REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no. DA 12/11

In the matter between:

ELLIOT INTERNATIONAL (PTY) LTD **Appellant**

and

MOONSAMY VELOO **First Respondent**

VINODA VELOO **Second Respondent**

Heard: **25 February 2014**

Delivered: **23 July 2014**

Summary: Respondents (employees) alleging that they were dismissed because of joining a union and, therefore, dismissals automatically unfair, ito s187 of LRA. Alternatively, dismissals were non-compliant with s189. Appellant (employer) denied that employees were dismissed - alleged that employees elected voluntary retrenchment. Respondents refused to sign voluntary retrenchment agreement but banked money for retrenchment packages – no repayment or tender thereof. Held: On the facts, inference could not be drawn that respondents elected voluntary retrenchment . Held: Dismissals were automatically unfair. Appeal dismissed.

Coram: **Ndlovu JA et Molemela AJA *et* Sutherland AJA**

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NDLOVU JA

Introduction

[1] The appellant, Elliot International (Pty) Ltd, conducts business in the furniture removal industry and has various branches established throughout the Republic. The first and second respondents, Mr Moonsamy Veloo and his wife, Mrs Vinoda Veloo (collectively "the respondents") were formerly employed by the appellant at the appellant's branch located at Springfield Park, Durban, until their dismissal on 31 October 2004. At the time of their dismissal they were earning R6865,00 per month and R2650,00 per month, respectively.

[2] Mr Veloo commenced employment with the appellant on 8 April 1989 as an operations clerk and Mrs Veloo started on 1 July 2002 as a receptionist. They were dismissed together with other two former employees, Ms Yvonne Heather Kruger and Ms Belinda Lee Coetzee. The four of them (collectively "the employees") were aggrieved with their dismissals which they claimed were automatically unfair.

[3] The employees initially referred their dispute to the CCMA for resolution. However, when it transpired that the parties to the dispute belonged to the National Bargaining Council for the Road Freight Industry ("the bargaining council"), the CCMA referred the matter to the bargaining council in terms of section 147(2)(a)(i) of the Labour Relations Act ("the LRA").[1] The bargaining council attempted to conciliate the dispute but without success and, on 10 February 2005, issued a certificate of outcome to the effect that the dispute

[1] Act 66 of 1995.

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remained unresolved. Consequently, the employees referred the matter to the Labour Court for adjudication.

[4] In its judgment handed down on 23 December 2010, the Labour Court (per Cele J) found the dismissals of Ms Kruger and Ms Coetzee to have been fair, but that of the respondents to have been automatically unfair and ordered their reinstatement retrospectively from the date of their dismissals, namely, 31 October 2004. It is that part of the judgment of the Court *a quo* that relates to the respondents (i.e. that they were automatically unfairly dismissed) against which the appellant now appeals to this Court, with leave of the Court *a quo*. On this basis, the dispute pertaining to Messrs Kruger and Coetzee falls outside of the purview of this appeal.

<u>The factual matrix</u>

[5] On or about 25 June 2004, the employees, together with a few other colleagues in the appellant's administration section, joined a registered trade union known as the National Federal Trade Union of South Africa ("FEDTUSA" or "the union"). During this period, the appellant's Durban branch manager was Mr Gordon Lentz who, according to the appellant, had since emigrated to Australia.

[6] On 30 August 2004, a notice was issued by the appellant and addressed '*To all Administration Staff,'* containing the following message:

> '<u>RE: RETRENCHMENT CONSULTATION NOTICE BASED ON OPERATIONAL REQUIREMENT</u>
>
> 1. We regret to advise and inform you in writing that we the company is (*sic*) contemplating dismissing certain administration employees based on operational requirements.
>
> 2. The company will, in terms of its retrenchment procedure, hold a meeting with all affected employees; this meeting will take place September 3, 2004 during which employees will be advised of this decision. Before implementation, we must reach consensus on (*sic*):
>
> 1.1 to avoid the dismissals;

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1.2 to minimize the number of dismissals;

1.3 to discuss the timing of the dismissals;

1.4 to mitigate the adverse effects of the dismissals;

1.5 the method for selecting the employees to be dismissed;

1.6 the severance pay for the dismissed employees.

Should you have any queries, please consult the writer.

Yours faithfully

Christine Lind (Mrs) (signed).'

[7] Ms Lind was the appellant's human resources official based at the appellant's head office in Johannesburg. The administration staff (including Mr and Mrs Veloo) received the retrenchment notice, which had also been copied to the union by the appellant. A consultation meeting was proposed by the appellant to take place on 1 September 2004. However, that date was not suitable to the union which pointed out that on the same date it would be holding its central committee meeting. The meeting was eventually held on 8 September 2004 and all parties were present, including the union representative, Mr Roy Bhengu.

[8] At that meeting, Ms Lind pointed out that the appellant's business operational costs were getting too high, occasioned especially by the expenditure on salaries. For this reason, she said, the appellant had decided to consider the possibility of retrenchment of some of the administration staff. Particularly, she announced, amongst others, that the employees would be affected by the contemplated retrenchment. Ms Lind further stated that if the affected employees agreed to a voluntary retrenchment, they would be paid more than what was otherwise prescribed by the law. After the meeting, each of the employees was presented with a copy of the voluntary retrenchment agreement to consider and sign.

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[9] The material terms of the voluntary retrenchment agreement included the following:

9.1 That the appellant and the employee agreed that the employment of the employee with the appellant would terminate on 31 October 2004 due to the employee having accepted voluntary retrenchment. (Clause 1.1)

9.2 That the employee voluntarily and of his/her own accord entered into the retrenchment agreement, without being forced or coerced to do so. (Clause 1.3)

9.3 That the retrenchment agreement was entered into in full and final settlement of all claims of whatever nature arising from the termination of the employee's employment with the appellant. (Clause 2.1)

9.4 That the appellant undertook to pay the employee a retrenchment package as follows:

9.4.1 R5660,00 notice pay subject to normal taxation deductions.

9.4.2 R5330,00 non-taxable gratitude pay.

9.4.3 R16979,95 non-taxable severance pay (for 13 weeks).

9.4.4 R5747,00 outstanding leave (for 22 days) subject to normal tax deduction.

9.4.5 Medical aid would be deducted until 31October 2004.

9.5 That the abovementioned amounts would be paid to the employee by 31 October 2004, together with any leave pay or other amounts due to the employee. The first payment would be made by 30 September 2004.

9.6 That the employee would not be required to work out his/her notice of termination of employment in terms of this agreement. Medical Aid

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would be deducted until 31 October 2004 and the Medical Aid cover would expire in October 2004.

9.7 That the employee's Pension Fund would be terminated on 30 September 2004.

9.8 That this agreement constituted the entire contract between the parties who, by their signature thereon acknowledged that no representations were made or warranties given or conditions or stipulations attached, to any of the matters referred to in this agreement, save as set out in the agreement.

9.9 That no variation of this agreement would be of any force or effect unless recorded in writing and signed by or on behalf of the parties by their duly authorized representatives.

[10] Copies of the voluntary retrenchment agreement were delivered to the respondents by registered post under cover of a letter dated 10 September 2004, which read as follows:

> 'Dear Mr & Mrs Veloo,
>
> **RE: RETRENCHMENT**
>
> Enclosed please find Voluntary Retrenchment Agreement, as negotiated and agreed by all concerned including the Union representative and Shopstewards.
>
> Yours faithfully
>
> Christine Lind
>
> LLR'

[11] It is common cause that whilst Ms Kruger and Ms Coetzee signed the voluntary retrenchment agreement, the respondents declined to sign. The employees' last day on duty was 8 September 2004, in line with the notice of retrenchment which stated that they did not have to work for the remainder of

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the days until 31 October 2004, that being the effective date of their dismissals.

[12] On 16 September 2004, the appellant addressed a letter to the union, which read as follows:

> 'Dear Roy [Bhengu],
>
> I would like to thank you for your meritorious help and input of the unfortunate, unavoidable retrenchment negotiations. I appreciated your understanding and your help to keep the negotiations on an unemotional level to reach consensus to all parties' satisfaction.
>
> Formula used for packages:
>
> 1) Notice Pay until 31st of October 2004 not required to work;
>
> 2) Gratitude payment part of Retrenchment R2500,00 each and two weeks partial salary and commission average where applicable;
>
> 3) Severance Pay according BCE (BCEA ?) and LRA 189(a)-(j)
>
> 4) All outstanding leave even when excessive;
>
> 5) Transport allowance one's off (sic) where applicable.
>
> Kind regards
>
> Christine Lind.'

[13] In its response, on 20 September 2004, the union expressed dissatisfaction about the termination of the employees' services, alleging that it was unfair. The union's letter to the appellant reads as follows:

> 'We are informing you that the union feels the retrenchment was not fair and the company did not follow proper procedures, because of the following reasons:
>
> - The company did not open a voluntary retrenchment to all administration employees.

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- The company did not consult the union in 30 days before any retrenchment, as our recognition agreement stipulates.

- The company did not form a committee to establish whether retrenchment was necessary and make recommendations and alternatives regarding the details of the retrenchment, as clause 17.2 of our recognition agreement stipulates.

- The company consulted our members first, and then invited us to observe, which is contrary to section 189 of the Labour Relations Act.

- The company did not use (the) last in first out (LIFO) method.

We take the failure of the company to comply with the above points as instance (*sic*) dismissal of our members.

We therefore propose a meeting on 23 September in order to find alternative ways to resolve this issue.

Please confirm your availability on or before 21 September 2004.

Nhlanhla Nyandeni

National Organiser.'

[14] The appellant responded to the union's letter, above, and expressed surprise at the union's allegation that the employees' dismissals were unfair. The appellant insisted that *"after a long and intensive negotiation we reached agreement to satisfy all parties. Not once has there been concern voiced that it is unfair, or and procedural(ly) incorrect, or that the employees where (sic) instantly dismissed."* The letter continued and stated that *"[a]s soon as we all agreed on the package we drafted the letters handed those to your Union Official to check for mistakes; satisfied we went ahead and called the relevant employees into the office handed out the letters and Pension withdrawal forms to complete section 7 (seven) return us in order to follow their wishes."* The appellant further stated that 23 September 2004 was not suitable to it for the proposed next meeting, *"as it was too short (notice) to arrange transport to Durban"*, and suggested a date in mid-October 2004.

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[15] No further meaningful communication appeared to have taken place between the appellant and the union. All affected employees, including the respondents, were accordingly paid their retrenchment packages on the basis of the formula and calculations appearing in clause 3.1 of the voluntary retrenchment agreement.

Proceedings in the Labour Court

[16] In their pleadings, the employees raised a number of factual and legal issues against the appellant, which included the following:

1. That after the appellant received a notification from the union concerning 11 administration employees who had joined the union, Mr Lentz called the union members (including the employees) to meetings at which he interrogated and victimized them. As a result, some of the union members subsequently resigned their union membership, but the employees did not resign.

2. That the employees were coerced to accept and sign the voluntary retrenchment agreement, but which the respondents refused to do.

3. That the appellant failed to enter into any meaningful consultation process with the employees and, therefore, failed to comply with the provisions of section 189 of the LRA.

4. That the appellant's real reason for selecting the employees for termination of their services was because of their union membership.

5. That the dismissals of the employees were therefore automatically unfair in terms of section 187 or unfair in terms of section 188 read with section 189 of the LRA.

[17] The appellant denied that the respondents were dismissed in the first place. It also denied that the respondents were victimized in any manner because of their union membership. According to the appellant, during the consultation meetings held between the appellant, the respondents and their union representative on the issue of possible retrenchments, the respondents

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decided freely and voluntarily to accept retrenchments, which were based on the appellant's legitimate economic and operational rationale. The fact that they did not sign the voluntary retrenchment agreements did not affect the position that they agreed to the arrangement. This was confirmed by the fact that the respondents received the retrenchment packages paid out to them and they never returned or tendered to return the same, which they were expected to do if they were opposed to voluntary retrenchments.

[18] The appellant further contended that in the event of the Court finding that the respondents were indeed dismissed such dismissals were only for operational reasons and were both substantively and procedurally fair.

[19] Mr Veloo, Ms Kruger and Ms Coetzee testified on behalf of the employees and sought to support their claim that the real reason for their dismissal was because of them having joined the union. On this basis, they submitted that their dismissals were automatically unfair.

[20] Given the non-availability of Mr Lentz due to his reported emigration to Australia as aforesaid, the evidence on behalf of the appellant was adduced only from Mr Kevin James Miller, the appellant's current regional manager for KwaZulu-Natal region. However, Mr Miller had no personal knowledge of what transpired that had culminated in the termination of the employees' employment, because he was not personally involved in the process. In fact, according to his evidence, at the time of this dispute, he was based at the appellant's head office in Johannesburg. He further testified that the whereabouts of Ms Lind (the appellant's human resources official) and the person who personally handled the matter, were unknown, hence she could not be secured to give evidence.

[21] The learned Judge *a quo* pointed to this fact that nobody with personal knowledge of the circumstances surrounding the dismissal of the employees testified for the appellant. Mr Miller possessed no such knowledge and, therefore, was not in a position, on an evidential basis, to counter the factual allegations raised by the employees, particularly the allegation that the real reason for their dismissal was because they had joined the union. The Court *a*

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quo accordingly found that the probabilities strongly favoured the acceptance of the account given by the respondents that their refusal to sign the voluntary retrenchment agreement was sufficient proof to demonstrate their non-acceptance of the voluntary retrenchment deal. Hence, the Court *a quo* concluded that the termination of the respondents' employment constituted their dismissals as envisaged in the LRA and that, in the circumstances of the case, such dismissals were automatically unfair. Thereupon the following order was issued by the Court *a quo*:

> '1. The respondent is ordered to re-instate the first and second applicants to the positions they held before their dismissal on 3 October 2004 with no loss of earnings and benefits, with the exception stated in paragraphs 2 below.
>
> 2. The respondent is entitled to deduct from the back pay of the first applicant [Mr Veloo], such of the earnings as he received from another employment since his dismissal by the respondent.
> 3. The respondent is ordered to pay costs of this claim, including those of counsel, but only for the first and second applicants.
> 4. The first and second applicants are to report for duty with the respondent on 10 January 2011 at 8h00.
> 5. No costs order is made against the third and fourth applicants.
> 6. Any party proved to have caused a two year delay in filing the pre-trial minute is liable for the costs reserved on 9 June 2006. In the absence of such proof, no costs order is made.'

<u>The appeal</u>

[22] The appellant's grounds of appeal can be summarised as follows:

1. That the Court *a quo* erred in failing to properly consider the fact that the appellant's business was long unionised under the auspices of the same union which the respondents joined and the fact that the appellant had made immediate arrangement for the deduction of union subscriptions shortly after the respondents joined the union, which was not the conduct of an employer that victimised union members.

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2. That the Court *a quo* erred in failing to conclude that the reason for the retrenchment was the drastic downturn in finances of the appellant for the last two years and the actual loss for the period within which the retrenchments took place.

3. That the Court *a quo* erred in failing to appreciate the fact that the respondents, duly assisted by their union, made no reference in their dispute referral to the CCMA that they were dismissed for reason of their union membership.

4. That the Court *a quo* erred in failing to properly consider the fact that the respondents actually accepted payment of the severance package in terms of the voluntary retrenchment agreement and that they never returned or tendered to return the same, as indication that they were against the retrenchment agreement.

5. That the Court *a quo* erred in failing to appreciate that in terms of the pre-trial minute, the respondents did not institute a claim of an automatic unfair dismissal in terms of Section 187(1)(d) and that the Court *a quo* was, therefore, only required to determine whether the respondents' alleged dismissals were substantively and/or procedurally fair and not to decide the issue of an automatic unfair dismissal, which the Court *a quo* did.

6. That the Court *a quo* erred in failing to consider that reinstatement was impracticable on the basis that there had been substantial delay in finalising this matter, which was not caused by the appellant; the appellant's existing dire financial position and the fact that Mr Veloo had in the meantime obtained suitable and better alternative employment.

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<u>Submissions on behalf of the appellant</u>

[23] Initially, Mr Sn*yman*, for the appellant, argued from the premise that the respondents never alleged in their referral papers that their joining of the union had anything to do with their dismissals. However, it later transpired that

counsel was mistaken in that regard and he immediately conceded that the issue of union membership was indeed alleged by the respondents in their referral papers.[2]

[24] Whilst acknowledging that the respondents' statement of case referred both to unfair dismissal for operational requirements and automatically unfair dismissal, Mr *Snyman* submitted that it was clear, based on the parties' pre-trial minute, that the respondents had made an election to pursue the former complaint as their cause of action and not the latter. He submitted that the pre-trial proceedings were there for a reason and limited the issues which the Court *a quo* was called upon to decide.

[25] On this basis, counsel submitted that the Court *a quo* was not entitled to determine the dispute of automatic unfair dismissal, which he suggested formed the core basis of the Court *a quo*'s finding against the appellant. In support of this submission, he referred us to *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd*[3] in which this Court held that a pre-trial minute binds the parties and the court to deal with and determine only those issues as defined in the minute.

[26] Counsel further pointed out that the retrenchment agreement documents were posted to the respondents under cover of a letter which specifically recorded that the retrenchment payments were in *'full and final settlement'* of their claims. Therefore, their acceptance of the payments meant that they accepted settlement of the dispute in terms of the voluntary retrenchment agreement and that, for this reason, their signatures were not necessary. In this regard he referred us to *Andy's Electrical v Laurie Sykes (Pty) Ltd*[4],where the Court stated[5]:

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[2] CCMA Referral, at p177 of the indexed record. The bottom part of this page (which originally formed part of the bundle) was truncated and the reference to the issue of union membership was not visible. The new complete page was subsequently replaced, which reflected the missing portion.
[3] (2000) 21 ILJ 142 (LAC).
[4] 1979 (3) SA 341 (N)
[5] *Andy's Electrical*, at 346A-B; See also *Odendaal v Du Plessis* 1918 AD 470; *Van Breukelen en 'n Ander v Van Breukelen 1*966 (2) SA 285 (A) at 290C-H; *Blumberg v Atkinson* 1974 (4) SA 551 (T); *Paterson Exhibitions CC v Knights Advertising and Marketing CC* 1991 (3) SA 523 (A) at 528F-H; *Van As v African Bank Ltd* (2005) 26 ILJ 227 (W).

> "Once it is evident that the payment's real purpose is the settlement of the whole dispute, the product is an offer of compromise, not the mere discharge of an acknowledged liability, and the condition characterizing it as such is its very essence, which the creditor disregards at his peril."

Submissions on behalf of the respondents

[27] In supporting the remark made by the Court *a quo* that "*the [respondents] did not contribute either to their dismissal or to the delay in finalizing this matter"*, Mr *Seery*, appearing for the respondents, pointed out that the appellant contributed to a delay during the pre-trial stage when the appellant switched attorneys. The appellant was initially represented by Snyman Attorneys; then changed to Garlicke and Bousfield; and then changed back to Snyman Attorneys. This indecisiveness contributed to the delay. Thereafter, a further delay was caused when the trial was postponed twice at the instance of the appellant and, once at the instance of the Court *a quo*. In other words, there was no occasion when the matter could not proceed for reason pertaining to the respondents.

[28] Mr *Seery* submitted that, in the circumstances of this case, it was not impracticable to reinstate the respondents to the appellant's employ. He further noted that in seeking reinstatement, the first respondent was not motivated by the money factor but by the fact that he would feel more secure working at the appellant than at his current employer where employees had already been warned of imminent retrenchments.

[29] Concerning the retrenchment package, Mr *Seery* submitted that whilst Ms Lind had informed the employees that if they accepted the deal they would get something extra, she had also made it clear to them that whether they accepted or not they would be retrenched anyway. That was the evidence of the employees which stood unchallenged. Mr *Seery* further submitted that the respondents were not warned of the consequences of accepting the retrenchment packages and/or not repaying or tendering repayment thereof. After all, as Ms Lind had told them that whether they accepted the deal or not they would still be retrenched, they had no option but to accept and bank the money.

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Analysis and evaluation

Did the respondents accept voluntary retrenchment or did the termination of their employment constitute dismissal, as envisaged in the LRA?

[30] As already indicated, it was common cause that the respondents persistently denied ever agreeing to their retrenchments, which was consistent to their refusal to sign the voluntary retrenchment agreement. It would appear from the appellant's correspondence that, at best, the appellant negotiated with the union on the issue of the employees' proposed retrenchments and not directly with the employees[6] – albeit the union, less than a week later, seemed to distance itself from the proposed retrenchment settlement.[7] Among other things, the union complained that the appellant had, in any event, failed to follow the 'Last-In-First-Out' (LIFO) principle in selecting the employees to be retrenched. Seemingly, in this regard, the union had in mind the position of Mr Veloo who had nearly 16 years' service with the appellant and who would most probably not have been selected for retrenchment, had the LIFO principle been properly applied, if at all. This sentiment by the union further gives the impression that the union might have thought that this exercise was all about compulsory retrenchment, which is not what the appellant is presenting its position to be. The appellant's case is premised on its claim that the respondents voluntarily agreed to be retrenched.

[31] It is trite that a registered trade union may act on behalf of its members[8] and that any dispute settlement negotiated and concluded between such trade union and an employer party is binding on members of the union concerned. However, it seems to me logical and common sense that in a proposed voluntary retrenchment scenario a settlement proposal negotiated by a trade union may bind the employee members only if such members have agreed to the settlement proposal and specifically mandated the union to accept the proposal on their behalf. In the present instance, the respondents did not sign the retrenchment agreement and it is clear to me that they never gave any

[6] See the appellant's letter dated 16 September 2004, at p159-160,Vol 2 of the indexed record.
[7] See the union's letter dated 20 September 2004, at p162 Vol 2 of the indexed record.
[8] Section 200 of the LRA

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mandate to the union to accept the agreement on their behalf. That being the case, the respondents did not, in my view, agree to be retrenched and, therefore, the termination of their employment constituted a dismissal in terms of the LRA.

[32] In my view, the fact of the respondents having been paid the retrenchment packages which they received and never tendered to return, should be understood in the context of this case. It is noted that the decision in *Andy's Electrical,* as well *as* the other related cases referred to us by Mr *Snyman* (save *Van As)*, involved commercial transactions between corporate litigants and not lay individuals, such as the respondents in this case. None of those cases involved an employer paying to an employee certain monies under similar circumstances as it obtained here, or as an offer of compromise, in a supposed labour dispute settlement.

[33] It also seems to me that the facts in *Van As* are clearly distinguishable from the facts in the present case. In that case, the employee, Mr Van As, brought an urgent application seeking an order interdicting and restraining the employer from dismissing him in breach of a retrenchment agreement. On 12 August 2004, the employer instituted disciplinary proceedings against Mr Van As and suspended him from duty pending the outcome of a disciplinary hearing. However, on 5 October 2004 the employer forwarded to Mr Van As a signed retrenchment agreement for consideration. Mr Van As handled the matter himself and was not represented by a union. Upon due consideration, he also signed the retrenchment agreement, thereby indicating his acceptance of the terms of the agreement. However and despite the retrenchment agreement, the employer proceeded with the disciplinary proceedings and dismissed Mr Van As. The Court concluded that the parties had clearly intended that the retrenchment agreement be in full and final settlement of all disputes and claims between them. Therefore, whilst in *Van As* the employee signed the retrenchment agreement and sought to rely on it, in the present case the direct opposite obtained, in that the respondents refused to sign the retrenchment agreement and they do not seek to rely on it.

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[34] At any rate, it seems to me that, whereas in a business transaction scenario between business people or corporate entities certain patterns of conduct are expected, the same set of expectations cannot ordinarily be applied to circumstances where employees, who are generally ignorant of business conventions, make decisions. Therefore, if the indications from the facts suggest that banking the money was not intended to be a waiver, on the part of the party banking the money, then the inference cannot be drawn from the facts, against such party, that the transaction was a full and final settlement of the claim or dispute between the parties. Each case would have to be determined on the basis of its own specific facts. It is significant that even in *Andy's Electrical,* relied upon by Mr *Snyman*, the Court further stated as follows[9]:

> "A payment's description as one 'in full settlement' is not necessarily decisive. The circumstances may show that, despite the description, the payment is intended to satisfy nothing more than an admitted debt. If that is its true rating, the words 'in full settlement' are of no further consequence and may safely be ignored." (346B-C)

[35] Therefore, in the present instance it would be important to examine whether any facts exist on the record which suggested that the respondents grasped and appreciated the significance and potential negative implication that by not returning or offering to return the payments they would thereby be deemed to have made an election to subscribe to the retrenchment agreement as voluntary participants. In my view, such facts did not exist, for the reasons that appear in this judgment. Therefore, in my view, an inference in favour of the appellant cannot properly be drawn.

[36] Besides, it is significant to bear in mind that, irrespective whether the union acted on behalf of the respondents in negotiating a settlement with the appellant, the product of those negotiations was, on the appellant's own case, intended for a voluntary retrenchment agreement to be concluded between the appellant and the respondents. It was not an agreement between the

[9] *Andy's Electrical*, at 346B-C

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appellant and the union, the latter acting on behalf of the respondents. Indeed, the impugned voluntary retrenchment agreement purports to be an agreement between the appellant and the respondents. The union is not a party to it, either in a representative capacity or otherwise. Although the respondents attended the meeting on 8 September 2004, it is common cause, nevertheless, that they refused to sign the voluntary retrenchment agreement. It would appear from the appellant's letter of 16 September 2004[10] that the appellant suggested that the union agreed to the so-called voluntary retrenchment deal on behalf of the respondents. On this basis, it is, in my view, illogical and inconceivable to suggest that the respondents, being the affected parties in a proposed voluntary retrenchment exercise, should not be party to the ultimate decision-making process leading to their retrenchment, just for the suggested reason that their union acted on their behalf. Such retrenchment cannot, in my view, correctly be termed voluntary retrenchment, but rather, compulsory or forced retrenchment which, remarkably, is not the appellant's case in this instance.

[37] As already stated, the respondents were lay individuals who not only persistently refused to sign the retrenchment agreement, but also remained steadfast throughout in strongly opposing the agreement. They clearly did not know and, in my view, were not reasonably expected to have known, that by receiving and banking the money paid to them by the appellant they had snookered themselves into being deemed to have made the election to accept the voluntary retrenchment agreement. Significantly, there was also no evidence or suggestion that the appellant ever demanded them to repay the money and that they refused or failed to do so - let alone warning them about the implications thereof.

[38] It also appears that should the respondents be reinstated, no financial prejudice would be suffered by the appellant to the extent of the retrenchment monies paid to the respondents because such payments could be set off against any arrear salary payment which the respondents could be entitled to

[10] See para 12 above.

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in terms of the reinstatement order. Alternatively, the appellant could recover such monies by way of deduction from the respondents' salaries.

Whether the Court a quo was entitled to consider and decide on the issue of automatic unfair dismissal, instead of dismissal for operational requirements

[39] In my view, it is clear from the respondent's pleadings and throughout their case that they remained adamant that the real reason for their dismissal was because they had joined the union. This standpoint went to the root of their dispute with the appellant. For instance, in their referral form filed at the CCMA they alleged, amongst others, as follows[11]:

> 'The company had employed new people and reshuffled the employees and then dismissed those who joined the union. Members' jobs are being performed by other people.' (My emphasis)

And, in their statement of case, they alleged:

> 'The Respondent's conduct in terminating the Applicants' services amounts to their victimization as the real reason for their termination was the Union membership.' (My emphasis)

[40] There was unchallenged evidence adduced by the employees during the trial to the effect that soon after their joining the union, Mr Lentz called them one by one in his office where he expressed his unhappiness with the development and somehow intimidated them, which resulted in some other employees resigning their union membership. As branch manager at the time, Mr Lentz was acting in the name of the appellant. It could not be said that such conduct on the part of the appellant was consistent of the appellant pleasantly and wholeheartedly accepting the employees' union membership.

[41] The fact that Ms Lind undertook to process the deduction of union membership subscriptions in respect of the employees was, in my view, not necessarily an indication of the appellant's change of heart in this regard.

[11] CCMA Referral dated 30/10/04, at p177 of the indexed record.

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After all, once the employees joined the union, the appellant was obliged by law, upon request of the union, to process the implementation of such deductions.

[42] It is trite that trade union membership in a workplace is any employee's right protected under section 5 of the LRA and, hence, a *"dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5."*[12] It is clear, in my view, that this is not one of those cases where the respondents can be said to have abandoned their right of claim for automatic unfair dismissal.[13] There is no evidence to suggest that they consciously decided to waive their right to pursue a dispute of automatically unfair dismissal. This Court, in *Driveline Technologies*, stated[14]:

> '[64] At any rate, it matters not for purposes of jurisdiction whether at the time of the conciliation of a dismissal dispute, the reason alleged for the dismissal was operational requirements or an automatically unfair reason. The dispute is about the fairness of the dismissal. Therefore, provided the alleged reason is one referred to in s 191 (5)(b), the Labour Court will have jurisdiction to adjudicate the real dispute between the parties without any further statutory conciliation having to be undertaken as long as it is the same dismissal.' (My emphasis)

[43] Therefore, on the facts of this case, the respondents' claim of automatically unfair dismissal does not raise a new cause of action *vis-à-vis* the claim of unfair dismissal for operational requirements. Both claims derive from one and the same dismissal whose fairness is in issue.[15]

[44] I think that the pre-trial minute had to be read and understood holistically and not in a compartmentalised and restrictive fashion in relation to the headings used therein. It is significant to note that whilst under the heading: *'The issues that the Court is required to decide'* (in the pre-trial minute) the allegation of automatically unfair dismissal was omitted, it was nevertheless raised

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[12] Section187 of the LRA.
[13] *Driveline Technologies*, above.
[14] *Driveline Technologies*, at para 64. See also: *Sondorp and Another v Ekurhuleni Metropolitan Municipality* (2013) 34 ILJ 3131 (LAC); [2013] 9 BLLR 866 (LAC), at para 51.
[15] *Driveline Technologies; Sondorp,* above.

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elsewhere under the heading *'Facts that are in dispute'* where it is couched thus: *"Whether the Respondent victimized and retrenched any of the Applicants on account of their union membership."*[16] Therefore, regardless of the heading under which this issue was raised, it was clearly still part of the employees' *facta probanda* in their pleadings. Section 5(1)(c) of the LRA specifically protects the right of an employee to the freedom of association, including joining a trade union of his or her choice. On the facts of this case, I am satisfied that the respondents succeeded in demonstrating that the dominant reason of their dismissal was because they had joined the union, which was a violation of their right protected by the LRA. Consequently, the conduct of the appellant constituted an automatically unfair dismissal of the respondents in terms of section 187 of the LRA.

Whether the appellant's operational financial downturn, if any, warranted and justified the dismissal of the respondents for operational requirements

[45] Mr *Snyman* conceded that the appellant's case did not really focus on this issue as a ground of the respondents' termination of employment. The appellant had based its case on the ground that the respondents accepted voluntary retrenchment. However, there were financial statements in the court bundle purporting to illustrate that for the financial period 1 March 2004 to 28 February 2005, in particular, the appellant's financial condition showed a drastic downturn from a profit of R5 952 114 to a loss of R1 797 455. Mr *Snyman* submitted that these statements were properly audited and, therefore, constituted public documents. On this basis, he submitted that the Court *a quo* ought to have considered the statements as constituting a fair reason for the respondents' dismissal for operational requirements, in the event of the Court not accepting the appellant's version that they accepted voluntary retrenchments.

[46] However, the fact of the matter was that no financial auditor who conducted an audit of the appellant's company and compiled these financial statements was called to testify that the statements reflected the true and correct financial condition of the appellant at the relevant time. The admissibility of the

[16] Item 3.5 of the Pre-Trial minute.

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statements was, therefore, placed in some doubt. Significantly, despite the respondents' non-objection to the financial statements, the parties' pre-trial minute reflected, in this regard, that the status of all documents in the bundles was what the documents purported to be and that the interpretation and contents thereof would remain in dispute and the issue of their veracity be the subject of cross examination.[17]

[47] In any event, the mere existence of the financial statements aforesaid was not even put to any of the employee witnesses during cross-examination at the trial. Indeed, Mr *Snyman* correctly conceded that the appellant's case fell short on this particular point. Be that as it may, it still remained that if the retrenchment was founded on *bona fide* economic operational rationale, there was no plausible explanation whatsoever as to why a long-serving staff member such as Mr Veloo would have been selected for retrenchment.

[48] There was another controversial issue pertaining to the position vacated by Mr Veloo on his dismissal. He held the position of operations clerk, reporting to the operations manager who at the time was Mr Ravi Moodley. According to the appellant's own records,[18] a Mr Dave Charles was appointed to the position of operations manager with effect from 1 October 2004. In other words, he took over the post of Mr Moodley, yet the latter was still retained in the appellant's employ. Mr *Snyman* submitted that Mr Moodley understandably took over the operations clerk's duties previously performed by Mr Veloo. However, there was no evidence on record to clarify this aspect. In any event, the appointment of Mr Charles as operations manager with effect from 1 October 2004 - within a few weeks before the respondents' formal discharge on 31 October 2004 – begs the question why he was appointed in the first place, as operations manager, whilst Mr Moodley was occupying the same post. At any rate, it is not clear why the apparently unnecessary appointment of Mr Charles affected Mr Veloo, after all, instead of Mr Moodley, at least.

[17] See indexed record, at p106, Vol 2 (Para 6.5 of Pre-Trial Minute),
[18] See indexed record, at p237-8, Vol 3.

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[49] Similarly, Mrs Veloo had occupied the position of receptionist since 1 July 2002. The appellant's own records also reflected that a Ms D St Clair-Wicker was appointed as receptionist with effect from 14 June 2004 *"to replace Joelene Paterson who was promoted to sales executive"*. This then again begs the question why the appellant did not retrench or offer a voluntary retrenchment package to Ms St Clair-Wicker, instead of Mrs Veloo. Anyway, I may hasten to acknowledge that Mr S*nyman* prudently conceded that, from the perspective of any retrenchment exercise affecting the respondents, such retrenchment would, in the circumstances of this case, have been unfair.

[50] Accordingly, I am satisfied that the Court *a quo* was correct in its conclusion that *"the rationale underlying [the respondents'] dismissal was more than just a business decision"* and that the appellant *"was motivated by their joining of the union in deciding to retrench [them]".* In so doing, the appellant acted contrary to section 5 of the LRA.[19] The fact that the appellant's production labour force had long been unionised and the fact that Ms Lind appeared to have co-operated with the union by arranging for deduction of union subscriptions shortly after such request was made by the union did not, in my view, detract from the appellant's real and antagonistic attitude towards union membership of its administration staff. For these reasons, I am of the view that the Court *a quo* was correct in finding that the respondents' dismissals were automatically unfair, by virtue of the appellant having violated section 5 of the LRA in dismissing them.

Was the relief of reinstatement appropriate?

[51] The respondents asked for reinstatement. Indeed, that was the primary remedy for their unfair dismissal.[20] In this regard, Mr *Snyman* submitted that in the exercise of its discretion, the Court *a quo* ought to have considered that the effluxion of time in finalising this matter (i.e. the six year delay) constituted a *non-reinstatable* condition justifying a departure from the primary remedy of

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[19] See also: Code of Good Practice: Dismissal 'Operational Requirements', Item 12(8).
[20] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2008] 29 ILJ 2507 (CC); [2008] 12 BLLR 1129 (CC) at para 36.

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reinstatement. He submitted that at least an award of compensation would have been appropriate.

[52] Mr *Snyman* referred us to the decision of this Court in *Mediterranean Textile Mills v SACTWU and Others*[21] in support of his proposition that the order of reinstatement should not be confirmed. In *Mediterranean Textile Mills* this Court stated as follows[22]:

> 'By its use of the word *"must"* in section 193(1)(a) of the LRA, the Legislature clearly intended that upon the finding in a given case that the employee concerned was substantively unfairly dismissed, such employee *must* be reinstated, if the employee so wished, unless either or both of the conditions referred to in paragraphs (b) and (c) of subsection (2) of the said section (hereinafter, for the present purpose, referred to as "the *non-reinstatable conditions*") are present.[23] …. It is notable that in terms of the earlier decisions, section 193(2) was construed as placing an *onus* on the employer to establish the existence of any of the non-*reinstatable* conditions,[24] but since *Equity Aviation* there has been a constitutional paradigm shift in this regard. Rather than departing from the premise of a legal *onus*, the focal point and overriding consideration in this enquiry should be the underlying notion of fairness between the parties and that "[f]airness ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment."'[25]

[53] Indeed, the Court *a quo* was entitled to make a factual finding on the issue of whether any of the so-called non-reinstatable conditions existed, as envisaged in section 193(2) of the LRA, which would render an order for the reinstatement of the respondents inappropriate. The Court *a quo* found that such conditions did not exist. It is trite that an appeal court may not lightly interfere with a trial court's discretion on factual finding unless the appeal court is satisfied that such finding is based on misdirection or is clearly wrong.

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[21] *Mediterranean Textile Mills v SACTWU and Others* (2012) 33 ILJ 160 (LAC); [2012] 2 BLLR 142 (LAC).
[22] *Mediterranean Textile Mills*, at para 28.
[23] *Equity Aviation,* at para 33.
[24] *Kroukam v SA Airlink* (Pty) Ltd [2005] 12 BLLR 1172 (LAC) at 1203 para 94; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and others* [2006] 11 BLLR 1021 (SCA) at para 45.
[25] *Equity Aviation,* at para 39.

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On the conspectus of evidence in this case, I cannot fault the finding of the Court *a quo* in that regard, for the reasons that follow.

[54] In his evidence, Mr Miller could not deny the fact that the entire current administration personnel (comprising some 11 employees) were appointed during 2005, that is, just after the dismissal of the respondents. These positions, all in the appellant's administration department in Durban, were filled pursuant to some numerous job advertisements which were published and circulated internally, mostly during April 2005.[26] It would appear therefore that, despite the alleged economic downturn, the appellant was still able to advertise for and fill those administrative posts, which apparently included similar positions as those vacated by the respondents.

[55] Mr Miller testified that in the event of a reinstatement order being granted, the appellant would need to make some alternative arrangements to accommodate that situation; although he conceded that he had not actually inquired into the practicability thereof. On that basis, nevertheless, there seemed to have been no evidence to suggest that reinstatement of the respondents would be impracticable. Further, from the appellant's own version of its professed tolerance of unionisation of staff within its workplace, the continued employment of the respondents should not be a problem, after all.

[56] Granted, there has been a long delay in the finalisation of this matter since the respondents' dismissal on 31 October 2004. However, the cause of such long delay cannot be attributed to the respondents. There was evidence to the effect that during the pre-trial stage the appellant changed attorneys three times, which in itself contributed to the delay. Further, it was not in dispute that on three previous occasions the trial had been adjourned twice at the instance of the appellant and once at the instance of the Court *a quo*. In other words, in all these instances, the respondents were not responsible for the delay, or for the matter not proceeding.

[26] See indexed record, at pp191-236, Vol 3.

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[57] However, according to Mr *Snyman* there was an unexplained delay of 2 years (between 2006 and 2008) which could not be accounted for by either party and for which the appellant should, therefore, not be blamed. Of course, besides the instances referred to by Mr *Seery* as having contributed to the 6 year delay (i.e. from 2004 to 2010), the Court was not presented with a chronology setting out specific occurrences that contributed to the delay. On this basis, I agree with Mr *Snyman* that it cannot rightfully be said that the entire 6 year delay was attributable exclusively to the appellant. Be that as it may, there was no legal impediment present, as envisaged in section 193(2) of the LRA, which justified a departure from the respondents' primary remedy of reinstatement, which they were entitled to.

[58] It was common cause that Mr Veloo acquired new employment, only three months after his dismissal and that at the time he gave evidence (i.e. 7 October 2010) he was earning some R14 000 per month, which was more than double his salary at the time of his dismissal from the appellant's employ. It is settled that the Court has discretion on the question of the extent of arrear salary or back-pay to be awarded to an unfairly dismissed employee, in light of the circumstances of each case. In this instance, the Court *a quo* took into account the fact that Mr Veloo's financial loss as a result of his unfair dismissal was mitigated by the earnings received by him from his new employment and the Court *a quo* ordered that the amount of the earnings so received be deducted from his back-pay in terms of the Court order. In my view, the Court *a quo* properly exercised its discretion in this regard, in terms of its consideration of fairness to both parties.

[59] To my mind, the appeal must fail. In consideration of law and equity, there should be no order as to costs of prosecuting the appeal.

[60] Accordingly, the following order is made:

1. The appeal is dismissed.

2. No costs order is made for prosecuting the appeal.

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Molemela AJA *et* Sutherland AJA concur in the judgment of Ndlovu JA

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Ndlovu JA

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