CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 72/09
[2010] ZACC 3

In the matter between:

BILLITON ALUMINIUM SA LTD t/a HILLSIDE ALUMINIUM	Applicant
and	
NTOKOZO ARCHIBALD KHANYILE	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
COMMISSIONER A ZWANE NO	Third Respondent

Heard on : 19 November 2009

Decided on : 18 February 2010

JUDGMENT

FRONEMAN J:

Introduction

[1] The issue presented in this matter is whether there is a constitutional duty on an appellate or review court to fashion a just and equitable remedy by having regard to facts that occurred after the decision appealed against or taken on review. This issue has arisen only because of systemic delays in the dispute resolution system under the

provisions of the Labour Relations Act[1] (the LRA). There can be no question that systemic delay of this kind undermines confidence in the courts and that urgent steps need to be taken to alleviate and eradicate them. Whether their occurrence creates constitutional duties for courts to create remedies where none previously existed is a different and more complicated issue to determine. The conclusion reached here is that the facts of the present case do not compel the creation of a remedy different to the one granted in the tribunal of first instance. What follows explains the road travelled to arrive at this conclusion.

Factual background and litigation history

[2] The first respondent, Mr Ntokozo Archibald Khanyile (employee) was employed by the applicant, Billiton Aluminium SA Ltd t/a Hillside Aluminium (employer) in 1995. Sometime in 2001, the employee appeared as a witness in an arbitration hearing before the Commission for Conciliation, Mediation and Arbitration (CCMA). This was at the behest of a fellow employee whose dismissal by the employer was being disputed. At this hearing the employee disclosed certain information which was deemed confidential according to the employer's rules. The employee was summoned to a disciplinary hearing for this alleged transgression. At the disciplinary hearing, he intimated that he would do what he did again if circumstances demanded it. He was found guilty and dismissed.

[1] 66 of 1995.

[3] After a failed attempt at conciliation, the dispute concerning the unfairness or otherwise of the employee's dismissal was referred to the CCMA for arbitration in terms of the provisions of the LRA.

[4] On 18 March 2002 an arbitration award (first arbitration award) was handed down. The commissioner accepted the employee's explanation as genuine and that he had acted in good faith throughout. Accordingly the commissioner found that the dismissal was substantively unfair and ordered reinstatement of the employee from the time of dismissal. He did not, however, give reasons for his decision. On review by the employer in terms of section 145 of the LRA,[2] the first arbitration award was set aside by the Labour Court on 15 April 2003, one year after the first arbitration award. The reason for setting it aside was that a proper record of the proceedings was not

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[2] Section 145 provides:

> "(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award–
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> (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or
> (b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.
>
> (1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1).
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> (2) A defect referred to in subsection (1), means–
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> (a) that the commissioner–
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
> (iii) exceeded the commissioner's powers; or
> (b) that an award has been improperly obtained.
>
> (3) The Labour Court may stay the enforcement of the award pending its decision.
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> (4) If the award is set aside, the Labour Court may–
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> (a) determine the dispute in the manner it considers appropriate; or
> (b) make any order it considers appropriate about the procedures to be followed to determine the dispute."

available to decide the review on its merits. The Court referred the dispute back to the CCMA to be heard by another commissioner with an instruction that a proper record of the proceedings be kept.

[5] On 30 March 2004 the second arbitration commenced. During this arbitration the employer again supported the fairness of the dismissal. The employer also intimated that it would oppose reinstatement on the basis that the trust relationship between employer and employee had broken down and that there had been changes in the employer's business which excluded reinstatement as an option. The employer called two witnesses, but neither of them gave any specific evidence that related to the alleged breakdown in trust, nor to the alleged change in the business environment. What emerged from their testimony, however, was that the employer had itself disclosed the kind of information at the co-employee's arbitration hearing that it had sought to prevent the employee from disclosing as being confidential at the same hearing.

[6] The employee testified in his own defence. He explained that he had decided to disclose the information at the earlier hearing of his co-employee in the interest of fairness, because he realised that the employer was not prepared to disclose the full particulars relating to the co-employee's alleged offences. When he made the statement at his own disciplinary hearing that he would do the same again, he did so in the context of his own belief that he was legally entitled to disclose the information and that if the employer knew what was disclosed at the hearing it would realise that

the disclosure was inoffensive to its interests. He indicated that by the time of the second arbitration he realised that if the employer regarded the information as confidential he would be bound by that. He indicated that he realised that he should not disclose any such information. He also asked for reinstatement.

[7] The outcome of this arbitration was that on 20 April 2004 a similar award to that in the first arbitration was made — namely of reinstatement from the date of dismissal based on a finding of substantively unfair dismissal. Six weeks later, on 1 June 2004, the employer again instituted review proceedings in the Labour Court to have this award set aside. The hearing took place on 6 December 2005. In its judgment of 10 April 2006, the Labour Court found that the dismissal was substantively unfair. The Labour Court, however, set aside the remedy of reinstatement on the basis that the employee's indication, at the disciplinary hearing, that he would do the same again pointed to a breakdown in trust which precluded reinstatement. The Labour Court granted compensation in its stead.

[8] On 22 June 2006 the employee filed an application for leave to appeal and also sought condonation for late filing. On 24 August 2006 the Labour Court refused to grant condonation. The Labour Court held that even if condonation had been granted it would still have refused leave to appeal for lack of prospects of success on appeal. A petition for leave to appeal to the Labour Appeal Court followed on 6 October 2006. Four months later, the Labour Appeal Court granted leave to appeal to it. The appeal was heard on 28 May 2008. Judgment was, however, only delivered

on 24 February 2009. This judgment found that the Labour Court had erred in its assessment of the breakdown of trust and its refusal to order reinstatement essentially on the basis that it approached the matter as an appeal, rather than a review. The Labour Appeal Court confirmed the commissioner's award of reinstatement retrospective to the date of the employee's dismissal.

[9] The employer then sought special leave to appeal to the Supreme Court of Appeal which was dismissed with costs on 3 June 2009. On 6 August 2009 the employer filed an application for leave to appeal to this Court. On 31 August this Court directed that the application for leave to appeal be set down for hearing on 19 November 2009. This Court also issued directions as a result of which it emerged that the employee had earned some income from other sources during the time he waited to be reinstated.[3] This information was not placed before the Labour Court or the Labour Appeal Court at the respective hearings before those courts.

[10] As can be seen from this chronology of events, there was a delay of one year before the first arbitration award was set aside on review in the Labour Court. It took nearly two years for the review of the second arbitration award to be finalised. The Labour Court took four months to deliver its judgment on review of the second arbitration award. The appeal process in the Labour Appeal Court took a further two

[3] The directions of 31 August 2009 required the employee to lodge an affidavit "a. [s]tating whether, since his dismissal by the applicant, he has, at any stage, been employed; and b. [i]f the first respondent has at any stage been employed, indicating his earnings from such employment."

years and eight months to be finalised. The Labour Appeal Court took nine months to deliver its judgment after hearing the appeal.

[11] Before this Court the employer argued that the Labour Appeal Court was wrong to restore the second arbitration award and that the Labour Court's review of the award, to the extent that compensation rather than reinstatement was the appropriate remedy, should have been upheld. It was only as an alternative that the employer also argued that even if the second arbitration award did not fall to be set aside on the question of remedy, the Labour Appeal Court was nevertheless under a constitutional duty to grant an order that was appropriate and just and equitable in terms of section 172(1)(b) of the Constitution. It was submitted that an order of reinstatement to a date eight years earlier was not just and equitable, particularly where it appeared that the employee had earned some other income during that period.

[12] This alternative argument was not raised at all in the Labour Appeal Court. The employer did not present any evidence in the second arbitration hearing that raised the issue of the inappropriateness of reinstatement to the date of dismissal as a remedy. It did not seek to introduce any further evidence relating to this issue either in the review before the Labour Court, or on appeal before the Labour Appeal Court. The sole basis for raising the point before this Court was the systemic delay outlined above.

Issues

[13] Three issues need to be dealt with. The first relates to the condonation applications brought by both the employer and the employee for lapses in adherence to the rules and directions of this Court. These were adequately explained and should be condoned. The second issue is whether to grant leave to appeal. The conclusion reached here is that leave should be refused because the constitutional issue presented by the applicant has not been raised timeously and that there has been no adequate explanation for that failure. Accordingly, leave should be refused because it is not in the interests of justice. Closely aligned to this is that the form and manner in which the constitutional point was presented in this Court did not, in the particular circumstances of the matter, justify the development of the law contended for by the applicants. Leave should therefore be refused for lack of prospects of success on appeal as well. These findings effectively dispose of the third issue, namely whether the Labour Appeal Court ought, on its own accord, to have considered and issued a just and equitable remedy.

Condonation

[14] Four condonation applications are before this Court. The employer lodged the application for leave to appeal more than one month late. It attributes its failure to lodge the application timeously to an attempt to settle the dispute. In addition, the employer's affidavit in response to the directions issued by the Chief Justice dated 31 August 2009 was filed one day late. The employee does not oppose these applications for condonation. The remaining condonation application relates to the

late filing of the employee's affidavit in response to the Chief Justice's directions,[4] as well as the late filing of written submissions which were 6 days late. The employer does not oppose this application. I need say little about these applications. The test for condonation in this Court is whether it is in the interests of justice to grant condonation.[5] It has unfortunately become common for litigants in this Court to disregard its rules and directions. This invariably leads to delays in the disposal of cases. The fact that parties are attempting a settlement does not necessarily provide a basis for disregarding the rules or directions of this Court. However, the parties have explained the delays and there is no prejudice to either. Accordingly, the applications for condonation should be granted.

Leave to appeal

[15] An application for leave to appeal to this Court should satisfy the requirements that (a) a constitutional issue has been raised and (b) that it is in the interests of justice to grant leave to appeal.[6] On the facts of this case, the answer to

[4] In terms of the directions the employer was requested to lodge an affidavit stating whether it has, during the period of dismissal, invited the employee to tender his services. The first respondent, in turn, was requested to lodge an affidavit stating whether, since the dismissal by the applicant, he has, at any stage, been employed and if so, indicating his earnings from such employment. The affidavit in question was supposed to be filed at this Court on 15 September 2009. The deponent, Ms Bridget Tracy Bishenden, was only available to sign the affidavit on Tuesday morning, 15 September 2009. The affidavit was then forwarded by courier to the employer's attorneys in Johannesburg who filed it on 16 September 2009. The respondent's affidavit was duly prepared and signed on 5 September 2009 and forwarded to its Johannesburg correspondents via Docex for filing at this Court. However, the affidavit was only filed on 7 October 2009.

[5] See *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at paras 20, 22, and 30-4; *S v Mercer* [2003] ZACC 22; 2004 (2) SA 598 (CC); 2004 (2) BCLR 109 (CC) at para 4; *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School and Others* [2003] ZACC 15; 2003 (11) BCLR 1212 (CC) at para 11; and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3, where this Court held that the broad test for granting condonation of late applications is whether it is in the interests of justice.

[6] See *Armbruster and Another v Minister of Finance and Others* [2007] ZACC 17; 2007 (6) SA 550 (CC); 2007 (12) BCLR 1283 (CC) at para 24; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19; *S v*

this question depends upon whether (a) it is desirable for this Court to sit as a court of first and last instance on the issues raised and (b) the proposed appeal bears prospects of success. There can be no question that this application raises a constitutional issue, namely, whether the Labour Appeal Court was under a constitutional duty to grant an order that was just and equitable in terms of section 172(1)(b) of the Constitution.

Was a constitutional issue raised properly and timeously?

[16] The employee's legal representative argued strenuously before us that the constitutional issue now raised, namely that the Labour Appeal Court should have considered and issued a just and equitable remedy ameliorating retrospective reinstatement, was not raised earlier. He also submitted that in order to get to the constitutional point raised, this Court would first have to consider the Labour Appeal Court's findings on ordinary, non-constitutional appellate grounds, and that such a course would close the door on any constitutional argument.

[17] The second arbitration award was subject only to review, not appeal, by the Labour Court. It is now common cause that the finding that the employee's dismissal was substantively unfair is correct. The only remaining issue was whether the remedy granted in the second arbitration award, namely that of reinstatement to the date of dismissal, was irregular to the extent that it should have been set aside on review. The Labour Court found that it was and ordered compensation instead. The Labour

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Bierman [2002] ZACC 7; 2002 (5) SA 243 (CC); 2002 (10) BCLR 1078 (CC); *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at paras 10-2; and *Fraser v Naude and Others* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 7.

Appeal Court reversed that finding, resulting in the reinstatement order, as made in the second arbitration award. If this Court finds that the Labour Appeal Court was correct, the reinstatement order would ordinarily stand. If it is held that the Labour Appeal Court was wrong, the Labour Court's compensation order would also ordinarily stand unaffected. Even before this Court the employer preferred this outcome to its alternative constitutional point. Thus, so it was submitted, whatever the outcome, the constitutional issue would not have been reached.

[18] As a general principle this Court has required that constitutional issues should be raised in the courts from which the appeal arises before leave to appeal will be granted by this Court.[7] Only in exceptional circumstances will it be in the interests of justice to grant leave to appeal where the constitutional issues sought to be advanced in this Court were not raised earlier.

[19] Counsel for the employer submitted, however, that it was only in the decision of this Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[8] that clarity was reached about the nature and interrelationship between the remedies of reinstatement, re-employment and compensation under section 193(1) of the LRA,[9] the effect on the time of

[7] See *Prophet v National Director of Public Prosecutions* [2006] ZACC 17; 2007 (6) SA 169 (CC); 2007 (2) BCLR 140 (CC) at paras 49-53; *Shaik v Minister of Justice and Constitutional Development* [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at para 40; *S v Bierman* above n 6 at para 8; *Prince v President, Cape Law Society and Others* [2000] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 22.

[8] [2008] ZACC 16; 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC).

[9] Section 193(1) provides:

reinstatement in terms of section 193(2) of the LRA,[10] and whether the limits on compensation in terms of section 194 of the LRA[11] also applied to remuneration payable upon reinstatement. He submitted that certain remarks in *Equity Aviation* foreshadowed, or laid the groundwork for, the constitutional argument now raised. These remarks related to the purpose sought to be achieved by reinstatement, the discretion a court or commissioner exercises when determining the extent of

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"If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may–

(a) order the employer to re-instate the employee from any date not earlier than the date of dismissal;
(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
(c) order the employer to pay compensation to the employee."

[10] Section 193(2) provides:

"The Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless–

(a) the employee does not wish to be re-instated or re-employed;
(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
(c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or
(d) the dismissal is unfair only because the employer did not follow a fair procedure."

[11] Section 194 provides:

"(1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

(2) . . .

(3) The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal

(4) The compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months remuneration."

retrospective reinstatement, and the factors that should be taken into account in determining the period of retrospectivity.[12]

[20] The judgment in *Equity Aviation* was delivered after the appeal in this matter was argued in the Labour Appeal Court, but before judgment was delivered by that court. The submission in this Court was that the implication of *Equity Aviation* is that, when faced with extensive delays, there is a constitutional duty on courts, including appellate courts like the Labour Appeal Court, to grant just and equitable remedies under section 172(1)(b) of the Constitution, by inquiring into matters such as the effect of delays on the position of employer and employee, even after reinstatement orders had been granted in lower tribunals or courts.

[21] The constitutional issues raised in this Court are no doubt important in the context of the remedies available under the LRA. They concern what impact, if any, systemic delay should have on the appropriateness or otherwise of reinstatement as a remedy for unfair dismissal. They are matters which manifestly fall within the exclusive jurisdiction of the Labour Court in the first instance and this Court in the last instance. The problem is that these issues were not raised in the court below. The employer is therefore asking this Court to sit as a court of first and last instance on these issues. This Court has on many occasions indicated the undesirability of determining constitutional issues as the court of first and last instance.[13]

[12] *Equity Aviation* above n 8 at paras 36 and 43.

[13] See *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another* [2006] ZACC 5; 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC) at para 26 and cases cited therein.

[22] In *S v Bierman*,[14] this Court said the following, concerning the failure to raise a constitutional issue in the lower courts:

> "The applicant's failure to raise the constitutional issues concerning the admissibility of the Rev Bothma's evidence in her application to the Supreme Court of Appeal inhibits her ability to raise them now in this Court. As a result of that failure, this Court has not had the benefit of that Court's consideration of these issues, which relate directly to established principles of the common law and to the application of such principles. The applicant's failure to raise the constitutional issues upon which her application to this Court is based in the Supreme Court of Appeal may well have been sufficient of itself to mean that her application to this Court should have been refused."[15]

[23] As I have pointed out above, the issues raised by the employer in this Court are issues that lie at the heart of the remedy available under the LRA. These are matters which the legislature has assigned to the Labour Court. Over the years the labour courts have developed expertise in the field of labour law as they deal with labour issues exclusively. It is therefore desirable that these courts should first consider the issues raised by the employer in this case and bring their expertise to bear on these issues. It is undesirable that this Court should sit as a court of first and last instance, without any possibility of a further appeal on these issues. As this Court pointed out in *Bruce and Another v Fleecytex Johannesburg CC and Others*:[16]

> "It is . . . not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more

[14] Above n 6.

[15] Id at para 8.

[16] [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC).

> likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment."[17]

[24] The employer has not proffered any explanation why these issues were never raised in the courts below. There is therefore no reason why there should be a departure from our precedent requiring a party to raise constitutional issues in the courts below prior to raising them here. For all these reasons it is not in the interests of justice to grant leave to appeal.

[25] Having dealt with this point, it may be possible to leave the matter as it stands. But there is another reason why the application for leave should be refused. As will be seen below, the constitutional point the employer advances seeks to circumvent existing procedural remedies for leading after-the-fact evidence on appeal. Given the particular circumstances of this matter it is necessary to state why the constitutional point, raised in this particular form and manner, has no prospects of success on appeal in any event.

Prospects of success:

Role of courts in ordering a just and equitable remedy

[26] After *Equity Aviation*, there can be no doubt that reinstatement is the primary remedy in unfair dismissal disputes and that section 193(1)(a) of the LRA confers a

[17] Id at para 8. See also *AParty and Another v Minister for Home Affairs and Others; Moloko and Others v Minister for Home Affairs and Another* [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) at paras 26-30.

discretion on the commissioner or court of first instance to determine the extent of retrospectivity of the reinstatement. In *Equity Aviation*, Nkabinde J stated:

> "The ordinary meaning of the word 'reinstate' is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The ordinary meaning of the word 'reinstate' means that the reinstatement will not run from a date after the arbitration award. Ordinarily then, if a Commissioner of the CCMA orders the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the Commissioner decides to render the reinstatement retrospective. The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly."[18] (Footnotes omitted.)

[27] It should be noted that these remarks relate to the inquiry at the first level of engagement, namely when a matter first comes before a court or commissioner. A commissioner or court, at that level, must act in accordance with the provisions of section 193(1) and (2) in the manner explained in *Equity Aviation*. The attack on the

[18] *Equity Aviation* above n 8 at para 36.

commissioner's award in this appeal was not premised on any delays in the process, but on the ground that the award does not expressly address the issues bearing on the exercise of a discretion under section 193(1) and (2) of the LRA. This failure, it was contended, showed that the commissioner did not exercise any discretion at all in regard to a proper remedy. Had he done so properly, the provisions of section 142 of the LRA[19] should have been utilised to initiate an inquisitorial type of inquiry into the appropriateness of reinstatement as a remedy and the period of retrospectivity of reinstatement, if that remedy was considered appropriate.

[19] Section 142(1) provides:

"A commissioner who has been appointed to attempt to resolve a dispute may–

(a) subpoena for questioning any person who may be able to give information or whose presence at the conciliation or arbitration proceedings may help to resolve the dispute;

(b) subpoena any person who is believed to have possession or control of any book, document or object relevant to the resolution of the dispute, to appear before the commissioner to be questioned or to produce that book, document or object;

(c) call, and if necessary subpoena, any expert to appear before the commissioner to give evidence relevant to the resolution of the dispute;

(d) call any person present at the conciliation or arbitration proceedings or who was or could have been subpoenaed for any purpose set out in this section, to be questioned about any matter relevant to the dispute;

(e) administer an oath or accept an affirmation from any person called to give evidence or be questioned;

(f) at any reasonable time, but only after obtaining the necessary written authorisation–

(i) enter and inspect any premises on or in which any book, document or object, relevant to the resolution of the dispute is to be found or is suspected on reasonable grounds of being found there; and

(ii) examine, demand the production of, and seize any book, document or object that is on or in those premises and that is relevant to the resolution of the dispute; and

(iii) take a statement in respect of any matter relevant to the resolution of the dispute from any person on the premises who is willing to make a statement; and

(g) inspect, and retain for a reasonable period, any of the books, documents or objects that have been produced to, or seized by, the Commission."

[28] I do not consider the submission to be sound, for a number of reasons. The employer is a large company. It was represented at the arbitration hearing, as was the employee. The employer indicated that it would oppose reinstatement on the basis of evidence it intended leading. It failed to present any such evidence. The employee gave evidence explaining the circumstances under which he made the only statement which might have been considered as impacting adversely upon the resumption of an employment relationship between the parties.

[29] That evidence was accepted by the commissioner, a finding not challenged by the employer. It was conceded before this Court, as it was, for the first time, before the Labour Appeal Court, that the dismissal was substantively unfair in that the alleged breach of confidentiality did not justify dismissal. If it did not justify dismissal I find it difficult to understand why, at the same time, it could nevertheless provide a ground to prevent reinstatement. In short, on the facts on record before the commissioner there was simply no reason for him to deviate from the statutory default remedy of reinstatement from the date of dismissal, nor was there any reason for him to initiate an inquiry of his own into those issues after the employer failed to present the evidence it promised.

[30] The next level of enquiry is the review of the second arbitration award in the Labour Court. The Labour Appeal Court held that the Labour Court erred in treating the matter as an appeal, rather than as a review in terms of the applicable provisions of

the LRA.[20] The enquiry in the review, in this instance, should have been restricted to the issue whether the decision reached by the commissioner was one a reasonable decision-maker could not reach.[21] There was at this stage of the proceedings no scope for him to fashion a different remedy. On the record there was no suggestion that the commissioner or the Labour Court was ever invited to consider the effect of systemic delays in mitigating the effect of reinstatement, nor did the employer offer any evidence to address this issue.

[31] That brings one to the appellate level: the decision in the Labour Appeal Court where retrospective reinstatement was ordered. In that court the employer's case was that reinstatement was not an appropriate remedy. It is clear from what has been stated above that on ordinary grounds the appeal against the Labour Appeal Court's findings must fail. The submission is now made, however, that despite this there was a duty on the Labour Appeal Court to initiate an inquiry into the factual situation that arose after the award made by the commissioner, to determine whether reinstatement was still feasible and, if so, whether the period of retrospective operation of the original reinstatement order was still warranted.

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[20] See section 145 above n 2.

Section 158(1)(g)-(h) provides:

> "The Labour Court may–
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> . . .
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> (g) subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law;
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> (h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law".

[21] See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at para 110.

[32] The starting point for this argument is section 172(1) of the Constitution:

> "When deciding a constitutional matter within its power, a court–
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> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
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> (b) may make any order that is just and equitable, including–
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> (i) an order limiting the retrospective effect of the declaration of invalidity; and
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> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[33] This particular section is primarily concerned, on its face, with the situation where a court has to decide on the validity of law or conduct that lies within its constitutional competence. This Court has held that section 172(1) empowers a court to make a just and equitable order even in instances where the outcome of a constitutional dispute does not hinge on the constitutional invalidity of legislation or conduct.[22] Instead it merely requires that the constitutional issue be decided in the Court but does not necessarily require an order of invalidity for the remedies in section 172(1)(b) to be available.[23] In the present matter there is no constitutional attack on the validity of any law or conduct – the submission is that the law should be developed to provide for just and equitable relief where circumstances may warrant such a development. There are, however, other provisions in the Constitution which

[22] See Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another [2009] ZACC 32, Case No CCT 40/09, 14 October 2009, as yet unreported, at para 97.

[23] Id. In *Sibiya and Others v Director of Public Prosecutions, Johannesburg High Court and Others* [2005] ZACC 6; 2005 (5) SA 315 (CC); 2005 (8) BCLR 812 (CC), this Court made a supervisory order despite a finding that the impugned legislation relating to the substitution of death sentences was not unconstitutional.

require just and equitable remedies to give proper effect to constitutional demands,[24] so these interpretive hurdles are not too important in the broader constitutional context.

[34] The more fundamental difficulty with direct reliance on any of these constitutional provisions is that there are specific provisions in the LRA that provide for the reception of further evidence on appeal and the remedies available under the LRA. These are contained in sections 167(1) and 174 of the LRA. The former provides that the Labour Appeal Court (like the Labour Court) is a court of law and equity. The latter sets out its powers on the hearing of appeals. Section 174 provides:

> "The Labour Appeal Court has the power–
>
> (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by the Labour Appeal Court, or to remit the case to the Labour Court for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Labour Appeal Court considers necessary; and
>
> (b) to confirm, amend or set aside the judgment or order that is the subject of the appeal and to give any judgment or make any order that the circumstances may require."

[35] The provisions of section 174 of the LRA are not unique or exceptional in our law. Similar provisions exist in relation to ordinary civil appeals,[25] appeals to this

[24] Sections 38, 39(2) and 173 of the Constitution. Compare *Masiya v Director of Public Prosecutions, Pretoria and Others* [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC) at para 51 and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24.

[25] Section 22 of the Supreme Court Act 59 of 1959 provides:

Court[26] and in applications for leave to appeal in criminal cases.[27] A considerable body of law has developed on the application of these provisions in the courts. Considerations that play an important role in determining whether further evidence on appeal should be allowed include the importance of finality in legal proceedings; that further evidence should only be allowed in exceptional circumstances; that an explanation is required why the evidence was not led earlier; and that the proposed new evidence should be credible, material and practically conclusive.[28]

> "The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power–
>
> (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and
> (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require."

[26] Rule 30 of this Court's Rules provides:

> "The following sections of the Supreme Court Act, 1959 (Act 59 of 1959), shall apply, with such modifications as may be necessary, to proceedings of and before the Court as if they were rules of their court.
> …
> 22. Powers of court on hearing of appeals."

Rule 31 provides:

> "1. Any party to any proceedings before the Court and an amicus curiae properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts–
> a. are common cause or otherwise incontrovertible; or
> b. are of an official, scientific, technical or statistical nature capable of easy verification.
> 2. All other parties shall be entitled within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court."

[27] Section 316 of the Criminal Procedure Act 51 of 1977 provides for a similar process to that of section 22 of the Supreme Court Act, albeit by application for leave to appeal.

[28] See *S v Shaik and Others* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC) at paras 17-23; *Prophet* above n 7 at para 33; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 34-43; *Prince* above n 7 at para 21.

[36] In general a court of appeal when deciding whether the judgment appealed from is right or wrong, will do so according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards.[29] This is not an inflexible rule and after-the-fact evidence may be admitted in cases affecting children[30] and in "exceptional cases that cry out for the reception of post-judgment facts".[31]

[37] One such exceptional case in this Court was *Prince v President, Cape Law Society and Others*[32] where Ngcobo J stated the following:

> "Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasise that all this information must be placed before the court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no

[29] *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd* 1992 (2) SA 489 (A) at 507C-D; *S v Nofomela* 1992 (1) SA 740 (A) at 748D-F; *S v V en 'n Ander* 1989 (1) SA 532 (A) at 544I-545C; *S v Immelman* 1978 (3) SA 726 (A) at 730H; *Goodrich v Botha and Others* 1954 (2) SA 540 (A) at 546A.

[30] See AD *and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC) at para 30; *J v J* 2008 (6) SA 30 (C) at paras 15-21.

[31] Harms *Civil Procedure in the Superior Courts*, August 2009, C-21; *Van Eeden v Van Eeden* 1999 (2) SA 448 (C) at 451H-454H.

[32] Above n 7.

> doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal.
>
> That said, the considerations applicable to allowing further evidence on appeal in constitutional matters are not necessarily the same as the considerations applicable in other matters. It is undesirable to attempt to lay down precise rules when leave to adduce further evidence on appeal will be granted by this Court."[33] (Footnotes omitted.)

[38] The employer did not seek to lead further evidence before this Court in terms of this Court's Rules 30 or 31. Nor did it seek to lead any such evidence before the Labour Appeal Court. On the facts available on record such an application would, in all likelihood, have failed. There is nothing on record to indicate what the evidence is that would have been "credible, material and conclusive", or that it was either not in the possession of the employer at the time or could not have been obtained by proper diligence.[34] What the employer seeks to do, in effect, is to circumvent compliance with these requirements by asking this Court to develop the existing law by stating that there is a constitutional duty on the Labour Appeal Court to initiate an inquiry of its own accord into post-judgment facts even though none of the parties to an appeal before it have requested that to happen or have sought to place any further evidence before it. No basis for requiring the courts to do this has been shown.

Whether an employee has an obligation to mitigate loss

[39] I understood counsel for the employer to submit that a burden of some kind rested on an employee to mitigate his or her damages after dismissal and that this

[33] Id at paras 22-3.

[34] Id at para 21.

submission finds some support in this Court's decision in *Equity Aviation.*[35] The submission is that this mitigation rule triggers a duty to seek after judgment facts, even when existing rules for adducing further evidence have been ignored or disregarded, because not to do so would lead to substantial unfairness between the parties. Reliance was also placed on the effects of the systemic delay described at the start of this judgment. In my view neither of these submissions can be sustained.

[40] The facts in *Equity Aviation* were largely common cause.[36] None of the issues that had to be decided involved the issue of mitigation or whether a burden of any kind was associated with that issue.[37] In discussing the discretion that a commissioner or court has to exercise in terms of section 193, Nkabinde J stated that the period between the dismissal and the trial as well as the fact that the dismissed employee was without an income during the period of dismissal should be taken into consideration in such a manner that "an employer is not unjustly burdened if retrospective reinstatement is ordered or awarded.**"**[38] She said nothing that could legitimately be used in support of an argument that a dismissed employee carries some burden to mitigate his or her loss after dismissal. The whole tenor of the discussion about reinstatement in *Equity Aviation*, namely that it is the primary statutory remedy in unfair dismissal disputes that is aimed at reinstating employees "on the same terms and conditions that prevailed at the time of their dismissal",[39] suggests the contrary.

[35] Above n 8.

[36] Above n 8 at para 4.

[37] Above n 8 at para 18.

[38] Above n 8 at para 43.

[39] Above n 8 at para 36.

[41] To talk in legal terms of a burden on an employee to mitigate loss in the context of an unfair dismissal strikes one as decidedly odd, if not somewhat perverse. In real life, dismissed employees will seek alternative means of income in order to sustain their own survival and that of their dependants. It requires little imagination to appreciate that for many people in South Africa obtaining employment is, at best, a very difficult task. Equitable considerations militate against transforming this practical necessity of life into a legal burden on employees to mitigate their loss in dismissal cases. To do so might even serve to undermine their claim to the primary statutory remedy of reinstatement available under the provisions of the LRA.

[42] In so-called 'purely' legal terms too, the argument is misconceived. Mitigation principles in law are applied to damages or compensation claims. Even in contractual damages claims the onus of establishing that there were other less costly remedies which a claimant should have adopted rests with the defendant.[40] The correct analogy in reinstatement cases would, however, be to look at cases where specific performance was ordered under the common law contract of employment. Until the decision in *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Another*,[41] reinstatement in common law employment contracts was regarded as almost invariably undesirable for entailing the enforcement of an order for rendering of personal services. The LRA has changed that. Little help can thus be

[40] See *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 689D-E.

[41] 1982 (4) SA 151 (T) at 158A-H.

expected from the common law in developing new principles in relation to the remedy of reinstatement.

[43] The remedies awarded in terms of the provisions of section 193 of the LRA must be made in accordance with the approach set out in *Equity Aviation*. That approach is based on underlying fairness to both employee and employer. It would introduce unwanted and unnecessary rigidity to saddle an inquiry into fairness with notions of a legal *onus*.

[44] There is thus no legal rule of mitigation or otherwise that would trigger the existence of a constitutional duty to seek after-judgment facts where existing rules for adducing further evidence have been ignored or disregarded. The first ground advanced by counsel for the employer must thus fail.

Effect of systemic delay on remedies

[45] The second ground relied upon as an exceptional circumstance justifying the development of that duty is that of the systemic delay in this matter. At this stage it is perhaps necessary to clarify what is meant by 'systemic delay'. It means nothing greater or less than a delay that occurs in the system of labour dispute resolution under the provisions of the LRA, such delay being one of the underlying problems that the LRA seeks to remedy. The participants in that system are employers and employees, their representatives (legal or otherwise), the officials tasked with conciliation, mediation and arbitration in the CCMA and last, but not least, the judges in the

Labour Court, the Labour Appeal Court, the Supreme Court of Appeal and in this Court. The delays in the 'system' are caused by any one or more of these actors. 'Systemic delay' is not an impersonal, inevitable and independent force, it is simply a delay caused by the inaction of people within the labour dispute resolution process.

[46] There is no magic in relying on 'systemic delay' in order to justify the development of the law. What is needed is to scrutinise the role of each of the actors in the system to determine how and to what extent each may have contributed to the problem that is said to have been caused by the delay. It is only in exceptional instances that there might be room for the development of the law in the manner advanced by the employer here. As will be seen below I do not consider that exceptional circumstances are present in this matter. In saying that it must not be taken to imply that the general delays in this case are not to be deplored. Far from it.

[47] In three recent judgments this Court has found it necessary to make adverse comments about institutional delays in the labour dispute resolution process.[42] In the

[42] *Equity Aviation* above n 8 held at para 52:

> "I should add in this regard that it is a matter of great concern that the system of expedited adjudication of unfair dismissal disputes which the LRA sought to establish often operates far from expeditiously. The case at hand is a good example of how labour disputes are taking far too long to reach finality. The adverse effects of these delays impose burdens both on employers and on workers, as this case again illustrates."

In the same way it was held in *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO and Others* [2009] ZACC 10; [2009] 6 BLLR 517 (CC); (2009) 30 ILJ 1521 (CC) at paras 1 and 12:

> "The case arises out of the dismissal by the applicant of the third respondent, Ms Jane Moabelo, more than ten years ago, on 26 October 1998. The time that has elapsed since the dismissal is cause for significant concern.
> …
> "We conclude by noting once again that it is a matter of concern that proceedings concerning an unfair dismissal in October 1998 should not have reached their final resolution some ten years later. It is not clear to us from the record before us where the blame for the delay lies

same period two judgments were delivered in the Supreme Court of Appeal on the same issue.[43] It is unfortunately necessary to make some forthright comments about this unsatisfactory state of affairs again. There is nothing inevitable that causes delays in the dispute resolution process under the provisions of the LRA. If there is an underlying cause it may be because problems in the process are not addressed timeously and are then acknowledged as being the acceptable norm.

[48] If delays in the conciliation, mediation and arbitration process under the CCMA are caused by insufficient personnel numbers or financial resources, it should be addressed by the users of the system (employers and employees) in institutions such as the National Economic Development and Labour Council (NEDLAC)[44] and, if needs be, by Parliament. If individuals overseeing conciliation, mediation or

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> (and so far as we can discern it does not lie singly), and so we can take the matter no further now."

In *Strategic Liquor Services v Mvumbi NO and Others* [2009] ZACC 17; (2009) 30 ILJ 1526 (CC) at paras 12-3 it was held:

> "Some comment is necessary. First, the delay. It is lamentable that so many delays occurred, some (though not all) attributable to judicial management of the employer's case. The Supreme Court of Appeal has recently (in not incomparable circumstances, where the Labour Appeal Court took more than fifteen months to deliver judgment) deplored what it called 'systemic delays' in the labour courts. It pointed out that:
>
> > 'The entire scheme of the LRA and its motivating philosophy are directed at cheap and easy access to dispute resolution procedures and courts. Speed of result was its clear intention. Labour matters invariably have serious implications for both employers and employees. Dismissals affect the very survival of workers. It is untenable that employees, whatever the rights or wrongs of their conduct, be put through the rigours, hardships and uncertainties that accompany delays of the kind here encountered. It is equally unfair that employers bear the brunt of systemic failure.'
>
> This Court has recently dealt with a matter where the Labour Appeal Court delivered judgment more than two and a half years after oral argument was concluded before it, and the comments of the Supreme Court of Appeal must be endorsed." (Footnotes omitted.)

[43] *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* 2009 (3) SA 493 (SCA); [2009] 7 BLLR 619 (SCA) at paras 33-4 R*epublican Press (Pty) Ltd v CEPPWAWU and Others* 2008 (1) SA 404 (SCA) at paras 20-2.

[44] As established by the National Economic Development and Labour Council Act 35 of 1994.

arbitration in the CCMA are failing in their duties, the necessary steps must be taken up with their employer in order to rectify these deficiencies. The Labour Court and Labour Appeal Court rules provide for a court-managed process to ensure that matters are heard in proper form, and expeditiously so. If practitioners cause delays, the rules provide the means for the Labour Courts' judiciary to exercise discipline and control over them. As Judges we also need to produce our judgments expeditiously. Accountability and responsibility affect and concern us all.

[49] I now return to the argument at hand. It is that 'systemic delays' justify the development of a constitutional duty for the Labour Appeal Court to initiate an inquiry of its own into post-judgment facts, even when the original order was justified on the facts at the time it was made and where no application to lead further evidence on appeal was made by any of the parties either. The answer to that contention must, in each instance where it is aired, be determined by an examination of the facts of the particular case. A similar kind of argument was raised, but rejected, in *Equity Aviation*.[45] It needs to be rejected in the present case as well.

[50] It is true that there were delays in this matter not attributable to the fault of the employer. But it is not these delays that caused the constitutional issue to arise only at this late stage of the proceedings. What primarily caused this issue to arise was the employer's failure to implement the reinstatement order after it was given. A

[45] Above n 8 at paras 50-1.

secondary cause was its failure to raise the constitutional issue earlier, at least at the stage when the matter was heard in the Labour Appeal Court.

[51] Any appeal process carries its own risk. In *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others*,[46] Goldstone JA stated, in relation to the previous Labour Relations Act,[47] that:

> "Whether or not reinstatement is the appropriate relief, in my opinion, must be judged as at the time the matter came before the industrial court. If at that time it was appropriate, it would be unjust and illogical to allow delays caused by unsuccessful appeals to the Labour Appeal Court and to this Court to render reinstatement inappropriate. Where an order for reinstatement has been granted by the industrial court, an employer who appeals from such an order knowingly runs the risk of any prejudice which may be the consequence of delaying the implementation of the order."[48]

[52] The circumstances of this matter, however, go beyond the mere fact of that institutional risk. 'Systemic delay' is often also caused by rich and powerful litigants who use their superior financial capabilities to take the review and appeal opportunities available to them to the very end in the hope of wearying out an opposing litigant who may be in a less advantageous financial position. Where that does not eventuate the 'appeal risk' is one way of dealing with this use (or abuse) of the legal system. In the present matter the employer eventually conceded that its dismissal of the employee was substantively unfair. As pointed out earlier in this

[46] 1994 (2) SA 204 (A).

[47] 28 of 1956.

[48] Above n 46 at 219H-I.

judgment,[49] that concession should also have entailed the recognition that reinstatement to the time of dismissal was the proper remedy. Objectively then, the employer should have realised at the time the second arbitration award was made that the reinstatement remedy was a proper one. It was only its own failure to appreciate that fact that set the review and appeal process in motion. Its own failure to raise the constitutional point it now advances, earlier, at the Labour Appeal Court hearing, merely compounded its own remissness. And, finally, things were not helped when even in argument before this Court the employer did not abandon its hope for an order of compensation rather than reinstatement.

[53] The conclusion that I come to is that it was not any institutional delay beyond the control of the employer that led to the constitutional issue arising only at this late stage of the proceedings. It was the employer's own conduct in causing this delay that led to this state of affairs. Whether that conduct was motivated by a cynical 'playing of the system', or a genuine but belated recognition of its own misconception of the correct legal principles, matters not. Neither the institutional part of the system nor the employee was to blame for the unnecessary prolonging of the proceedings. If the employee earned some income since that order was granted it was because he had to do so in order to survive and live a decent life. The employer could have prevented that necessity by implementing the reinstatement order.

[49] Para [29] above.

Order

[54] The following order is made:

a. The applications for condonation are granted.

b. The application for leave to appeal is dismissed with costs.

Ngcobo CJ, Moseneke DCJ, Cameron J, Mogoeng J, Nkabinde J, Skweyiya J and Van der Westhuizen J concur in the judgment of Froneman J.

Counsel for the Applicant:	Advocate GJ Marcus SC and Advocate S Budlender instructed by Deneys Reitz Attorneys.
Legal Representative for the First Respondent	Mr ZE Buthelezi of Buthelezi Incorporated.