2)(c) and section 5(3) of the LRA in that it prejudiced the union members because of their membership of the trade union and advantaged the non-union members in exchange for their not exercising the rights conferred upon them by section 4 of the LRA to join a trade union and to participate in its lawful activities. The order of the Labour Court should therefore be varied to that end.

33] In addition to the declarators, the Labour Court made the following

order:

> 'Directing the respondent to remedy its unlawful and unconstitutional conduct and to this end that it be and is hereby directed to inform all the employees to whom the unilateral increases were awarded of the fact that respondent's conduct in awarding the increases was unlawful and furthermore is hereby directed within 21 days of the grant this order (*sic*) to grant all employees, including those who are or may become members of the applicant similar increases in remuneration backdated to 1 July 2007.'

The order so formulated will be difficult to implement, but aims prudently at restoring equality between the two groups of employees by removing the effects of the discriminatory conduct. The court had a choice of either directing the appellant to extend the benefits of the 4.5% increase to the union members (levelling up) or to set aside that increase and to withdraw it from those who received it (levelling down). The order instructs the appellant to level up. The problem with an order levelling up, though, is that it takes no cognisance of the fact that the non-union members did not benefit from an increase for the period 1 January 2008 to 30 June 2008, whereas the union members did. And, furthermore, there is no evidence regarding the increase awarded to the non-union members effective from 1 July 2008. Hence it is not possible to calculate the precise financial prejudice suffered by the union members as a result of the 4.5% award made to the non-union members in July 2007. Levelling up would unjustifiably advantage the union members. Unfortunately, in consequence, the matter will have to be remitted to the Labour Court for a proper determination of the actual financial prejudice caused by the discrimination, on the basis of additional evidence. However, one is hopeful that the parties can agree on the arithmetical calculations in order to place a settlement agreement before the Labour Court for the purpose of making it an order of court.

34] Lastly, there is no merit in the argument that an award of damages or

compensation amounts to inappropriately re-writing the contractual bargain between the parties. The Labour Court's power to redress discriminatory conduct contravening section 5 by an award of damages or compensation is derived from section 158(1)(a)(iii) of the LRA which confers upon it the power to make any appropriate order including an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of the LRA.

35] The respondent has prevailed on appeal and there is no reason why costs should not follow the result.

36] The following orders are issued:

i) The appeal is dismissed.

ii) The order of the Labour Court is varied and substituted as follows:

'1. The award in August 2007 by the respondent of a remuneration increase of 4.5% to employees who are not members of the applicant, backdated to 1 July 2007, subject to the condition that such employees shall forfeit the benefit of the increase if they become members of the applicant, is declared to be in contravention of section 5(2)(c)(i) and section 5(3) of the Labour Relations Act 66 of 1995 on the grounds that it prejudices the members of the applicant because of their trade union membership and advantages the employees who are not members of the applicant in exchange for their not exercising the right to join the applicant.

2. The respondent is ordered to pay the costs of the application.'

iii) The matter is remitted to the Labour Court for the purpose of receiving additional evidence and argument for the

determination of the financial prejudice suffered by the members of the respondent caused by or arising out of the award of a remuneration increase of 4.5% to the employees who were not members of the applicant with effect from 1 July 2007, in contravention of section 5 of the Labour Relations Act 66 of 1995 ("the Act") and for the further purpose of making an order in terms of section 158 of the Act remedying the financial prejudice caused by the appellant's contravention of the Act.

iv) The appellant is ordered to pay the costs of the appeal.

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JR MURPHY

Acting Judge of the Labour Appeal Court

Mlambo JP and Mocumie AJA concur in the judgment of Murphy AJA.

Appearances:

For the Appellant:	P Kennedy SC
Instructed By:	Edward Nathan Sonnenbergs
For the Respondent:	M Pillemer SC
Instructed By:	Brett Purdon Attorneys