CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 228/14

In the matter between:

TOYOTA SA MOTORS (PTY) LIMITED	Applicant
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
COMMISSIONER: TERRENCE SERERO	Second Respondent
RETAIL AND ALLIED WORKERS UNION	Third Respondent
MAKOMA MAKHOTLA	Fourth Respondent

Neutral citation:	*Toyota SA Motors (Pty) Ltd v CCMA and Others* [2015] ZACC 40
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J
Judgments:	Nkabinde J (majority): [1] to [53] Zondo J (minority): [54] to [190] Wallis AJ (concurrence): [191] to [209]
Heard on:	18 August 2015
Decided on:	15 December 2015
Summary:	Review of arbitration award — application to dismiss — protracted delay in prosecution of review

ORDER

On appeal from the Labour Court of South Africa, Johannesburg:

1. Condonation for the late filing of the statement of facts is granted.
2. Leave to appeal is refused with costs.

JUDGMENT

NKABINDE J (Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Van der Westhuizen J and Wallis AJ concurring):

Introduction

[1] Time periods in the context of labour disputes are generally essential to bring about timely resolution of the disputes. The dispute resolution dispensation of the old Labour Relations Act[1] was uncertain, costly, inefficient and ineffective. The new Labour Relations Act[2] (LRA) introduced a new approach to the adjudication of labour disputes. This alternative process was intended to bring about the expeditious resolution of labour disputes which, by their nature, require speedy resolution. Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years.

[1] 28 of 1956.

[2] 66 of 1995.

[2] This application for leave to appeal is against a decision of the Labour Court of South Africa, Johannesburg dismissing with costs, the applicant's application for review and making an arbitration award against the applicant an order of Court.[3] At its heartland is whether the Labour Court was correct when it dismissed the review application on the basis of delay. The Labour Court refused the applicant leave to appeal, as did the Labour Appeal Court, hence this application. The applicant also seeks condonation for the late filing of its statement of facts.

Parties

[3] The applicant is Toyota SA Motors (Pty) Limited (Toyota). The first respondent is the Commission for Conciliation, Mediation and Arbitration (CCMA). The second respondent is the commissioner of the CCMA (arbitrator) who arbitrated the dispute of unfair dismissal between Toyota and the fourth respondent (Mr Makhotla). The third respondent is the Retail and Allied Workers Union (Union) of which Mr Makhotla is a member. The CCMA and the arbitrator have not opposed this application. Mr Makhotla and the Union have opposed the application. To the extent necessary I refer to them, collectively, as the respondents.

Factual background

[4] Toyota employed Mr Makhotla in 2006. During the course of his employment, Mr Makhotla failed to report for duty from 28 February to 3 March 2011. Mr Makhotla unsuccessfully attempted to locate his supervisor, Ms Mukhavhuli, on her mobile phone on 28 February 2011 when it became evident that he would be unable to report for duty. He contacted one of the senior managers, Mr Hawkins, within his division and reported to him. He also sent a short message service (SMS) to Ms Mukhavhuli, indicating that it would take him three days to address the issues that caused his absence from work. Receipt of the SMS was acknowledged by Ms Mukhavhuli.

[3] *RAWU obo Makhotla v Toyota SA Motors (Pty) Ltd* [2014] ZALCJHB 527. This judgment was handed down on 9 July 2014 by Fourie AJ *ex tempore* (verbally directly after hearing) (Labour Court *ex tempore* judgment).

[5] When Mr Makhotla returned to work on 4 March 2011, Toyota served him with a notice to attend a disciplinary enquiry in terms of Toyota's Disciplinary Code and Procedures (Code).[4] Three days later, on 7 March 2011, Mr Makhotla tendered notice of resignation with effect from 31 March 2011.[5] He was informed that notwithstanding his resignation, he would be disciplined. Ms Mukhavhuli testified that she referred the resignation to Human Resources and the Vice President of Toyota. They refused to accept the resignation. Mr Makhotla was charged in terms of the Code with misconduct for being absent from work without leave (AWOL) for four days without advising Toyota of his whereabouts and providing an acceptable reason. The disciplinary hearing was finally held on 24 March 2011. Mr Makhotla was dismissed on that date.[6]

Litigation history

CCMA

[6] On 21 April 2011, Mr Makhotla referred an alleged unfair dismissal dispute to the CCMA for conciliation. When the dispute could not be resolved he requested that it be referred to arbitration. The arbitration took place on 1 September 2011.

[7] Toyota led witnesses with a view to establishing that Mr Makhotla was absent without leave and without providing an acceptable or reasonable explanation for his absence.[7] The testimony covered: his communication with Mr Hawkins, during which

[4] The Code provided that "[b]eing absent from work without authority (AWOL) without advising the Company of whereabouts and failing to provide acceptable reasons to Management" for "4 days or longer" is a category 4 offence (meaning that the first transgression would result in disciplinary action of dismissal). The Code also contained a note that: a "[t]elegram / [r]egistered [l]etter requesting [the] whereabouts of [the] employee [is] to be sent by the 3rd day".

[5] The notice was dated 1 March 2011.

[6] Toyota alleges that the decision to dismiss was taken on 24 March 2011 but Mr Makhotla was informed in writing of this decision on 21 April 2011. However, the document entitled "Disciplinary Procedure: Enquiry Decision and Reasons" indicated that the outcome of the disciplinary enquiry was that Mr Makhotla was "DISMISSED", the document is dated 24 March 2011 and is signed by him. His application to the CCMA also identified 24 March 2011 as the date of his dismissal.

[7] Ms Mukhavhuli, Ms Malumo (co-ordinator of the Toyota Academy and Ms Mukhavhuli's secretary), Ms Hlatshwayo (Toyota's HR manager) and Mr Hawkins (a manager at Toyota).

he said that he was absent because he was not feeling well; his SMS to Ms Mukhavhuli saying he was in the Drakensberg "clearing his head"; and his explanation for the absence, on his return to work, that he had to rescue a girl from an initiation school to which she had been abducted. In addition, Ms Mukhavhuli testified that she had obtained some queries about Mr Makhotla's failure to attend certain training sessions and that it was always difficult to establish his whereabouts. Mr Makhotla was, according to Toyota, aware of the rule on absenteeism.

[8] On the whole, Mr Makhotla's testimony echoed that of Toyota's witnesses. He testified that on his return to work he approached Ms Mukhavhuli to apologise and she accepted the apology. He said that he was dismayed at Toyota's decision to summon him to a disciplinary enquiry and tendered his resignation out of anger.

[9] The arbitrator found that it was common cause that the applicant was absent from 28 February to 3 March 2011. The bone of contention, he said, was "whether [Mr Makhotla] had obtained any permission for his absence (AWOL) and whether he provided a plausible explanation for same".[8] The arbitrator observed that absence without leave for four days and failure to provide acceptable reasons constituted, in terms of Toyota's Code, a dismissible offence.[9]

[10] In determining the issues the arbitrator remarked:

> "The evidence indicates that [Mr Makhotla] phoned Mr Hawkins and also later forwarded a text message to his immediate superior. Therefore, on the second day of his absence [Toyota] was aware of [Mr Makhotla's] whereabouts. If indeed his continued absence was viewed as an offence his immediate superior ought to have rejected his apology and instructed him to return to work immediately. In actual fact a proper reading of the company's disciplinary code indicates that on the third day of an employee's AWOL the company must despatch a telegram or registered letter

[8] Arbitration award at para 5.4.

[9] Id at para 2.10 and above n 4 for definition as a dismissible offence.

> enquiring about his whereabouts . . . . Perhaps this was not done because [Toyota] was aware of [Mr Makhotla's] whereabouts.
>
> Further, even if one was to find that [Mr Makhotla's] explanation for his five days absence was not plausible the dismissal was unwarranted. There is no evidence of habitual absenteeism. Put differently [Mr Makhotla] does not have a dismal disciplinary record in this regard. It is trite that if an employee is unable to account for [his] absence the respondent's recourse is to ensure that he is not paid for the period of his unauthorised absence or leave (See section 23(1) of the Basic Conditions of Employment Act [75] of 1997)."

[11] The arbitrator concluded that the dismissal was substantively unfair.[10] He ordered Toyota to reinstate Mr Makhotla and to pay him six months' salary amounting to R218 400.[11]

Labour Court and Labour Appeal Court

[12] On 19 October 2011 Toyota launched a review application in terms of section 145 of the LRA,[12] seeking an order setting aside the award and replacing it with an order that the dismissal of Mr Makhotla was both procedurally and substantively fair. This application was lodged within the six week period required by

[10] The procedural fairness was not and is still not in dispute.

[11] The award, dated 19 September 2011, reads:

> "6.1 The applicant's dismissal was substantively unfair.
>
> 6.2 The respondent (Toyota SA Motors (Pty) Ltd) must reinstate the applicant (Makhotla Makoma). The applicant must report for work on 30 September 2011.
>
> 6.3 The respondent must pay the applicant 6 months' salary (back-pay) amounting to R218 400.00.
>
> 6.4 The aforesaid payment must be effected within 14 days from the date of receipt of this award.
>
> 6.5 There is no order as to costs."

[12] Section 145 provides, in relevant part:

> "Review of arbitration awards.—
>
> (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—
>
> (a) within six weeks of the date that the award was served on the applicant".

the LRA.[13] Toyota took issue with (a) the fact that the arbitrator prevented it from cross-examining Mr Makhotla as to the true nature of his whereabouts during his absence; (b) the findings of the arbitrator that there was no evidence of habitual absenteeism and that the dismissal was substantively unfair and the award for reinstatement payment of six months' salary (back-pay).

[13] Toyota sought to review the award on grounds that the arbitrator—

(a) did not deal with the fact that Mr Makhotla gave contradictory versions for his absence;

(b) disregarded the impact Mr Makhotla's dishonesty had;

(c) prevented it from cross-examining Mr Makhotla on this issue; and

(d) imposed an "additional criterion" into its disciplinary code by making it necessary to show habitual absenteeism to justify dismissal.

[14] It is common cause that the CCMA failed to deliver a complete recording of the arbitration proceedings to the Registrar of the Labour Court when it delivered the record in terms of rule 7A of the Labour Court Rules.[14] Only one compact disc covering merely 20 minutes of the proceedings was delivered to the Registrar of that Court. Toyota wrote to the CCMA and asked about the balance of the record including other discs. The CCMA did not proffer an explanation for the absence of a complete record of the arbitration proceedings.

[15] It is undisputed that the parties met on 28 November 2012 to try to reconstruct the record. Consequently, pursuant to an agreement between them, their notes were transcribed. Between 18 November 2011 – when the CCMA delivered the record, and 31 January 2013 – when Toyota's attorneys sent typed copies of the parties notes of the proceedings to the Union, little progress was made in preparing a complete record

[13] Id.

[14] Rules for the conduct of proceedings in the Labour Court, GN 1665 *GG* 17495, 14 October 1996 as amended by GN R961 *GG* 18142 of 11 July 1997; GN R1100 *GG* 19196, 4 September 1998 and GN R766 *GG* 22587, 17 August 2001 (with effect from 20 August 2001) (Labour Court Rules).

of the arbitration hearing. Toyota did not comply with rule 7A(8) requiring it to indicate whether it stood by its original notice of motion or wished to amend it.

[16] It is not clear when Toyota received the arbitrator's typed notes. However, the transcribed notes were available for collection from the Labour Court by no later than 23 January 2013. Thereafter no steps were taken by Toyota until after a rule 11 (read with rule 7) application was lodged by the respondents on or about 8 August 2013.[15] The respondents sought orders dismissing the review application on the ground of excessive delay in pursuing the review and making the award an order of Court in terms of section 158 of the LRA.[16] Notably, this was approximately 22 months after Toyota's review application was lodged in the Labour Court.

[17] In its opposition to the dismissal application Toyota set out the various steps it took in an attempt to reconstruct the record. Toyota contended that it could not finalise the review application on the documents before the Court because neither legible notes of the arbitrator nor a transcribed record were available. It said that its principal point of review related to the cross-examination of Mr Makhotla. Toyota argued that the arbitrator's hand-written notes would not chronicle whether the arbitrator had interfered with its cross-examination. It submitted that the delays were the result of the difficulties it had reconstructing the record and that it had not abandoned its review.

[18] The Labour Court remarked about Toyota's "inordinate delay in prosecuting the review".[17] Given that Toyota had "[done] nothing for 18 months" to prosecute the

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[15] Labour Court *ex tempore* judgment at para 4.

[16] Section 158 provides, in relevant part:

> "Powers of Labour Court.—
>
> (1) The Labour Court may—
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> . . .
>
> (c) make any arbitration award or any settlement agreement an order of the Court".

[17] Labour Court *ex tempore* judgment at para 2.

review, the Court took a "robust approach".[18] It dismissed the review application on the basis of the delay, made the award an order of Court and ordered Toyota to pay Mr Makhotla's costs. The Labour Court subsequently dismissed Toyota's application for leave to appeal and so did the Labour Appeal Court.[19]

In this Court

[19] Toyota seeks leave to appeal against the decision of the Labour Court dismissing its review application and making the award an order of Court. It contends that the application involves matters of general public importance[20] and implicates its rights to fair labour practices,[21] administrative justice[22] and access to courts.[23] Toyota argues that the Labour Court was wrong to hold that it had done nothing for 18 months to prosecute its review. It sets out various steps it took to reconstruct the record.

[20] Toyota further takes issue with the Labour Court's conclusions that there was an obligation on the litigants to take notes of the arbitration proceedings, and that it had no prospects of success in the review. In this regard it contends that, given that Mr Makhotla had resigned, it was obvious that the award of reinstatement was

[18] Id at para 10.

[19] In considering leave to appeal, the Labour Court stated that the primary reasons for dismissal of the review application were the failure to place an adequate record before the Court as well as the failure to prosecute the review in an expeditious manner. While it seems that the Labour Court conflates its original ground for dismissal (being the unreasonable delay) with a failure to provide an adequate record, the Court noted that it is permissible to dismiss a review application on either ground. It went further to state, at para 6, that in circumstances where the record cannot be reconstructed "a party simply lets the matter lie and takes no substantial steps for 18 months to prosecute the review application, it is difficult to imagine any other outcome [than] the review application failing". It is noted that Toyota does not appeal against the ruling on leave to appeal.

[20] Toyota contends that granting leave to appeal would be justified in terms of section 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013.

[21] Section 23(1) of the Constitution provides that "[e]veryone has the right to fair labour practices".

[22] Section 33(1) of the Constitution provides that "[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair".

[23] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

incompetent and thus the Court ought not to have made the award an order of Court. Toyota submits that it has prospects of success in the review because of Mr Makhotla's three versions for his absence. It argues that the "prospects of succeeding on review on the basis that the [a]rbitrator's decision was not one which a reasonable decision maker could make, *were patent from the available record*".[24]

[21] According to Toyota, there are competing interpretations of rule 7A of the Labour Court Rules with regard to the rights and remedies available to litigants who are alleged not to have prosecuted their review timeously.[25] This is said to be the case also where a litigant cannot properly bring a review due to the failure of the CCMA to keep an adequate recording of arbitration proceedings. Toyota submits that these are matters of general public importance and that the interests of justice warrant this Court determining them.

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[24] Emphasis added.

[25] The relevant parts of rule 7A are as follows:

> "7A Reviews
>
> . . .
>
> (3) The person or body upon whom a notice of motion in terms of subrule (2) is served must timeously comply with the direction in the notice of motion.
>
> (4) If the person or body fails to comply with the direction or fails to apply for an extension of time to do so, any interested party may apply, on notice, for an order compelling compliance with the direction.
>
> (5) The registrar must make available to the applicant the record which is received on such terms as the registrar thinks appropriate to ensure its safety. The applicant must make copies of such portions of the record as may be necessary for the purposes of the review and certify each copy as true and correct.
>
> (6) The applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body.
>
> . . .
>
> (8) The applicant must within 10 days after the registrar has made the record available either—
>
> (a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit;
>
> or
>
> (b) deliver a notice that the applicant stands by its notice of motion.
>
> (9) Any person wishing to oppose the granting of the order prayed in the notice of motion must, within 10 days after receipt of the notice of amendment or notice that the applicant stands by its notice of motion, deliver an affidavit in answer to the allegations made by the applicant."

[22] Mr Makhotla supports the Labour Court's decision. He contends that, because of the prolonged delay, Toyota had abandoned the review application. Mr Makhotla says that for a period of almost two years from launching the review, Toyota used delaying tactics to frustrate him. He argues that Toyota failed to give an adequate explanation for the delay and take steps in terms of the Labour Court Rules and the Practice Manual of the Labour Court of South Africa (Practice Manual).

Directions

[23] In directions issued by the Chief Justice on 18 February 2015, the parties were directed to provide short written submissions to this Court on—

(a) whether an order for reinstatement is competent when an employee has resigned prior to the grant of that order;

(b) whether the dismissal of the review, on the basis that the record of the arbitration proceedings is incomplete, is a denial of Toyota's right to fair administrative justice;

(c) who bears the onus/obligation to produce a proper and complete record in anticipation of the prosecution of review proceedings; and

(d) what are the consequences in review proceedings when the arbitrator or the parties to the dispute are unable to produce a proper and complete record?

Leave to appeal

[24] The first question for determination is whether leave to appeal should be granted. There can be no doubt that this Court has jurisdiction over this matter because it concerns, among other things, the right to fair labour practices in terms of section 23 of the Constitution.[26] Nonetheless, this Court retains the discretion whether to grant leave to appeal. Whether it is in the interests of justice for leave to appeal to be granted depends on a careful weighing up of relevant considerations. Chief of

[26] Above n 21.

these, although not decisive, is whether there are prospects of success.[27] Differently put, one has to make an assessment of Toyota's prospects of success as one of the factors relevant to the proper exercise of the Court's discretion. The question arises whether the Labour Court was wrong in dismissing the review application on the basis of an inordinate delay in pursuing the review.

Delay

[25] The application to dismiss Toyota's review in the Labour Court was launched in terms of rules 11 and 7 of the Labour Court Rules. These rules deal with interlocutory applications and procedures not specifically provided for in the other rules and reviews, respectively. In relevant part, rule 11 reads:

> "(1) The following applications must be brought on notice, supported by affidavit:
>
> (a) Interlocutory applications; [and]
>
> (b) [O]ther applications incidental to, or pending, proceedings referred to in these rules that are not specifically provided for in the rules . . . .
>
> . . .
>
> (4) In the exercise of its power and in the performance of its functions, or in any incidental matter, *the court may act in a manner that it considers expedient in the circumstances to achieve the object of the [LRA]*." (Emphasis added.)

[26] As to what Toyota's obligations were concerning the record in its review application, rule 7A(5) obliged it to make copies of the record or portions of the record "necessary for the purposes of the review" and sub-rule (6) required it to furnish the "record or portion of the record" to the registrar and the other parties. Further, sub-rule (8) provides:

> "The applicant must within 10 days after the registrar has made the record available either—
>
> (a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit;
>
> or

[27] *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 25.

(b) deliver a notice that the applicant stands by its notice of motion."

[27] Sub-rule (9) required the respondents to file answering affidavits once in receipt of the notice contemplated in sub-rule (8).

[28] On 12 March 2012, after being put under pressure by the Union, Toyota provided the same documents as had been given to it by the registrar from the CCMA, but without a transcript of the arbitrator's handwritten notes. It made a further attempt to comply with rule 7A(6) on 27 August 2013 after the dismissal application had been brought.

[29] In dealing with the question of delay, the Labour Court said the following:

> "During 2012, it became apparent that there were problems with the record – not all of the evidence had been properly recorded or could be transcribed. After many months of delay, Toyota finally convened a reconstruction meeting. Certain steps were taken after that to have notes of the various representatives and the arbitrator typed up, but by early 2013, it became apparent that the record was very poor and that there was no further steps to be taken in reconstructing the record. This was certainly the view that Toyota took of the matter at the time.
>
> It is worth noting that the notes kept by the representatives are also fairly sparse and this, no doubt, contributed to the difficulties of reconstructing the record. Blame for this cannot be assigned to the arbitrator. Be that as it may, by January or February 2013, Toyota took the view that it had done all it reasonably could to reconstruct the record and the record, as it was, was not sufficient to pursue the review. Toyota then did nothing further in the review, until several months later, [the Union] launched an application to dismiss the review application. Toyota then responded by opposing the application, and in the review itself, by filing the record and (a few days ago) by filing a Notice in terms of Rule 7A(8).
>
> . . .
>
> The Labour Relations Act, case law and the practice manual makes it quite clear that expeditious resolution of labour disputes is a fundamental requirement of fairness and of the Act itself. An applicant who does nothing for 18 months in prosecuting a

review, should not be surprised when a court takes a robust approach and dismisses the review on the grounds of delay."[28]

[30] In determining the correctness or otherwise of the remarks by the Labour Court, it is necessary to set out the sequence of the steps that Toyota took from the date of the arbitration award until the launching of the dismissal application. The sequence follows:

- 19 September 2011 - The arbitrator made the award.
- 19 October 2011 - Toyota launched the application for the review of the award.
- 18 November 2011 - The CCMA delivered an incomplete recording of the record of arbitration proceedings to the Labour Court.
- 30 November 2011 - Toyota instructed its correspondent attorneys to uplift the record.
- 24 January 2012 - Toyota followed up on the instruction to its correspondent attorneys.
- There is an unexplained delay of two months from 30 November 2011 to 24 January 2012. The delay is over the Christmas period. However, according to rule 7A(8) of the Labour Court Rules, Toyota had 10 days from the date the registrar made the record available to give notice of an amendment, variation of, or addition to its notice of motion or to abide by its existing notice of motion. Toyota did not give the notice. Toyota had not even given the initial instruction to its correspondents to uplift the record eight court days into this period.
- The correspondent uplifted the record on 27 January 2012 and sent it to Toyota.
- 2 February 2012 - Toyota received the record from its correspondent attorneys. By this date Toyota should have become aware of the

[28] Labour Court *ex tempore* judgment at paras 3, 4 and 10.

absence of a full recording of the arbitration proceedings and initiated steps to reconstruct the record.

- 3 February 2012 - Toyota's attorneys sent a letter to the Union advising that they had received the record, had requested their transcribers to attend to the transcription and would be serving and filing in terms of rule 7A(6) shortly.
- 29 February 2012 - Toyota instructed the correspondent attorneys to uplift the arbitrator's handwritten notes.
- 6 March 2012 - Toyota sent the arbitrator's handwritten notes for transcription.
- 12 March and 19 March 2012 - Toyota delivered the record (without any transcript of the arbitration hearing) in terms of rule 7A(6). The Union requested that the outstanding transcribed record be delivered and Toyota responded explaining that the recording was incomplete and saying that it had sent the arbitrator's notes for transcription.
- 7 June 2012 - Toyota received a letter from the CCMA advising that they could not locate any further recordings. The CCMA offered to set the matter down for reconstruction.
- 20 June 2012 - Toyota received correspondence from the transcribers advising that approximately 70% of the handwritten notes were illegible and that they would attempt finalising them.
- 27 July 2012 - Toyota addressed correspondence to their transcribers following up with regards to the handwritten notes. There was no response.
- 23 August 2012 - Toyota forwarded further correspondence to their transcribers regarding the handwritten notes.
- 23 August 2012 - Toyota informed the CCMA that the arbitrator's handwritten notes were illegible and asked the CCMA to arrange a reconstruction meeting. There is no explanation why it took so long to take up the CCMA's offer. As it is, the CCMA never responded and Toyota never followed up.

- 5 October 2012 - Toyota's attorneys wrote to the Union suggesting that the parties agree to the remittal of the arbitration to the CCMA for rehearing.
- 22 October 2012 - Toyota wrote to the Union and requested an update on the record.
- 9 November 2012 - The Union, having only received Toyota's 5 October 2012 letter on 6 November 2012, rejected the suggested remittal and demanded that a meeting be held to reconstruct the record of the hearing.
- 28 November 2012 - A meeting to reconstruct the record was held between the parties. There is no explanation why it took so long to do so.
- 23 January 2013 - The arbitrator's transcribed handwritten notes were filed and ready for collection.
- 29 January 2013 - Toyota's attorneys informed the Union that the notes were available and that they had instructed their correspondents to uplift them. They further stated that the transcription of the parties' handwritten notes was almost complete.
- 31 January 2013 - Reconstruction of the record was completed and Toyota transmitted the transcribed notes of the parties (but not of the arbitrator) to the Union requesting confirmation of the correctness of the transcription. Toyota said it would revert once it had obtained the arbitrator's handwritten notes from its correspondents. However, Toyota never reverted.
- 8 August 2013 - The respondents lodged the application to dismiss the review in terms of rules 11 and 7.

[31] When the application for dismissal was lodged Toyota had not delivered the notice amending and varying its existing notice together with supplementary affidavits, if any, as required by rule 7A(8). These papers should have been delivered by 2 December 2011. Notably, the notice and affidavit dated 4 July 2014, purportedly

in terms of that rule, were only served on the respondents and filed by handing them up in Court at the hearing of the dismissal application on 9 July 2014.[29] No attempt seems to have been made to serve and file the affidavit before the hearing, despite its finalisation five days earlier.

[32] In that affidavit Toyota, for the first time and after a prolonged delay, asked the Labour Court to "provide direction as to how the matter should proceed" and to refer the matter back to the CCMA for consideration before a new commissioner.

[33] I have read the judgment of my Colleague, Zondo J. He is of the view that the respondents should have delivered answering affidavits. When regard is had to what is stated in [31] and [32] above, Mr Makhotla would have been required, in terms of rule 7A(8), to file the answering affidavit barely by 23 July 2014. Unsurprisingly, by this date the Labour Court had delivered its decision on the dismissal application.

[34] Toyota did not challenge the proposition that the Labour Court had the power to dismiss its review application if it unreasonably delayed in pursuing the review. It needs to be stressed that when assessing the reasonableness of a delay, sight must not be lost of the purpose of the LRA.[30] This purpose was articulated by Ngcobo J in *CUSA*:

> "The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring about the expeditious resolution of labour disputes. These disputes, by their very nature, require speedy resolution. Any delay in resolving a labour dispute could be detrimental not only to the workers who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have a detrimental effect on an employer who may have to reinstate workers after a number of years. The benefit

[29] Needless to say, the notice and affidavit in terms of rule 7A(8) were out of time. Toyota ought to have applied to the Labour Court to condone (in terms of rule 12(3)) non-compliance with the period prescribed in the Labour Court Rules. It did not.

[30] See in this regard the Explanatory Memorandum on the Labour Relations Bill: *Explanatory Memorandum* (1995) 16 ILJ 278 at 318. See also this Court's reliance on the Memorandum in *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008 (4) 367 (CC); 2008 (3) BCLR 251 (CC).

of arbitration over court adjudication has been shown in a number of international studies."[31] (Footnotes omitted.)

[35] This Court went on to elaborate:

"The absence of appeal from arbitral awards was intended to speed up the process of resolving labour disputes and free it from the legalism that accompanies other formal judicial proceedings. By adopting this simple, quick, cheap and informal approach to the adjudication of labour disputes, Parliament intended that, as far as it is possible, arbitral awards should be final and should only be interfered with in very limited circumstances. In order to give effect to these objectives, Parliament deliberately decided against appeals from arbitral awards and opted for the narrowest species of review, namely that specified in section 145 of the LRA.

Consistent with the objectives of the LRA, commissioners are required to 'deal with the substantial merits of the dispute with the minimum of legal formalities'. This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to 'conduct the arbitration in a manner that the commissioner considers appropriate'. But, in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And . . . they must act fairly to all the parties as the LRA enjoins them to do."[32] (Footnotes omitted.)

[36] From the sequence of steps set out above,[33] it is plain that in 22 months Toyota did very little to prosecute the review. The delay is wholly excessive. There is no explanation for the delays between 30 November 2011 and 24 January 2012, and 19 March and 23 August 2012. The approach to procuring a full record of the hearing

[31] *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 63.

[32] Id at paras 64-5.

[33] See above [30].

was not diligent, the prosecution of the review was not expeditiously pursued and the explanation for the delays is not reasonable.

[37] Toyota ought to have initiated steps to reconstruct the record as early as 2 February 2012, when it received an incomplete record from its correspondent attorneys. It did not. Instead, it sat back until March 2012 when it delivered the incomplete record. The respondents had requested that the outstanding transcribed record be delivered. Toyota replied to the respondent alleging incompleteness of recorded proceedings and informed the Union that it was "being pro-active in having the handwritten notes transcribed". Unacceptably, without any sense of the need to act expeditiously, Toyota only followed up with its transcribers thereafter twice in a period of five months as to what progress was being made in the transcription.

[38] What is more, for the period of approximately seven months, between March and October 2012, the respondents were left in the dark about the status of the record. During that period Toyota did not communicate with the respondents, while it communicated with the transcribers and the CCMA. This could not have been insignificant for the respondents. It explains why the respondents, obviously having been at the receiving end, felt the effect of the delay, took the initiative and requested a meeting with a view to reconstruct the record. Yet again, Toyota persisted with its dilatory tactics and proposed a hearing *de novo* (anew). This is not consistent with a reviewing party that is eager to expedite the resolution of the dispute. The further immediate rejection by the respondents of the suggested rehearing, and their proposal of reconstruction of the record and a reconstruction meeting is also telling.

[39] I have dealt, above, with the delay from the date of launching the review, October 2011, until about February 2013. Another hurdle of an added inordinate delay that Toyota had to surmount, which remains unexplained, relates to the period between about February and August 2013. It is common cause that the transcription of the arbitrator's notes was done on 22 January 2013 and the transcribed notes were subsequently filed by the CCMA with the Registrar of the Labour Court on

23 January 2013. These notes were made available to Toyota on or about 29 January 2013. Despite all of this, Toyota only delivered the reconstructed record on 27 August 2013 – some seven months later. This was after Mr Makhotla's application to dismiss the review and make the award an order of Court was lodged.

[40] It is correct that Toyota delivered the representative's notes to the respondents by the end of January 2013 and requested them to peruse the notes and indicate whether they accepted them. It is also true that the respondents did not respond. In my view, the respondents' reticence does not detract from the fact that Toyota, as *dominus litis* (litigant in charge of the suit), could still have taken appropriate steps to prosecute the review. For example, it could have approached the Court for a direction on the further conduct of the review application if it really intended to pursue it.[34] This is fortified by the fact that, when Toyota handed up its supplementary affidavit in Court on 9 July 2014, it asked the Labour Court, for the first time, to give that direction.

[41] In any event, that failure to communicate cannot, in itself, be a reason to come to the assistance of Toyota, and be used to countenance its dilatoriness in the conduct of the litigation. Interestingly, in certain cases, this Court has refused to come to the rescue of litigants who had delayed for a period far less than the delay in this case.[35]

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[34] Rule 11(1)(c) of the Labour Court Rules provides:

> "(1) The following applications must be brought on notice, supported by affidavit:
>
> . . .
>
> (c) any other applications for direction that may be sought from the court."

[35] See for example *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School and Others* [2003] ZACC 15; 2003 (11) BCLR 1212 (CC) (*Settlers*) at para 11; *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) (*Brummer*) at para 3. The delays in these cases did not concern the effective resolution of labour disputes. They related to the alleged unconstitutional interpretation of the Employment Educators Act 76 of 1998 and to an attempt to set aside a sale in execution of the applicant's right in pending litigation, respectively. In *Settlers*, the applicant applied for leave to appeal to this Court nine months after the Supreme Court of Appeal dismissed an application for leave to appeal from the High Court. In *Brummer*, the delay was more than nine months from the delivery of the judgment of the Supreme Court of Appeal. In both cases, this Court refused condonation for the late filing of the applications for leave to appeal on the ground that it was not in the interests of justice that condonation be granted.

[42] The delay between the end of January and August 2013 was excessive and no explanation, at all, is given for the seven months' delay. It not only demonstrates an obvious lack of attention to matters that plainly called for explanation, but also evidences a failure by Toyota to take this Court into its confidence. It is not surprising that Mr Makhotla approached the Labour Court for an order dismissing the review application and making the award an order of Court.

[43] Toyota, as the party seeking review, had an obligation, when it became apparent that there were difficulties with the record, to have initiated steps towards reconstruction. In *Lifecare* the Labour Appeal Court had occasion to determine how the reconstruction of the record should be undertaken by a party whose obligation it is to do so.[36] The Court said the following:

> "A reconstruction of a record (or part thereof) is usually undertaken in the following way. The tribunal (in this case the commissioner) and the representatives . . . come together, bringing their extant notes and such other documentation as may be relevant. They then endeavour, to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavour is adequate for the purpose of the appeal or review is for the court hearing same to decide, after listening to argument in the event of a dispute as to the accuracy or completeness.
>
> . . .
>
> When it appeared that there were difficulties with regard to the record, it was the obligation of Lifecare, as the reviewing party, to initiate the enquiries and steps which have been set forth in this judgment. It should not have been left to the Labour Court at first instance, and to this Court on appeal, to resolve problems which were other than residual or intractable."[37]

[36] *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA and Others* [2003] ZALAC 3; [2003] 5 BLLR 416 (LAC) (*Lifecare*) per Comrie AJA with the concurrence of Zondo JP (as he then was) and Jappie AJA.

[37] Id at paras 17 and 19.

[44] These remarks apply with equal force here. Moreover, the Labour Court's Practice Manual, although it came into effect in April 2013, enjoined Toyota to approach the Judge President for a direction on the further conduct of the review application, if the record of the proceedings under review had been lost, or if the recording of the proceedings was of poor quality. According to the Practice Manual, the Judge President would then allocate the file to a Judge for a direction, which might include the remission of the matter to the person or body whose award is under review, or where practicable, a direction to the effect that the relevant parts of the record be reconstructed.[38] Whilst the Practice Manual came into effect part-way through the litigation, Toyota failed to make use of it. By April 2013, anyway, Toyota had proposed a hearing *de novo* and held the view that the reconstructed record, as it was, was not sufficient to pursue the review application.

[45] Excessive delays in litigation may induce a reasonable belief, especially on the part of a successful litigant, that the order or award had become unassailable.[39] This is so all the more in labour disputes. Mr Makhotla was entitled to approach the Labour Court for the relief he sought in order to have closure and get on with his life.

[46] Toyota failed to discharge its obligation as envisaged by the Labour Appeal Court in *Lifecare* and by the LRA. The Labour Court cannot thus be faulted for having dismissed the review application on the basis of the inordinate delay, some part of which is not reasonably explained and another part wholly unexplained. The Court, enjoined under rule 11,[40] acted in a manner it considered expedient in the circumstances to achieve the object of the LRA. To criticise it and grant leave to appeal as my colleague, Zondo J does, especially in the circumstances of this case,

[38] See item 11.2.4 of the Practice Manual which came into effect on 2 April 2013.

[39] *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) (*Van Wyk*) at para 31. The remarks were made by this Court, in the context of an application for condonation of a delayed application for leave to appeal to this Court. However, the principle finds application here.

[40] See above [25].

would not only undermine the object of the LRA regarding the expeditious and effective resolution of labour disputes, but would also not be in the interests of justice.

[47] The application for leave to appeal should thus be dismissed on the basis of the excessive delay, alone.

[48] In any event, there is no merit in Toyota's original grounds of review.[41] For our purposes, I focus on the point Toyota referred to in the minutes of the reconstruction meeting as the "principal point of review", namely that its representative was prevented from cross-examining Mr Makhotla as to the three reasons provided for his absence. Both the written argument submitted by Toyota to the arbitrator and the reconstructed record show that the converse is true. This is borne out by what appears in the reconstructed record:

> "CROSS-EXAM
>
> Q – Absent Monday – Tues send message going [to] Drakensburg
>
> A – Yes, Tues morning
>
> Q – But she only got same at night
>
> A – Correct
>
> Q – So prev stat incorrect [previous statement incorrect]
>
> A – Tues, evening
>
> Q – Tues, still clear your mind
>
> A – [P]rocess rescuing the girls still conti [continuing] till Thursday

[41] These include that the arbitrator "handed down an award which was not an award of a reasonable and objective decision maker, failed to apply his mind, misconducted himself, committed a gross irregularity, exceeded his powers by acting unreasonably or unjustifiably in:

> 10.1.1 Failing to recognise that [Mr Makhotla's] defence was contradictory and in ignoring the two versions put forward as to his absence namely:
>
> a. That he had gone to the Drakensburg to clear his head;
>
> b. That he had to rescue a girl from an initiation school;
>
> 10.1.2 Failing to appreciate the dishonest nature of such defence, the significance of such dishonesty on [Mr Makhotla's] defence as set out in the Constitutional Court in the matter of *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC).
>
> 10.1.3 Preventing [Toyota] from cross-examining [Mr Makhotla] as to the real reasons for his absence.
>
> 10.1.4 Imposing an additional criterion in respect of [Toyota's] code in requiring for there to be some form of 'habitual absenteeism' to justify a termination."

Q – So not going to ----clear you head

A – Yes, could not be specific on SMS

Q – But acc [according] to co witness said in your call said not feeling well

A – Not correct

Q – [S]o 3 exp [explanations] for absence – so don't know why absent – so lies

A – Not correct – your opinion

. . . ."

[49] There is another matter. Toyota raised a new point before this Court. It said that Mr Makhotla's notice of resignation precluded the arbitrator from making an order of reinstatement, because his contract of employment would, in any event, have come to an end on 31 March 2011. The point was not raised at any previous stage, whether before the arbitrator or the Labour Court. It would be unfair to Mr Makhotla if Toyota were to be permitted to raise the point for the first time at this stage. Needless to say, it was not a point that the Labour Court ought to have taken into account in its consideration of Toyota's prospects of success as it was not raised before it. My colleague, Zondo J, is of the view that if the arbitration award is allowed to stand Toyota may end up paying Mr Makhotla around R2 million or even more, and that this would be unjust.[42] I do not think this is correct. The arbitrator expressly limited the payment of back-pay to six months' salary in the amount of R218 400.[43] There is no reason why Toyota would be required to pay any more than this.

[50] Having concluded that the Labour Court was correct in dismissing the review application on the basis of the excessive delay and that there was no merit on the said two grounds of review, it is not necessary to deal with the further grounds of review. The application falls to be dismissed.

[42] See [161] of the judgment by Zondo J.

[43] See above n 11.

Condonation

[51] Toyota also seeks condonation for the late filing of its statement of facts, which was delayed by two days. The application is not opposed and respondents are not prejudiced. The explanation is acceptable. Condonation should be granted.

Costs

[52] Toyota seeks costs in the appeal despite its dilatory behaviour. This runs counter to the objects of the LRA, namely, a simple, quick, cheap and informal approach to the adjudication of labour disputes.[44] Toyota's conduct warrants the granting of costs in favour of the respondents.

Order

[53] The following order is made:

1. Condonation for the late filing of the statement of facts is granted.
2. Leave to appeal is refused with costs.

ZONDO J:

Introduction

[54] This is an application brought by Toyota SA Motors (Pty) Ltd (Toyota) for leave to appeal against in effect the judgment and order of the Labour Court after the Labour Appeal Court refused it leave to appeal. The judgment of the Labour Court was given by Fourie AJ in favour of the third and fourth respondents. The third and fourth respondents are, respectively, the Retail and Allied Workers Union (union) and Mr Makoma Makhotla (Mr Makhotla), a former employee of Toyota. The union and Mr Makhotla brought an application in the Labour Court in terms of Rules 7 and 11 of

[44] Above [34] and [35].

the Rules of the Labour Court. They sought an order dismissing an application that Toyota had brought to review and set aside an arbitration award that had been issued by the second respondent, a commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA) (Commissioner) against Toyota and in favour of Mr Makhotla.

[55] The arbitration award was given in a dispute between Toyota, on the one hand, and, the union and Mr Makhotla, on the other, about the fairness of Mr Makhotla's dismissal from Toyota's employ. The Commissioner issued his award on 19 September 2011. He found that Mr Makhotla's dismissal was substantively unfair and ordered Toyota to reinstate him and pay him a back pay of R218 400. In the award the Commissioner directed Mr Makhotla to report for duty on 30 September 2011. The back pay amount represented the remuneration that the Commissioner believed Mr Makhotla would have earned from Toyota from the date of dismissal to the date of his reinstatement but for the dismissal. That was a period of about six months. It is this award that Toyota sought to have reviewed and set aside.

[56] I have had the opportunity of reading the judgment prepared by my Colleague, Nkabinde J (majority judgment). Although the majority judgment concludes that this Court has jurisdiction, it concludes that leave to appeal should be refused. For reasons that I shall indicate later, I agree that this Court has jurisdiction but I am unable to agree that leave to appeal should be refused. In my view, not only should leave to appeal be granted but also the appeal should be upheld.

Background

[57] The majority judgment has sufficiently set out the facts which gave rise to the dismissal of Mr Makhotla from Toyota's employ. It has also set out sufficiently the evidence that can be gathered from the affidavits before the Labour Court and the incomplete reconstructed record that was before that court when it made the decision against which leave to appeal is sought. I, therefore, do not propose to set out those

facts in this judgment except in so far as they may be necessary for a proper understanding of this judgment and my approach to the issues.

[58] Briefly, the facts I wish to emphasise are:

(a) Mr Makhotla was employed by Toyota as a manager and had been in Toyota's employ for about five years when he was dismissed. Toyota had a rule that, if an employee was absent from work for four consecutive days without permission or a valid reason or acceptable explanation, that would be a dismissible offence. On 28, 29 February, 1 and 2 March 2011 Mr Makhotla was absent from work. He had not obtained permission to be absent from work ahead of the first day of his absence nor did he obtain permission at any stage thereafter. According to Toyota, on the first day of his absence he called a manager other than his immediate superior and told him that the reason he was not at work was that he was not feeling well. That manager was Mr Hawkins.

(b) On the second day he sent his immediate superior, Mrs Mukhavhuli an SMS to the effect that he was alone in the Drakensberg to "clear" his "mind". The SMS read:

> "Hi Boss, I'm sorry I've just taken sometime (3 days) off just to clear my mind. I'm on Drakensberg by myself. Makoma."

He, thereafter, sent another one that read:

> "Sorry Boss. It came unexpectedly it won't happen again."

(c) On his return to work after four days of absence Mr Makhotla said that he was absent because he had gone to rescue certain girls from an initiation process. Toyota took a decision to bring a disciplinary charge against him. On 7 March 2011 Mr Makhotla submitted a letter of resignation to Toyota. The letter of resignation read:

> "Dear Mrs Mukhavhuli,
>
> I am writing to formally notify you that I am resigning from my position as Hino Training Manager & Special Projects with Toyota Motors South Africa. My last day of employment will be

> 31st March 2011, as per the responsibilities under terms of my employment contract.
>
> I appreciate the opportunities I have been given at Toyota Motors South Africa and your professional guidance and support. I wish you and the company every moment of success in the future.
>
> Thanking you in co-operation.
>
> Regards,
>
> Makoma A.K. Makhotla
> Employee Number: 100358."

(d) Toyota decided to proceed with the disciplinary action against Mr Makhotla notwithstanding his letter of resignation. He was found guilty of misconduct and was dismissed on 24 March 2011. That was seven days before the expiry of his notice period when his resignation would take effect and when he would have left Toyota's employment.

Arbitration

[59] After the conciliation process had failed to produce a resolution of the dispute, the dispute was arbitrated by the Commissioner in terms of the Labour Relations Act, 1995[45] (LRA). Toyota led the evidence of four witnesses. Mr Makhotla testified in support of his case but did not call any witness. The Commissioner concluded that he could not say that the dismissal was fair. He then held that it was fair and equitable to order Toyota to reinstate Mr Makhotla. He made an award in the following terms:

> "6.1 The applicant's dismissal was substantively unfair.
>
> 6.2 The respondent (Toyota SA Motors (Pty) Ltd) must reinstate the applicant (Makhotla Makoma). The applicant must report for work on 30 September 2011.
>
> 6.3 The respondent must pay the applicant 6 months' salary (back pay) amounting to R218 400.00.

[45] 66 of 1995.

6.4 The aforesaid payment must be effected within 14 days for the date of receipt of this award.

6.5 There is no order as to costs."

[60] Two features of the award immediately catch one's eye. The one is that, although an award of reinstatement is made, the reinstatement is not with retrospective effect. The other is that the Commissioner awarded Mr Makhotla an amount of R218 400 as back pay or salary representing six months' remuneration.

[61] The questions that arise out of the terms of this award are: What does the award mean when it says Toyota "must reinstate [Mr Makhotla]"? Does the award mean that Toyota has to put Mr Makhotla in the position in which he was in terms of his contract of employment when he was dismissed? Does the award mean that Toyota has to put Mr Makhotla in the position in which but for the dismissal, he would have been in at the time the arbitration award was issued? These questions arise as a result of the fact that, when Mr Makhotla was dismissed, he was serving his notice period for the termination of contract of employment and he was due to leave Toyota's employ in seven days' time.

Review application

[62] Toyota launched its review application timeously but experienced various difficulties relating to the record of the arbitration proceedings. The difficulties arose out of the fact that the CCMA and the Commissioner either lost a substantial part of the electronic recording of the arbitration proceedings or failed to ensure that the arbitration proceedings were recorded in their entirety.

[63] Various attempts were made to ensure a reconstructed record but, in the end, the reconstructed record that was lodged was not complete. The review application was launched in October 2011. In August 2013 the union and Mr Makhotla launched an application in the Labour Court for an order dismissing Toyota's review application and making the arbitration award an order of the Labour Court.

[64] By the time of the hearing Toyota had delivered its supplementary affidavit in addition to its founding affidavit and as complete a record as could be delivered in the circumstances. Toyota had also indicated that it was abiding by its notice of motion in the review application and had called upon the respondents to deliver answering affidavits should they wish to oppose the review application.

[65] The union and Mr Makhotla pressed ahead with their application for the dismissal of Toyota's review application without delivering answering affidavits. They contended that Toyota's review application should be dismissed because Toyota had unduly delayed in delivering a complete record and its review application had poor prospects of success. The Labour Court, through Fourie AJ, gave an *ex tempore* judgment.[46] He granted the union's and Mr Makhotla's application and dismissed Toyota's review application without adjudicating it on the merits. The Labour Court also made the arbitration award its order.[47]

[66] The Labour Court dismissed Toyota's application for leave to appeal to the Labour Appeal Court on the basis that there were no reasonable prospects of success. A petition to the Labour Appeal Court was also dismissed for the same reason. Thereafter, Toyota lodged with this Court an application for leave to appeal.

Jurisdiction

[67] There is no doubt this matter engages this Court's jurisdiction. It concerns the interpretation of the LRA which, it is trite by now, is a constitutional issue. The Labour Court dismissed Toyota's review application without adjudicating the merits thereof. The question whether the Labour Court was correct or justified in doing so is one of the questions that arise. Another question that arises is whether a review court in general and the Labour Court, in particular, is justified, in dismissing a review

[46] Labour Court *ex tempore* judgment above n 3.

[47] In terms of section 158(1)(c) of the LRA. See above n 16.

application without adjudicating it on the merits in a case where the review applicant launched the review application timeously and has delivered all its affidavits and as complete a record as is possible when the review court hears the application to have such a review application dismissed.

[68] Another question that arises is whether an arbitrator appointed under the LRA who is assigned the arbitration of a dismissal dispute arising out of a dismissal for alleged misconduct may properly determine such a dispute without deciding whether the employee was guilty of the misconduct for which he was dismissed. Put differently, one of the questions that arise is whether in such a case an arbitrator may assume that the employee is guilty of misconduct without so deciding and then conclude that the dismissal is unfair because as a sanction it was unwarranted.

[69] A further question that arises is whether, in the light of the meaning of the word "reinstate" and the aim of reinstatement as articulated in the judgment of this Court in *Equity Aviation*,[48] an employee who would have left the employer's employ by reason of resignation at some stage after the dismissal but before the arbitration of the dismissal dispute may competently be reinstated. Another question is whether an award for the payment of back pay in such a case is competent.

Leave to appeal

[70] The questions that arise are important questions. This Court has never considered them. They affect a significant section of our society, workers and employers, trade unions and employers' organisations. For reasons that will appear later in this judgment, I am of the view that there are reasonable prospects of success. In my view, leave to appeal should be granted.

[48] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2008] ZACC 16; 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) (*Equity Aviation*) at para 36.

The appeal

[71] The majority judgment reaches its conclusion on the basis that there was only one ground upon which the Labour Court dismissed Toyota's review application. This is not correct. On my reading of the Labour Court's *ex tempore* judgment and the judgment on leave to appeal, it dismissed Toyota's review application on three grounds. They are that:

(a) Toyota did "nothing for almost 18 months to improve the record" of the arbitration proceedings sought to be reviewed; it said this in the *ex tempore* judgment but in the judgment on leave to appeal, it said that Toyota failed to timeously prosecute its review application.[49]

(b) Toyota's review application did not have "excellent" prospects of success; indeed, the Labour Court said that Toyota's review application had poor prospects of success and there was "no prospect of quickly supplementing the record".

(c) Toyota failed to place an adequate record before the Court.[50]

[72] The Labour Court did not accept that its decision was based only on Toyota's delay. In its judgment refusing Toyota leave to appeal,[51] it said that there were two primary grounds on which its decision was based. It put it thus:

> "The primary grounds on which the judgment is based are the failure to place an adequate record before the Court, and the failure to prosecute the review application timeously and diligently."[52]

The fact that it said there were two primary grounds means that there could be other grounds that it did not regard as primary grounds.

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[49] See Labour Court *ex tempore* judgment above n 3 at paras 8-10.

[50] *Toyota SA Motors (Pty) Ltd v The CCMA and Others* case no: JR2627/11 (Labour Court judgment on leave to appeal) at para 2.

[51] Id.

[52] Id.

[73] The Labour Court said in effect that, if Toyota had had "excellent prospects" of success in its review application, it would not have been inclined to dismiss Toyota's review application without the adjudication of its merits. It said that it would have been inclined to put the parties on terms for the further conduct of the review application. The question is whether there was a proper basis for the Labour Court to use "excellent prospects" in that sentence.

[74] If the Labour Court used "excellent prospects" as a test, it would have erred because the norm is that the concept of reasonable prospects of success is generally used. However, if it used the concept of "excellent prospects" in the sense that they could or would make up for what it considered a long delay or to make up for what it may have seen as an inadequate explanation, that would have been correct. Unfortunately, the judgment leaves us speculating as to the sense in which the Court used the concept of "excellent prospects".

[75] One would have expected the Court to first set out the principles which governed the application before it. If it had done so, one would see where "excellent prospects" featured in those principles. For purposes of this judgment I am prepared to say no more than that the Court's assessment of Toyota's prospects of success played an important role in the decision.

[76] The Labour Court said that Toyota's prospects of success were a relevant factor even though they were not determinative.[53] However, it then went on to say - which supports the proposition that its assessment of the prospects of success weighed heavily with it - "had the prospects of success been excellent or had there been a prospect of quickly supplementing the record, I would have been inclined to not grant the application at this stage but perhaps to put the parties on terms as to the further conduct of the review application". In the rest of the paragraph the Court said that the reconstructed record was not going to improve, that Toyota had done nothing for

[53] Id at para 9.

18 months "to improve the record" and that "the prospects of success do not militate against dismissing the review application on the grounds of delay".

Are we at large to decide the matter as we see it?

[77] Are we at large to decide this matter on the basis of our own view or are we limited to interfering in the decision of the Labour Court only on the well-known limited grounds applicable to interference with the exercise of a true or narrow discretion? In my view we are at large to decide this case on the basis of our own view because the Labour Court was not exercising a true or narrow discretion but it was exercising the so-called wide discretion.

[78] In *Knox D'Arcy* the Appellate Division said that the statement that "a court has a wide discretion seems to mean no more than that the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision".[54] In *MWASA* the Court held that the power to determine whether a dismissal constituted an unfair labour practice fell under the so-called wide discretion.[55] It seems to me that, the power to determine whether there is a good cause or sufficient cause would also fall under this category. The Court said the following about the so-called narrow or true discretion:

> "The essence of a discretion in this narrower sense is that, if the repository of power follows anyone of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a court would have preferred him to have followed a different course among those available to him."[56]

[54] *Knox D'Arcy Ltd and Others v Jamieson and Others* [1996] ZASCA 58; 1996 (4) SA 348 (AD); [1996] 3 All SA 669 (A) at 361I.

[55] *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* [1992] ZASCA 149; 1992 (4) SA 791 (AD); [1992] 2 All SA 453 (AD) (*MWASA*) at 800E-F.

[56] Id. See also *Shepstone & Wylie v Geyser NO* 1998 (3) SA 1036 (SCA) and *Hix Networking Technology v System Publishers Pty Ltd* 1997 (1) SA 391 (A).

This Court's judgment in *Trencon* is to the same effect.[57]

[79] A good example of a narrow discretion is to be found in the determination of a sentence by a trial court. That is an example of the kind of discretion the exercise of which can only be interfered with on the well-known limited grounds. In my view the matter before the Labour Court was not one in which it had available to it a number of courses each of which it could correctly choose. Therefore, this was not a matter involving the exercise of a true or narrow discretion. That being the case, we are at large to decide the matter on the basis of our own view. However, even if the Labour Court was exercising a narrow discretion, we would have been entitled to interfere with it because that Court misdirected itself in certain respects.

[80] One of these is that it overlooked to take into account the issue of prejudice. Another one is that it overlooked the fact that Mr Makhotla was dismissed at a time when he was serving his notice period and the Commissioner had failed to appreciate the effect and implications thereof on the remedy. Another is that it made its decision on the basis that Toyota had done nothing for 18 months to improve the record of the arbitration proceedings or to deliver a complete record and yet there was clear evidence before the Labour Court of steps that Toyota had taken at least between November 2011 and 31 January 2013.

Did Toyota do nothing for 18 months?

[81] The decision of the Labour Court was based, in part, on the finding that Toyota had done nothing for 18 months "to improve the record" of the arbitration proceedings. This was the finding made in its *ex tempore* judgment. In its judgment refusing leave to appeal the Labour Court said the two primary grounds on which it had based its decision were that Toyota had failed to deliver a complete record and that it had failed to prosecute its review application timeously and diligently.

[57] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC) at para 88.

[82] First of all, it would have been impossible for Toyota to deliver a complete record of the arbitration proceedings because the CCMA, which had the obligation to ensure that a proper and complete record was delivered to the Registrar of the Labour Court, failed to do so. The only disc it provided had 20 minutes of recording. Toyota and the union did the best they could to reconstruct the record on the basis of their respective notes and the Commissioner's notes but, even after that, the record was still unsatisfactory.

[83] Furthermore, the finding that Toyota did nothing for 18 months to improve the record or to prosecute its review application is contradicted by the facts. There is no period of 18 months when Toyota did nothing to try and get as good a record as was possible or when Toyota did nothing to prosecute its review application. Toyota launched its review application in October 2011 and the union launched its application to have Toyota's review application dismissed without being adjudicated on the merits on 8 August 2013.

[84] From November 2011 to 31 January 2013 almost every month some or other step was taken. These steps were taken by Toyota's attorneys or their correspondents, or by the CCMA or union, in response to Toyota's correspondence. This much is clear from Toyota's answering affidavit filed in response to the union's application. Some of the steps taken by Toyota's attorneys or their correspondents are set out under [30] of the majority judgment. Some of the dates on which those steps were taken are:

(a) 30 November 2011.
(b) 24 January 2012.
(c) 27 January 2012.
(d) 2 February 2012.
(e) 3 February 2012.
(f) 13 February 2012.[58]

[58] Although this date does not appear under paragraph 30 of the majority judgment, it does appear in affidavits and annexures.

(g) 29 February 2012.

(h) 6 March 2012.[59]

(i) 12 March 2012.

(j) 19 March 2012.

(k) 7 June 2012.

(l) 20 June 2012.

(m) 27 July 2012.

(n) 23 August 2012.[60]

(o) During September 2012 Toyota's attorneys were waiting for a reply from the CCMA to their letter of 23 August 2012 requesting the CCMA to set the matter down for a reconstruction of the record.

(p) 5 October 2012.

(q) 22 October 2012.

(r) 28 November 2012.

(s) 23 January 2013.

(t) 24 January 2013.

(u) 29 January 2013.

(v) 31 January 2013.

[85] I have chosen not to elaborate on the steps partly because some of the elaboration is already in the majority judgment but partly also to avoid making this judgment longer than is necessary.

[86] Based on the above, the finding of the Labour Court that for 18 months Toyota did nothing to improve the record or to prosecute its review application was a misdirection. The period during which Toyota did not do anything is from March 2013 to 8 August 2013. However, I think that Toyota should not be blamed for all that period because on 31 January 2013 it had sent the union a transcription of the parties' notes and asked the union to indicate whether it was comfortable with the

[59] Two steps were taken on this day.

[60] Three steps occurred on this day.

transcription. Obviously, Toyota wanted the union's view that the transcription was acceptable and that it could be filed in court. The union ignored that letter and request and had not responded when it launched its application on 8 August 2013. For the month of February 2013 and maybe that of March 2013 Toyota may have been justified to wait for a reply from the union. On that basis, maybe Toyota may be criticised for waiting beyond March but the union was not the one who could complain about the delay from March 2013 to early August 2013 because it had failed to respond to the letter from Toyota's attorneys of 31 January 2013.

[87] In my view it could not lie in the mouth of the union to complain in August that Toyota had not prosecuted its review application from February to August 2013 when it had not reverted to Toyota on the latter's request. Toyota was right to wish to file those notes by agreement between the parties if at all possible and the union was wrong not to co-operate in this regard.

The CCMA's role

[88] The Labour Court did not set out the principles that governed the union's application for the dismissal of Toyota's review application without adjudicating its merits. There are two or so further matters to which I must refer. The first one is that the Labour Court did not make a finding that the CCMA and the Commissioner were responsible for the fact that there was no complete record available to Toyota to lodge in Court. Furthermore, the CCMA delayed in responding to correspondence from Toyota's attorneys which also contributed to some delay. The CCMA did not respond at all to Toyota's attorneys' request that it set the matter down for a "reconstruction".

[89] There was no justification for this attitude on the Court's part. Instead of placing the blame for the absence of a complete record at the door of the CCMA where it belonged, the Labour Court defended the CCMA for no obvious reason and suggested that the parties should have kept "proper notes or recordings of arbitration proceedings themselves and one should be slow to place full blame at the door of the arbitrator or the CCMA". I can see no justification for requirement by the Court that

the parties to arbitration should bring their own equipment to record arbitration proceedings mechanically when the CCMA is responsible for that. Nor can I see any justification for the Labour Court's suggestion that the parties should have taken more detailed notes when, as far as they knew, the proceedings were being mechanically recorded by the CCMA.

Toyota's failure to place complete record before Labour Court

[90] One of the reasons advanced by the Labour Court for its decision to dismiss Toyota's review application without adjudicating its merits was that Toyota failed to place a complete record of the arbitration proceedings before the Labour Court. It was unfair for the Labour Court to penalise Toyota for the fact that a complete record of the arbitration proceedings could not be placed before it. The record made available to the Registrar of the Labour Court and Toyota by the CCMA and the Commissioner was incomplete. This was due to no fault of Toyota. The blame for this lay squarely at the door of the CCMA which the Labour Court refused to criticise for this obvious failure to do its job properly.

Prejudice

[91] Another factor that the Labour Court did not take into account in making its decision is prejudice. The Labour Court was required to consider prejudice in deciding whether or not to grant the union's application. It was obliged to consider whether Mr Makhotla stood to suffer greater prejudice if Toyota's review application was not dismissed at that stage but was allowed to be decided on the merits in due course or whether it was Toyota that stood to suffer greater prejudice if its review application was dismissed without being adjudicated on the merits.

[92] The very nature of the union's application required prejudice to be considered because the union could obtain a dismissal of Toyota's review application after a few months after that when the review application was adjudicated on the merits if its application was dismissed. However, if the Court dismissed Toyota's review

application at that stage without the adjudication of the merits of its review application, the door of the Court would have been shut in Toyota's face permanently on this matter. Toyota would never have its review application adjudicated on the merits.

[93] No matter how bad and burdensome the arbitration award was, Toyota would be permanently burdened with it. However, if the union's application was dismissed at that stage and in due course the union secured an order dismissing Toyota's review application on the merits, Mr Makhotla would still have been reinstated (assuming that that could be done) and he would be paid back pay. The back pay would not only be for six months but also for the period from 30 September 2011 onwards when he was prevented from returning to work because Toyota was pursuing the review application. If Toyota's review application was dismissed at that stage, Toyota would be burdened for a long time – indefinitely.

Did Toyota's review application have reasonable prospects?

[94] There are three grounds upon which I have come to the conclusion that Toyota had reasonable prospects of success in the review application and that, on those grounds, the Labour Court should not have dismissed Toyota's review application without adjudicating it on the merits. They are that—

(a) the Commissioner committed a gross irregularity in preventing Toyota from adequately cross-examining Mr Makhotla on contradictory explanations;

(b) the Commissioner failed to appreciate the significance of resolving the conflicting explanations given by Mr Makhotla; he also failed to determine the dismissal dispute in its entirety in that he did not make any finding whether Mr Makhotla was guilty of misconduct and this constituted both a gross irregularity and misconduct; and

(c) the Commissioner misconceived the inquiry he was called upon to conduct and failed to apply his mind to the question whether or not

> reinstatement was appropriate in the present case; he both exceeded his powers and committed a gross irregularity in ordering reinstatement and the payment of the amount of R218 400. Indeed, I am of the view that the Commissioner gave an unreasonable arbitration award in the sense that no reasonable decision-maker could have given the award that he gave.

[95] Before discussing these grounds, it is necessary to say a word or two about the ground of review of gross irregularity in the proceedings. This is one of the grounds of review relied upon by Toyota. In *Goldfields Investment*[61] the plaintiffs instituted an action to have a decision of the Magistrate of the district of Johannesburg reviewed and set aside.[62] The Magistrate had sat in appeals in which he was required by section 15 of the Local Authorities Rating Ordinance[63] to inquire into values that had been put on certain properties by the valuation court. He took the attitude that he was not entitled to interfere with the values that had been given to the relevant stands by the valuation court unless he was of the opinion that those values were so untenable that no reasonable person could have held them.

[96] The Court held that, by the attitude that he adopted, the Magistrate had failed to carry out a function that he was required by law to carry out and this constituted a gross irregularity in the proceedings. In *Goldfields Investment*[64] Greenberg JP quoted the following passage from *Ellis v Morgan*:[65]

> "'[I]rregularity in proceedings does not mean an incorrect judgment; it refers not to the result but to the methods of the trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.'"

[61] *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551 (*Goldfields Investment*).

[62] Id at 552.

[63] 20 of 1933 (Transvaal).

[64] *Goldfields Investments* above n 61.

[65] *Ellis v Morgan* 1909 TS 576 at 581.

Thereafter Greenberg JP continued:

> "The plaintiffs' contention is that a mistake of law *per se* is not an irregularity, but through its consequence it may create an irregularity, for instance, where a magistrate, through mis-reading a section, refuses to the aggrieved party a hearing to which he is entitled. Initially the error arises from a mistake of law, but before relief by way of review is granted one has to consider the consequences."[66]

[97] Later on Greenberg JP said:

> "But in the present case the magistrate's error is fundamental. He is directed to inquire into the value, and he has declined to exercise the function which is entrusted to him. He has declined to do what the Statute has told him to do. It appears to me, therefore, that in the first place the magistrate has erred, and in the second place, his error is such as to have produced results which are a denial to the plaintiffs of the rights which were given to them by the section. This appears to me to be a gross irregularity within the terms of Proclamation 14 of 1902."[67]

[98] Schreiner J concurred in the judgment of Greenberg JP but wrote separately to elaborate on the nature of gross irregularities. Schreiner J said that gross irregularities fall broadly into two classes. He said that there were those that take place openly, as part of the conduct of the trial – which he said might be called patent irregularities – and those that took place inside the mind of the judicial officer, which he said were only ascertainable from the reasons given by the judicial officer and which might be called latent. Of course, said he, even the first class are only material in as much as they prevent, or are deemed to prevent, the Magistrate's mind from being properly prepared for the giving of a correct decision. He went on to point out that, unlike the second, they admit of objective treatment, according to the nature of the conduct. He stated that neither in the case of latent nor in the case of patent irregularities need there be any intentional arbitrariness of conduct or any conscious denial of justice.

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[66] *Goldfields Investment* above n 61 at 557.

[67] Id at 559.

[99] Schreiner J then said:

> "The law, as stated in *Ellis v Morgan* has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. *The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patents irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case*."[68] (Emphasis added.)

[100] Schreiner J said that, where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. He said that one would say that the Magistrate has decided the case fairly but had gone wrong on the law. But, pointed out Schreiner J, if the mistake leads to—

> "*the Court's not merely missing or misunderstanding a point of law on the merits, but its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial.* I agree that in the present case the facts fall within this latter class of case, and as to his functions, the magistrate, owing to the erroneous view which he held as to his functions, really never dealt with the matter before him in the manner which was contemplated by the section. That being so,

[68] Id at 560.

there was a gross irregularity, and the proceedings should be set aside."[69] (Emphasis added.)

[101] The test for determining whether or not the decision-maker's conduct or decision constitutes a gross irregularity is captured when, in the above passage Schreiner J says:

"The crucial question is whether [the conduct of the decision maker] prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity."[70]

In *Telcordia* the Supreme Court of Appeal said about errors of law:

"*Errors of law can, no doubt, lead to gross irregularities in the conduct of the proceedings. Telcordia posed the example where an arbitrator, because of a misunderstanding of the audi principle, refuses to hear the one party. Although in such a case the error of law gives rise to the irregularity, the reviewable irregularity would be the refusal to hear that party, and not the error of law. Likewise, an error of law may lead an arbitrator to exceed his powers or to misconceive* the nature of the inquiry and his duties in connection therewith."[71] (Emphasis added.)

[102] In *Paper Printing Wood*[72] the then Appellate Division of the Supreme Court, *inter alia*, had this to say about the phrase "gross irregularity in the proceedings" as used in the section 24(1)(c) of the now repealed Supreme Court Act:[73]

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[69] Id at 560-1. Recent judgments of both the Supreme Court of Appeal and of this Court have also referred to Schreiner J's judgment when dealing with "gross irregularity". See *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) at para 176; *Herholdt v Nedbank Ltd* [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA) at para 21; *ABSA Bank Ltd v De Villiers and Another* [2009] ZASCA 140; [2010] 2 All SA 99 (SCA) at para 28; and *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA); 2007 (5) BCLR 503 (SCA) (*Telcordia*) at paras 71-3.

[70] *Goldfields Investments* above n 61 at 560.

[71] *Telcordia* above n 69 at para 69.

[72] *Paper Printing Wood and Allied Workers' Union v Pienaar NO and Others* [1993] ZASCA 98; 1993 (4) SA 631 (A) (*Paper Printing*).

[73] The now repealed Act 59 of 1959.

> "Can this be brought home under para *(c)* of section 24(1)—'gross irregularity in the proceedings'? That expression is not confined to defects in the procedure as such. It covers the case where *the decision-maker through an error of law misconceives the nature of his functions and thus fails to apply his mind to the true issues in the manner required by statute, with the result that the aggrieved party is in that respect denied a fair hearing* (see, for example, *Goldfields Investments Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551; *Visser v Estate Collins* 1952 (2) SA 546 (C))."[74] (Emphasis added.)

[103] I now proceed to deal with the grounds on which I have come to the conclusion that Toyota had reasonable prospects of success in its review application and that, on, among others, those grounds, the Labour Court should not have dismissed Toyota's review application without adjudicating it on the merits. I start with the ground relating to the Commissioner's conduct in preventing Toyota from adequately cross-examining Mr Makhotla on his conflicting explanations for his absence from work.

Prevention from cross-examining

[104] In applying to the Labour Court for the dismissal of Toyota's review application at a time when the union had not delivered its answering affidavits, the union took the risk that the Court would have to accept Toyota's evidence in the founding and supplementary affidavits to be true because it was not disputed. Therefore, the approach that the Labour Court was called upon to adopt was that of assuming Toyota's averments in the affidavits to be true.

[105] One of Toyota's averments in its founding affidavit was that the Commissioner had prevented Toyota from adequately cross-examining Mr Makhotla on his contradictory explanations for his absence from work. If that averment was true, there would be no doubt that the Commissioner had committed a gross irregularity in the proceedings because the question whether Mr Makhotla had a valid reason for his absence from work for over four days was critical in Toyota's case. As the authorities

[74] *Paper Printing* above n 72 at 638H-I.

referred to above reveal, a gross irregularity is conduct on the part of an arbitrator or decision-maker that prevents one of the parties from having its case fairly heard or that prevents a fair trial of issues. Any decision by the Commissioner to prevent Toyota from cross-examining Mr Makhotla on such a crucial aspect of the case would be a gross irregularity justifying the setting aside of the Commissioner's award.

[106] The Commissioner was served with Toyota's review application and, on reading the founding affidavit, he would have noted that Toyota was making the serious allegation against him that he had prevented it from adequately cross-examining Mr Makhotla on such a crucial aspect of the case. Yet, he did not deliver an affidavit denying the allegation or justifying it. It is interesting to note that in his award the Commissioner did not resolve the issue of the contradictory nature of Mr Makhotla's explanations and yet it was a crucial aspect of the case. On the Commissioner's notes as well as on the notes of both parties' representatives, there is no indication that the Commissioner made any attempt to probe into Mr Makhotla's reasons or explanations for his absence from work for over four days. One would have thought that the Commissioner would have probed this aspect of Mr Makhotla's evidence.

Failure to resolve conflicting explanations and to determine merits of alleged misconduct

[107] The dispute between Toyota and Mr Makhotla was whether the latter's dismissal was fair. Toyota's position was that Mr Makhotla had no valid reason or acceptable explanation for his absence from work over four days. Mr Makhotla's position was that he had an acceptable explanation. That was the first component of the dismissal dispute between the parties. If Mr Makhotla was not guilty of misconduct, it would follow that the dismissal was unfair. Ordinarily, another component of a dismissal dispute would be whether a fair procedure was complied with when the dismissal was effected. In this case that component was not in issue. The second component was whether, if Mr Makhotla was guilty of the misconduct, dismissal was a fair sanction. If dismissal was a fair sanction, that would be the end

of the matter. If dismissal was unfair as a sanction, the third component of the dispute would be whether Mr Makhotla should be reinstated and, if so, with or without a disciplinary warning of one kind or another or whether he should be awarded compensation. All these are components of a dispute whether a dismissal is fair. They were also components of the dismissal dispute between Toyota and Mr Makhotla. If any one of these components of a dismissal dispute is not resolved, the dispute cannot be said to have been determined.

[108] It is important that an arbitrator who is assigned a dispute about the fairness of a dismissal to arbitrate determines every component of the dispute that is in issue between the parties. If he or she fails to determine any component of the dispute that is in issue between the parties, he or she will have failed to carry out his or her statutory function. This would constitute misconduct as well as a gross irregularity in the proceedings.

[109] Whether Mr Makhotla had a valid reason or acceptable explanation for his absence from work on four consecutive days was the most critical part of the dispute between the parties. The Commissioner also regarded this part of the dispute as very important. In his award he said:

> "5.4 As per the parties evidence it is indeed common cause that . . . [Mr Makhotla] was absent from 28 February to 3 March 2011. *Their main bone of contention is whether . . . [he] had obtained any permission for his absence (AWOL) and whether he provided a plausible explanation for same*."[75] (Emphasis added.)

I do not agree with the Commissioner that whether Mr Makhotla had obtained permission to be absent from work was in dispute between the parties. It was common cause that Mr Makhotla had never been given any permission. It was never his case that Toyota had given him permission to be absent from work. What was in

[75] Para 5.4 of the Arbitration Award.

dispute was whether, not having obtained permission, he had a valid reason or an acceptable explanation for his absence from work.

[110] The Commissioner also said:

> "*The crux of the matter* is that absence without leave for four days and *failure to provide acceptable reasons* is a dismissible offence in terms of the company's disciplinary code."[76] (Emphasis added and reference omitted.)

This, too, shows that the Commissioner was alive to the fact that whether Mr Makhotla had an acceptable explanation for his absence from work for four consecutive days was a crucial part of the dispute between the parties.

[111] According to Toyota, Mr Makhotla gave three conflicting explanations as to why he was absent from work. The first was that he was not well. According to Toyota he gave this one to Mr Hawkins in a telephone conversation on the first day of his absence from work. He gave the second one in an SMS to his immediate superior on the second day of his absence. It was to the effect that he had gone to the Drakensberg on his own to "clear his mind". He gave the third one to his immediate superior on the day he returned to work and also at the arbitration hearing. It was that he had gone to rescue a certain girl from an initiation process. He did not give any details of his explanations.

[112] In the arbitration proceedings Toyota led the evidence of four witnesses. That Mr Makhotla had given the above different explanations was testified to. In his evidence in the arbitration proceedings Mr Makhotla denied that he had told Mr Hawkins that the reason for his absence from work was that he was not well. However, he did not state what he had said to Mr Hawkins in the telephone conversation if he did not say that he was not well. He also did not say why Mr Hawkins would have said this is what Mr Makhotla had said to him if he had not

[76] Id at para 2.10.

said it. It would be difficult to believe that Mr Hawkins would falsely attribute to Mr Makhotla a health reason for the latter's absence from work if he sought to put him into trouble. It was never suggested in cross-examination that Mr Hawkins had a bad motive for attributing this explanation to Mr Makhotla.

[113] Mr Makhotla did not deny having given the explanation that he gave in the SMS to his immediate superior. That is that he had gone to Drakensberg "to clear his mind". That explanation is inconsistent with the explanation that he had gone to rescue a girl from an initiation process. Yet, Mr Makhotla never said in the arbitration why he had given that explanation in the SMS to his immediate superior and not the one that he gave on his return to work. It was easy for Mr Makhotla to deny what Mr Hawkins said he had said to him in a telephone conversation on the first day of his absence from work because it was not recorded anywhere. He, however, could not deny that in the SMS to his immediate superior he had given an explanation that differed from the one he gave on his return to work and in the arbitration. He could not deny it because he had given it in writing.

[114] The Commissioner had three explanations before him as to why Mr Makhotla was absent from work over four consecutive days. All three explanations were contradictory. He pointed out that three of Toyota's four witnesses corroborated Mrs Mukhavhuli in all material respects. Mrs Mukhavhuli was Mr Makhotla's immediate superior and was Toyota's first witness in the arbitration. The Commissioner put it thus:

> "The other three witnesses, Ms. Z. Malumo, Ms. N. Hlatshwayo and Mr. J. Hawkins corroborated Ms. O. Mukhavhuli's testimony *in all material respects*. *Most significantly* Mr. Hawkins confirmed that [Mr Makhotla] phoned him indicating that he could not report for work as he was not feeling well."[77] (Emphasis added.)

[77] Id at para 2.11.

[115] The Commissioner did not make any credibility findings against any of Toyota's witnesses. Nor did he make any credibility finding against Mr Makhotla. The tone of the last sentence I have just quoted from the award suggests that the Commissioner had no difficulty with Mr Hawkins' evidence that Mr Makhotla had called him and said that he could not report for duty because he was not feeling well. Mr Makhotla knew from the outcome of the disciplinary inquiry that Toyota did not accept his explanation based on rescuing a girl from an initiation process. He knew, therefore, that even at the arbitration this would still be a crucial aspect of the case. Yet, when he went to the arbitration, he did not bring any witness to corroborate his story. Nor did he bring any documents to support his story. He also did not bring any useful details such as the name and residential address of the girl he had gone to rescue. He had had many months to think about how he would reconcile his explanation contained in the SMS with the girl rescue explanation and in the arbitration he failed to reconcile the explanations.

[116] The Commissioner did not decide which one of the three explanations was true. When he was supposed to deal with the issue of whether Mr Makhotla was guilty of misconduct, the Commissioner had this to say:

> "5.4 As per the parties evidence it is indeed common cause that [Mr Makhotla] was absent from 28 February to 3 March 2011. *Their main bone of contention* is whether [Mr Makhotla] had obtained any permission for his absence (AWOL) and whether he provided a plausible explanation for same.
>
> 5.5 The evidence indicates that [Mr Makhotla] phoned Mr Hawkins and also later forwarded a text message to his immediate superior. Therefore, on the second day of his absence [Toyota] was aware of [Mr Makhotla's] whereabouts. If indeed his continued absence was viewed as an offence his immediate superior ought to have rejected his apology and instructed him to return to work immediately. In actual fact a proper reading of the company's disciplinary code indicates that on the third day of an employee's AWOL the company must despatch a telegram or registered letter of enquiry about his whereabouts (See page 14, company bundle). Perhaps this was not done

> because [Toyota] was aware of [Mr Makhotla's] whereabouts." (Emphasis added.)

[117] These two paragraphs are the most appropriate in which the Commissioner would have made the finding that Mr Makhotla was guilty of misconduct if he made such a finding. There is no other paragraph in his award in which it can be said that he did so. What is clear is that in the paragraphs referred to there is no express finding that Mr Makhotla had a valid reason or acceptable explanation for his absence from work. Nor is there any finding expressly made that Mr Makhotla was guilty of the misconduct. There is also no express finding that he was not guilty of misconduct. Yet, the Commissioner knew that whether or not Mr Makhotla had a valid reason or acceptable explanation for his absence from work was, in his words, "the crux of the matter" or "the main bone of contention".

[118] The Commissioner did not even by implication make a finding that Mr Makhotla had a valid reason or an acceptable explanation for his absence. The Commissioner simply did not determine or decide this "crux of the matter" or "main bone of contention" between the parties. It seems that the Commissioner misconceived the inquiry he was required to conduct in paragraph 5.5 of his award. He was required to direct his mind to the question whether or not on the evidence before him it could be said that Mr Makhotla had a valid reason or an acceptable explanation for his absence from work over four consecutive days. He did not do so. Instead, he directed his mind to the question whether Toyota "was aware of [Mr Makhotla's] whereabouts", the question whether Toyota "viewed" "his continued absence" "as an offence" and to a provision of the disciplinary code which he said—

> "indicate[d] that on the third day of an employee's AWOL [Toyota] [had to] despatch a telegram or registered letter".[78]

[78] Id at para 5.5.

None of these matters went to the question whether Mr Makhotla had a valid reason or an acceptable explanation for his absence from work.

[119] I conclude that the Commissioner did not determine whether Mr Makhotla was guilty of the misconduct for which he had been dismissed or whether Mr Makhotla had a valid reason or acceptable explanation for his absence from work. Instead, he decided the matter on the assumption that Mr Makhotla did not have a "plausible" explanation for his absence from work. He said:

> "5.6. Further, even if one was to find that [Mr Makhotla's] explanation was not plausible the dismissal was unwarranted. There is no evidence of habitual absenteeism. Put differently [Mr Makhotla] does not have a dismal disciplinary record in this regard. It is trite that if an employee is unable to account for its absence the respondent's recourse is to ensure that he is not paid for the period of his unauthorised absence or leave (See Section 23(1) of the Basic Conditions of Employment Act of 1997).
>
> 5.7 In the circumstances I am unable to conclude that [Mr Makhotla's] dismissal was substantively fair. Thus, it is just and equitable to order [Toyota] to reinstate [Mr Makhotla] retrospectively."

[120] The provisions of item 7 of the Code of Good Practice: Dismissal support the proposition that anyone determining the fairness of a dismissal for misconduct is required first to determine whether the employee was guilty of misconduct before dealing with sanction. That code was issued in terms of section 188(2) of the LRA. It appears in Schedule 8 to the LRA. Item 7 provides in paragraph (a) that a person determining whether a dismissal for misconduct is fair must consider whether or not a rule or standard has been contravened. Paragraph (b) of the item deals with matters that must be dealt with only if it has been found that the employee contravened a rule or standard. Item 7 of the Code of Good Practice: Dismissal reads:

> "7. Guidelines in cases of dismissal for misconduct
> *Any person who is determining whether a dismissal for misconduct is unfair should consider—*

(a) *Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and*

(b) *If a rule or standard was contravened,* whether or not—

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard." (Emphasis added.)

[121] Chapter VII of the LRA is a chapter on dispute resolution. Part C of that chapter deals with the resolution of disputes under the auspices of the CCMA. It covers sections 133-150. Section 133 bears the heading: "Resolution of disputes under the auspices of Commission". Section 133(1) and (2)(a) reads:

"(1) The Commission must appoint a commissioner *to attempt to resolve* through conciliation—

(a) any dispute referred to it in terms of section 134; and

(b) any other dispute that has been referred to it in terms of this Act.

(2) If a dispute remains *unresolved* after conciliation, the Commission must arbitrate the dispute if—

(a) this Act requires the dispute to be arbitrated and any party to the dispute has requested that the dispute *be resolved through arbitration*;

(b) . . . ." (Emphasis added.)

[122] One can also have regard to the provisions of section 136(1) and (2) and section 137(1). Section 136(1) and (2) reads:

"(1) If this Act requires a dispute to *be resolved through arbitration,* the Commission *must appoint a commissioner to arbitrate that dispute if—*

(a) a commissioner has issued a certificate stating that the dispute remains *unresolved*; and

> (b) within 90 days after the date on which that certificate was issued, any party to the dispute has requested that the dispute *be resolved through arbitration*. However, the Commission, on good cause shown, may condone a party's non observance of that timeframe and allow a request for arbitration filed by the party after the expiry of the 90-day period." (Emphasis added.)

Section 136(2) reads:

> "A commissioner appointed in terms of subsection (1) may be the same commissioner who attempted *to resolve the dispute through conciliation*." (Emphasis added.)

Section 137(1) reads:

> "In the circumstances contemplated in section 136(1), any party to the dispute may apply to the director to appoint a senior commissioner to attempt *to resolve the dispute through arbitration*." (Emphasis added.)

[123] The purpose of referring to the provisions of sections 133, 136(1) and (2) and 137(1) is to show that the statutory mandate of an arbitrator appointed in terms of the LRA, including a commissioner of the CCMA, is to "resolve" a dispute assigned to him or her and arbitration is simply a means to achieve that end. That is why in sections 133, 136 and 137(1) the word "resolve" is used in the way it is used. In this case, in my view the Commissioner failed to carry out that mandate. He failed because, it cannot be said that he resolved the dispute between the parties when he did not decide a part of the dispute that even he himself regarded as the "crux of the matter" or the "main bone of contention" between the parties. That failure constituted both a gross irregularity in the proceedings and misconduct on the Commissioner's part justifying the reviewing and setting aside of his award.

[124] If a Commissioner does not decide whether the employee was guilty of the misconduct for which he was dismissed, he acts contrary to the requirements of section 138(1) of the LRA. Section 138(1) reads:

> "The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order *to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities*." (Emphasis added.)

This provision is in part to the effect that, even though it is up to the Commissioner to decide the manner in which he or she conduct an arbitration, he or she must ensure that the dispute is determined "fairly and quickly" and that, whatever manner he adopts to conduct the arbitration, he must deal with the substantial merits of the dispute.

[125] When an arbitrator fails, as the Commissioner did, to decide whether the employee was guilty of the misconduct for which the employer had dismissed him, the arbitrator or Commissioner, like the Magistrate in the *Goldfield Investment* case who failed to carry out the instruction of the Ordinance, fails to carry out a statutory instruction.[79] When an arbitrator fails, as the Commissioner in this case failed, to decide which one of the conflicting explanations given by the employee is the correct one or is true, the arbitrator fails to carry out his statutory instruction. This constitutes both a gross irregularity in the proceedings as well as misconduct justifying that the award be reviewed and set aside.

[126] The Commissioner did not make any decision as to whether a rule or standard had been contravened which would then have allowed him to move to the second stage of the inquiry. The Commissioner simply said that, even if Mr Makhotla had been guilty of the misconduct, dismissal was unfair. He was not entitled to consider whether dismissal was an appropriate sanction without having decided whether

[79] *Goldfields Investment* above n 61 at 561.

Mr Makhotla had been guilty of contravening the rule. In failing to do so, he prevented Toyota from having a fair trial of issues. This alone constituted a gross irregularity in the proceedings.

[127] In its founding affidavit Toyota complained that the Commissioner:

(a) had failed "to recognise that [Mr Makhotla's] defence was contradictory . . .";

(b) had ignored "the two versions put forward" by Mr Makhotla as to his absence from work, namely—

(i) that he had gone to the Drakensberg to clear his head;

(ii) that he had gone to rescue a girl from an initiation school; and

(c) had failed "to appreciate the dishonest nature of [Mr Makhotla's] defence and the significance of such dishonesty on [Mr Makhotla's] defence as set out in the Constitutional Court in the matter of *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC)".

[128] On these grounds, Toyota submitted that, in conflict with the behest of the statute, the Commissioner handed down an arbitration award that no reasonable decision maker could have handed down, failed to apply his mind, misconducted himself, committed a gross irregularity and exceeded his powers. In my view what Toyota was complaining about with regard to the issues dealt with in [75] is that it was critical for the Commissioner to decide which one, if any, of the explanations given by Mr Makhotla for his absence from work was true and which ones were not true. Toyota implied that the Commissioner could not fairly determine this dispute between the parties without deciding that issue.

[129] Toyota was also saying that the contradictory explanations that Mr Makhotla had given could not all be true. Two of the three explanations had to be false if not all three of them. It was saying that Mr Makhotla had been dishonest and, if the Commissioner had appreciated this, he would have made a finding as to which one of

the different explanations was true. Toyota also implies that, if the Commissioner had decided which one of the explanations, if any, was true, he would have decided the issue of Mr Makhotla's guilt or innocence. It contends that, had the Commissioner appreciated that he was required to decide whether Mr Makhotla was guilty of the misconduct or not, he would have resolved the issue of the conflicting explanations. Toyota suggests that, if the Commissioner had appreciated the dishonest nature of Mr Makhotla's defence, he would have resolved the conflicting explanations and would have found that Mr Makhotla had no valid reason or acceptable explanation for his absence from work and had been dishonest. In turn, implies Toyota, this would have led to a finding that the dismissal was fair. Toyota suggests that, by failing to appreciate this and not resolving the conflicting explanations, the Commissioner denied Toyota a fair determination of issues which constitutes a gross irregularity in the proceedings.

[130] It must be remembered that it is the employer who bears the onus to prove that a dismissal is fair.[80] If an arbitrator does not determine whether the employee was guilty of misconduct, the employer has no chance of showing that the dismissal was fair. In a particular case an arbitrator may find that the employee was guilty of misconduct for which he was dismissed but still find that, nevertheless, dismissal was an unfair sanction. That this can happen does not, however, mean that an arbitrator may fairly determine such a dismissal dispute without determining whether or not the employee was guilty of misconduct.

[131] Part of the reason why an arbitrator is obliged to determine whether the employee was guilty of misconduct, apart from the fact that it is a critical component of such a dismissal dispute, is that, if it is found that dismissal as a sanction was unfair, the arbitrator must then determine what lesser sanction should be imposed on

[80] Section 192 reads:

> "(1) In any proceedings concerning any *dismissal*, the *employee* must establish the existence of the *dismissal*.
>
> (2) If the existence of the *dismissal* is established, the employer must prove that the *dismissal* is fair."

the employee. The arbitrator cannot impose a lesser sanction on an employee without first making a finding whether the employee committed the misconduct complained of. If an arbitrator were not to make the finding whether the employee was guilty but assumed that he was guilty, and then say that dismissal, as a sanction, was unfair and ordered the reinstatement of the employee, the employee would return to work as an innocent employee without even a disciplinary warning. That would be inappropriate. An employer has an interest in the determination of whether the employee was guilty of misconduct.

[132] Viewed against the fact that a crucial part of the dispute between the parties was whether Mr Makhotla had a valid reason or acceptable explanation for his absence from work and that he had given conflicting explanations, Toyota was right in contending that the case was such that, in order to determine the dispute, the Commissioner had to decide which explanation, if any, was correct and whether it was an unacceptable explanation. I agree that the Commissioner's failure to determine this issue and his approach in terms of which he purported to only determine whether, assuming that Mr Makhotla had no acceptable explanation, dismissal was a fair sanction prevented a fair determination of issues. Thus, it constituted a gross irregularity in the proceedings. This would justify the setting aside of the arbitration award.

Resignation and its effect on remedy

[133] Section 193 of the LRA sets out remedies for unfair dismissals. Section 193(1) provides:

> "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 reinstate 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 conditions from any date not earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee."

These remedies have been held to be alternative to one another with the result that no two of them can be given in the same case to one and the same employee.[81] The first two are by their nature mutually exclusive. But for the word "or" at the end of (b) the third one could notionally be given together with any one of the first two. For that reason, it has been held that compensation may not be awarded together with any one of the other two remedies.

[134] Then there is section 193(2). It reads:

"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 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." (Emphasis added.)

In terms of section 193(2) reinstatement is the preferred remedy and the Labour Court and arbitrators are enjoined to grant reinstatement if they have found a dismissal unfair unless one of the situations listed in (a) to (d) applies. Reinstatement is not competent in those cases in which one or more of the situations listed in paragraphs (a) to (d) is present.

[135] Once the Labour Court or an arbitrator has found a dismissal unfair, it or he is obliged to consider which one of the remedies listed in section 193(1) is appropriate, having regard to the meaning of section 193(2). Considering both the provisions of

[81] *Equity Aviation* above n 48 at para 42.

section 193(1) and section 193(2) is important because one cannot adopt the attitude that dismissal is unfair, therefore, reinstatement must be ordered. The Labour Court or an arbitrator should carefully consider the options of remedies in section 193(1) as well as the effect of the provisions of section 193(2) before deciding on an appropriate remedy. A failure to have regard to the provisions of section 193(1) and (2) may lead to the Court or arbitrator granting an award of reinstatement in a case in which that remedy is precluded by section 193(2).

[136] I wish to highlight paragraph (c) of section 193(2). Paragraph (c) is to the effect that reinstatement may not be granted in a case where it would not be "reasonably practicable for the employer to re-instate or re-employ the employee". Once the Labour Court or an arbitrator has decided that dismissal is unfair, it or he should, before deciding on which remedy to grant, ask itself or himself certain questions. These would include questions such as: in what way, if any, did the dismissal cause the employee prejudice? Had the dismissal not occurred, where would the employee be?

[137] In seeking to determine what remedy the Labour Court or an arbitrator should grant in a particular case, it seems to me that the Court or an arbitrator should first appreciate the meaning of the word "reinstate". In *Equity Aviation* this Court said:

> "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 [in] 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*."[82] (Emphasis added and footnote omitted.)

[82] Id at para 36.

[138] In this passage, this Court said that, where a Court or an arbitrator orders an employer to reinstate an employee, it in effect orders the employer to put the employee "in the position he or she would have been [in] but for the unfair dismissal".[83] This means that the Labour Court or arbitrator must ask itself the question: but for the dismissal, in what position would the employee have been? The court or arbitrator must ask this question because it must ensure that it does not order the "reinstatement" of an employee that will not put the employee in the position in which he or she would not have been but for the dismissal. If that happens, that would not be reinstatement as defined by this Court in *Equity Aviation*. It is also important to highlight the fact that in the above passage this Court made it clear that the remedy of reinstatement "safeguards workers'" employment by "restoring the employment contract". I pause here to say that in this sentence this Court emphasised that the remedy of reinstatement is meant to restore the employment contract. Obviously, the only contract that can be restored would be the contract that the employee had with the employer at the time of the dismissal.[84]

[139] In *Equity Aviation* this Court also put the definition of the word "reinstate" differently. It said:

> "Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal."[85]

Later this Court said:

> "The ordinary meaning of the word 'reinstate' means that the reinstatement will not run a date from 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*

[83] Id.

[84] Id.

[85] Id.

> *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*."[86] (Emphasis added.)

Lastly, the Court said:

> "[I]t is important to bear in mind that where a court or Commissioner has decided that reinstatement is the appropriate remedy, it will also have to be decided that the worker has been unfairly dismissed. *The worker will thus have been deprived of wages, unfairly, as a result of the conduct of the employer*."[87] (Emphasis added.)

[140] It is clear from the last passage quoted above that, in so far as the making of an order that may have implications for back pay is concerned, the question that would need to be asked would be whether the employee was deprived of remuneration or wages as a result of the employer's conduct in dismissing him or her. If the answer to this question is that, indeed, the dismissal deprived the employee of remuneration for the period in question after dismissal, then an order with implications for the payment of back pay would be justified. However, if the answer to the question is that the employee was not deprived of wages or remuneration for the period in question as a result of the employer's conduct in dismissing him or her, then an order with such implications should not be made against the employer. Such an order would be without any basis and would be unreasonable.

[141] What is the effect of resignation on the remedy for dismissal? There are different contexts in which resignation occurs. Where an employee resigned from his or her employer's employ in circumstances where the resignation constitutes constructive dismissal, the resignation is dealt with on the basis of our law on constructive dismissal. We need not concern ourselves with that situation.

[86] Id.

[87] Id at para 39.

[142] Another context of resignation is the normal resignation. Where an employee resigns from the employ of his employer and does so voluntarily, the employer may not discipline that employee after the resignation has taken effect. That is because, once the resignation has taken effect, the employee is no longer an employee of that employer and that employer does not have jurisdiction over the employee anymore. Indeed, even the CCMA or the relevant bargaining council would have no jurisdiction to entertain a referral of a "dismissal" dispute in such a case because there would be no dismissal as envisaged in section 186 of the LRA. Therefore, if an employee who has validly resigned later refers an alleged unfair dismissal dispute to arbitration under the LRA and it is found that the employee had validly resigned and had not been dismissed, reinstatement would be incompetent.

[143] If, in the present case, the resignation had preceded the dismissal, the CCMA would have had no jurisdiction and an award would not have been competent because an employee who resigned cannot be reinstated. That employee was not dismissed and reinstatement applies to cases of dismissal. The employee would also have brought his contract of employment to an end voluntarily and fairly. Mr Makhotla submitted his letter of resignation to Toyota on 7 March 2011 indicating that he was resigning and his last day in Toyota's employ would be 31 March 2011. He was dismissed on 24 March 2011. That was seven days before his last day of employment.

[144] Since an employee has no right of withdrawing a valid and lawful resignation once it has been communicated to the employer except with the consent of the employer, this means that as at the date of his dismissal, Mr Makhotla was bound to leave Toyota's employ on 31 March 2011. As already indicated, Mr Makhotla was dismissed a few days before his resignation would take effect. One can, therefore, say that the dismissal interrupted the resignation. That is why we cannot say that Mr Makhotla's employment with Toyota came to an end as a result of his resignation. We say that it came to an end as a result of his dismissal on 24 March 2011. However, the fact that Mr Makhotla's employment came to an end as a result of dismissal and not as a result of resignation does not mean that the fact that he was

dismissed at a time when he had submitted a letter of resignation and was serving his notice period and was due to leave Toyota's employ in seven days time is irrelevant. The fact that Mr Makhotla was dismissed at a time when in seven days' time his contract of employment with Toyota would have come to an end by his resignation and he would have left Toyota's employ is highly relevant if his dismissal dispute is arbitrated or adjudicated after the date when he would have left Toyota's employ had he not been dismissed.

[145] The same applies to a case where an employee was employed on a fixed term contract of employment and he is dismissed before the expiry of that contract but the dismissal dispute is arbitrated or adjudicated after the date when, but for the dismissal, his contract of employment would have come to an end. Another example is where an employee is dismissed but, after his or her dismissal but before the dismissal dispute is adjudicated or arbitrated, a retrenchment exercise occurs in the company and it is clear that, applying fair and objective selection criteria, the employee would have been one of the employees selected for dismissal for operational requirements.

[146] In this scenario the employee may not be reinstated when the original dismissal dispute is adjudicated or arbitrated. This is because his or her contract of employment would have come to an end prior to the date of the award had the dismissal not occurred.

[147] Another example is where an employee is dismissed a short time before he or she is due to reach a contractually agreed retirement age and he or she would have left the employer's employ on retirement on the agreed date in any event had he or she not been dismissed. In other words, a dismissal occurs on a certain date and between that date and the date of the arbitration or adjudication of the dismissal dispute, there is a date on which the employee would, by prior agreement with the employer, have gone on retirement. In such a case reinstatement would also be incompetent.

[148] In all the above examples reinstatement is incompetent. This is because reinstatement means that the employee must be put in the position in which he or she would have been, but for the dismissal. The position in which each one of the employees in the above examples would have been in but for the dismissal is out of the employer's employ. This is so because, had the employee not been dismissed, he or she would have left the employer's employ prior to the issuing of the arbitration award.

[149] The view I have expressed above, that the remedy of reinstatement is not competent in the above examples, is in line with the jurisprudence of the Labour Court. In terms of the jurisprudence of the Labour Court reinstatement cannot be granted where the employee would not have continued in the employer's employ.[88]

[150] In *Tshongweni*[89] the applicant had been employed on a fixed-term contract of employment. He was dismissed for misconduct nine months before the expiry of his contract of employment. His dismissal dispute was adjudicated long after the expiry of the nine months that he was still to serve in terms of his contract of employment when he was dismissed. His dismissal was found by the Labour Court to have been substantively unfair and he sought reinstatement and much more. The Labour Court rejected his prayer for reinstatement and more. It said that, since his contract of employment would have remained only for nine months from the time of his dismissal and that period had long expired, reinstatement would not be practicable and was not competent. Through Van Niekerk J, the Court said:

> "This is a big ask. All the authorities referred to suggest that the remedy of reinstatement is confined to reinstatement into the contract of employment in existence on the date of dismissal. In my view, if the duration of that contract was

[88] *Tshongweni v Ekurhuleni Metropolitan Municipality* [2010] ZALC 84; [2010] 10 BLLR 1105 (LC); (2010) 31 ILJ 3027 (LC) (*Tshongweni*); *Cash Paymaster Services, North-West (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2008] ZALC 168; [2009] 5 BLLR 415 (LC); (2009) 30 ILJ 1587 (LC) (*Cash Paymaster*); and *Nkopane and Others v Independent Electoral Commission* [2006] ZALC 93; (2007) 28 ILJ 675 (LC) (*Nkopane*).

[89] *Tshongweni* id.

> limited, and the expiry of the contract precedes the date on which a finding of unfair dismissal is made, reinstatement is not a competent remedy."[90]

[151] The Labour Court concluded in *Tshongweni* that the applicant in that matter should be awarded compensation equal to the remuneration that he would have earned for the nine months still remaining in his contract of employment at the time of his dismissal. Those were the only months that he would have worked for his employer had he not been dismissed. It said:

> "The court has a discretion in this regard, which must be exercised judicially having regard to all the relevant facts, and ensure that the requirements of fairness are met. In the present instance, the most material fact is the applicant's engagement on a fixed term, and that as at the date of his dismissal, the contract had some nine months to run. In these circumstances, and in accordance with the authorities referred to above, *an award of compensation equivalent to what the applicant would have earned had he remained employed for the full period of five years* is [not] appropriate."[91] (Emphasis added.)

The last sentence of this passage in the judgment does not have "not" before the word "appropriate" but a reading of the facts and the whole judgment makes it clear that the learned judge could not have intended to say "appropriate" in that quotation. He meant "is not appropriate".

[152] In *Nkopane*[92] the Labour Court held that there was no basis in law or equity for the award of compensation for a period that went beyond the date when a fixed term contract would have ended.[93] In *Zilwa*[94] the employee had been employed to perform duties during the life of a cleaning contract that the employer had been awarded in respect of certain buildings. She was dismissed before the expiry of that contract.

[90] Id at para 26.

[91] Id at para 28.

[92] *Nkopane* above n 88.

[93] Id at para 77.

[94] *Zilwa Cleaning and Gardening Services CC v Commission for Conciliation, Mediation and Arbitration and Others* [2009] ZALC 96; (2010) 31 ILJ 780 (LC).

However, by the time that her dismissal dispute was arbitrated, the employer no longer had that contract. The CCMA Commissioner found the dismissal substantively and procedurally unfair and ordered her reinstatement. In a subsequent review application, the Labour Court, through Le Roux AJ, held that the arbitrator had exceeded his powers by ordering reinstatement in that case because reinstatement was not practicable.[95] The Court also said:

> "In summary, I therefore find that in deciding to reinstate Ms Matambela without considering the provisions of section 193(2) and the possible implications of the fact that the Merino Building contract had been cancelled the second respondent did not apply his mind to the relevant facts and the applicable legal principles. He therefore committed a gross irregularity and exceeded his powers as envisaged in section 145 of the Act. In doing so he also came to a decision to which a reasonable commissioner could not come. *Sidumo & Another v Rustenburg Platinum Mine Ltd & others* (2007) 28 ILJ 2409 (CC); [2007] 12 BLLR 1097 (CC) at paras 110 et seq and 258 et seq."[96]

The Labour Court drew attention to the provision of section 193(2) to the effect that reinstatement may not be granted where reinstatement is not practicable. It held that in such a case reinstatement was not competent. It set aside the award of reinstatement.

[153] *Cash Paymaster*[97] was another case involving the dismissal for misconduct of an employee employed on a fixed term contract before the expiry of his fixed term contract of employment. By the time his dismissal dispute was arbitrated, the contract of employment was one month away to its expiry date. It is not clear from the judgment whether the award was issued before or after the date of expiry of the contract of employment. However, what is said in the judgment is that the arbitration award extended the contract of employment beyond the date of its expiry. The Court

[95] Id at para 25.

[96] Id.

[97] *Cash Paymaster* above n 88.

held that the Commissioner had exceeded her powers in this regard ordering reinstatement in that case. The Court set aside the part of the arbitration award which extended the contract of employment beyond the period agreed to between the parties. The Court replaced that part of the award with an order for the employer to pay the employee an amount equivalent to the employee's remuneration for the unexpired portion of the contract.

[154] Even during the 1980's it appears that the understanding was the same. In *Crabtree*[98] the employee was dismissed after he had indicated, in the context of discussions on restructuring in the company, that he was not interested in any position other than a certain position that had been given to someone else. In Court he sought reinstatement but the Court refused to reinstate him on the basis that he would not have continued working for the company because he had indicated that he no longer wanted to continue working for the company if he was not given the position that had already been given to someone else. In this present case Mr Makhotla was dismissed at a time when he had already indicated in his letter of resignation that he no longer wanted to continue in Toyota's employ beyond 31 March 2011. The Commissioner failed to apply his mind to the fact that, but for the dismissal, Mr Makhotla would have left Toyota's employ on 31 March 2011. Nor did he apply his mind to what the implications thereof were on remedy. He also did not apply his mind to the provisions of section 193(2)(c).

[155] The statement by this Court in *Equity Aviation* that the aim of a reinstatement order is to put an employee in the position in which he or she would have been in had it not been for the dismissal reflects the general understanding of the aim of reinstatement. A reinstatement order is not intended to put the employee in a position in which he would not have been had he not been dismissed. That means neither a less disadvantageous position nor a more advantageous position than the one in which he was or would have been in had he not been dismissed.

[98] *Crabtree v Dano Textile Industries* (1988) 9 ILJ 119 (IC).

[156] When all is said and done what remains is that, had Mr Makhotla not been dismissed on 24 March 2011, his contract of employment with Toyota would have come to an end on 31 March 2011 as a result of his resignation. He would not have continued in Toyota's employ beyond that date and he would not have earned any remuneration from Toyota for the period from 1 April 2011 to the date when the arbitration award was issued. Therefore, he ought not to be treated as an employee who would have continued in Toyota's employ or who would have continued to earn remuneration from Toyota after 31 March 2011. The Commissioner's award that Toyota reinstate Mr Makhotla in its employ and pay him a back pay of six months totalling R218 400 does exactly this.

[157] The normal reason why in dismissal disputes the Labour Court and arbitrators order the reinstatement of an employee who has been found to have been dismissed for no fair reason is that, had the employer not dismissed the employee, the employee would have continued in the employer's employ during the period from dismissal to the date of reinstatement. The reason why arbitrators and the Labour Court make reinstatement orders retrospective in their operation is that they believe that, had the employer not dismissed the employee, the employee would have continued to earn remuneration from that employer between the date of dismissal and the date of the award.

[158] When the factual position is that, had the employer not dismissed the employee, the employee would not have continued in that employer's employ and would, therefore, not have earned any remuneration from that employer in the post-dismissal period, there can be no basis for a reinstatement order. There can also be no basis for an order for the payment of back pay in such a case. In this case the Commissioner ordered Toyota to pay Mr Makhotla remuneration that he would not have earned from Toyota had Toyota not dismissed him. He would not have earned that remuneration from Toyota because his resignation would have taken effect on 31 March 2011. Quite clearly, the Commissioner did not apply his mind to this crucial aspect of the case. An award that an employer reinstate with back pay an

employee who would not have been in the employer's employ during the relevant period because his resignation would have taken effect in the meantime is an unreasonable award. If he was entitled to anything, it was only pay for seven days from 25 to 31 March 2011.

[159] If an arbitrator grants an award for the employer to reinstate an employee whose resignation would have taken effect, or, whose fixed term contract would have expired, on a date between the date of dismissal and the date of the arbitration award, he makes an award with which the employer cannot practically comply. This is because, but for the dismissal, that employee would have been out of the employer's employ as a result of his resignation. So, bearing in mind the meaning of the word "reinstate" in *Equity Aviation*, how does the employer comply with such an order?[99] In such a case it is not reasonably practicable for the employer to reinstate the employee within the meaning of section 193(2)(c) of the LRA as interpreted by this Court in *Equity Aviation*.[100] Such an order is incompetent and cannot be practically given effect to.

[160] In my view, if an award of reinstatement is made in a case such as the present and the employer were not to comply with it on the basis that it cannot put the employee in the position in which he would have been but for the dismissal and contempt of court proceedings were instituted, the employer would have a complete defence of impossibility of performance. He could legitimately say: "in terms of *Equity Aviation* an award of reinstatement requires the employer to put the employee in the position in which, but for the dismissal, the employee would have been. In this case, but for the dismissal, the employee would have been out of my employment on the basis of a resignation. He would not have been in my employ by now and I cannot put him in my employ because that would not be to reinstate him. To put him in my employ would be to put him in a position in which he would not have been but for the dismissal."

[99] *Equity Aviation* above n 48 at para 36.

[100] Id.

[161] Instead of making the reinstatement order and the order for the payment of R218 400 to Mr Makhotla, the Commissioner should have awarded Mr Makhotla compensation limited to the seven days' remuneration he would have earned for the period 25-31 March 2011 when his resignation would have taken effect. Instead, the Commissioner gave him a permanent job with Toyota which he would not have had if he had not been dismissed. As if that was not enough, the Commissioner ordered Toyota to give Mr Makhotla what is in effect a "golden handshake" to which he was not entitled and which he would not have got had he not been dismissed. If this award is allowed to stand, Toyota may have to end up paying Mr Makhotla around R2 million or even more as it was in September 2011 when the Commissioner ordered that he be reinstated and the further litigation has prevented him from going back to Toyota and work and earn his remuneration.

[162] The Commissioner's approach was simply that the dismissal was substantively unfair and the employee had to be reinstated. That a dismissal is unfair does not mean that a reinstatement order must necessarily be made. An arbitrator must apply his mind to the provisions of section 193(1) and (2) of the LRA. In making the reinstatement order in this case and in ordering Toyota to pay Mr Makhotla six months' remuneration in the amount of R218 400, the Commissioner exceeded his powers, committed a gross irregularity and made an order that no reasonable decision maker could have made. It is an order that the Labour Court ought to have realised had reasonable prospects of being reviewed and set aside.

[163] Apart from the application that the union and Mr Makhotla brought in the Labour Court for an order dismissing Toyota's review application, they also brought an application to have the Commissioner's arbitration award made an order of the Labour Court. The Labour Court made that arbitration award its order in terms of section 158 of the LRA. If the arbitration award is incompetent, it is because the Commissioner issued it contrary to section 193(1)(c), the Labour Court should not have made it its order and should have dismissed the union's application to make it an

order of court. The Labour Court may not make incompetent arbitration awards its orders. On that ground alone the matter should be remitted to the Labour Court to allow remaining affidavits to be delivered so that the review application can be adjudicated on the merits to avoid a situation where a litigant – Toyota – is burdened with an incompetent arbitration award that has been made an order of Court.

[164] It would seem that in some cases the Labour Court has taken the attitude that, where the record provided by the CCMA is incomplete and it is not the fault of the parties but that of the CCMA, the CCMA's failure to ensure that there was such a complete and proper record was an irregularity itself and used that to set aside the award and remit the dispute to the CCMA to be arbitrated afresh. Some of these cases are *Uee-Dantex*; *Shoprite Checkers*;[101] and *Balasana.*[102]

[165] In *Balasana*, relied upon by Toyota in the Labour Court, the Court set aside an arbitration award because the arbitrator had failed to keep proper notes and never told the parties that he was not recording the proceedings mechanically. In other words, the absence of the record was the fault of the arbitrator. The Labour Court was referred to this case but sought to distinguish it. The principle that can be extracted from that case is equally applicable to the present case. The fact of the matter is that in that case, as in this case, the person who was supposed to ensure that there was a proper and complete record of the arbitration proceedings did not do his or her job. In this case the CCMA and the Commissioner were supposed to ensure that there was a proper and complete record of the arbitration proceedings and they failed to perform their job. Therefore, on the basis of that case, and the other cases such as *Uee-Dantex* and *Shoprite Checkers*, Toyota's attitude was not unreasonable. It was a view that enjoyed some judicial support.

[101] *Shoprite Checkers Ltd v CCMA and Others* [2002] ZALC 136; [2002] 7 BLLR 677 (LC); (2002) 23 ILJ 943 (LC) (*Shoprite Checkers*) and *Uee-Dantex Explosives (Pty) Ltd v Maseko and Others* [2001] ZALC 63; (2001) 22 ILJ 1905 (LC) (*Uee-Dantex*).

[102] *Balasana v Motor Bargaining Council and Others* [2010] ZALC 124; [2011] 2 BLLR 161 (LC); (2011) 32 ILJ 297 (LC) (*Balasana*).

[166] It may be recalled that section 145(1) of the LRA provides that "[a]ny 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". In subsection (2) it is provided that:

> "A defect referred to in subsection (1) means—
>
> (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 proceedings; or
>
> (iii) exceeded the commissioner's powers".

[167] In *Boale* although the Labour Court held that a review application should be dismissed where the record is incomplete because the review applicant failed to provide a full transcript of the arbitration proceedings, it held that an exception would be a case where "the tape cassettes are missing or where the parties are unable to reconstruct the record".[103] The present case falls within this exception. In *Nathaniel* the Court refused to set aside the award and remit the dispute simply because the record was incomplete despite the fact that the parties had gone to great lengths to reconstruct the record, including the perusal of their lawyers' notes, the commissioner's notes and the employment of a specialist transcriber to re-assess the tapes.[104]

[168] It is the duty of a commissioner of the CCMA conducting an arbitration to ensure that a proper and complete record of those proceedings is kept and, together with the CCMA, to ensure that, if subsequently, there is a review application, a proper and complete record is made available to the Registrar of the Labour Court. It may well be that a failure by a commissioner to perform this important function constitutes

[103] *Boale v National Prosecuting Authority* [2003] ZALC 82; [2003] 10 BLLR 988 (LC); (2003) 24 ILJ 1666 (LC) at para 5.

[104] *Nathaniel v Northern Cleaners Kya Sands (Pty) Ltd and Others* [2003] ZALC 77; (2004) 25 ILJ 1286 (LC) at para 7.

misconduct or a gross irregularity in the proceedings as envisaged in section 145(2)(a) and (b), respectively. If that is so, then it would be possible to have an award reviewed and set aside on either of these two grounds in section 145(2)(a) and (b) if a commissioner failed to perform this function. I mention this without expressing a definitive view since this was not argued. If Toyota had relied upon this as one of the grounds of review, the Court may have had to give careful consideration to the point.

[169] The above cases show that there is uncertainty on what the position is when the situation which happened here in terms of the record arises. Toyota should not be condemned since there are conflicting judicial opinions on what the correct position is. The correct approach is that the parties should simply deliver affidavits setting out to the best of their recollections what happened at the arbitration and the court should resolve different versions by oral evidence. However, this approach was rejected by the Labour Court in *Fidelity*.[105] In the latter case, too, it seems that the Labour Court would not have dismissed the review application if the case was that the CCMA had lost the tapes which is what seems to have happened in this case.

[170] I now proceed to deal with certain points raised in Wallis AJ's judgment (concurrence) in which he concurs in the majority judgment. It is of vital importance that a proper balance be struck between, on the one hand, the need for the expeditious resolution of disputes and the need for the effective resolution of disputes that have arisen between parties. One of the primary objects of the LRA is the effective resolution of disputes.[106] In my view this judgment strikes a proper balance between the two factors by not having regard only to the need for the expeditious resolution of disputes but also by properly taking into account all relevant factors including prejudice, the merits and the need for the effective resolution of disputes. In this case there was a dispute between the parties about whether the arbitration award issued by the Commissioner was reasonable, fair and lawful which, as administrative action, it

[105] *Fidelity Cash Management Services (Pty) Ltd v Muvhango NO and Others* [2005] ZALC 68; (2005) 26 ILJ 876 (LC) (*Fidelity*).

[106] Section 1 of the LRA gives one of its primary objects as being "to promote . . . the effective resolution of labour disputes".

was required to be.[107] That dispute was not resolved on the merits because the Labour Court wrongly took the view that Toyota had "done nothing for 18 months" to improve the record and it failed to take into account the issue of prejudice to Toyota if it dismissed the review application without the merits being adjudicated.

[171] In his concurrence in the majority judgment, Wallis AJ expresses the view that Ms Edy's evidence that the Commissioner prevented Toyota from adequately cross-examining Mr Makhotla on his conflicting explanations was hearsay. There is no proper basis for this view. Ms Edy clearly states in Toyota's founding affidavit:

> "*The facts contained herein are*, to the best of my knowledge, *both true and correct. The facts are further within my own personal knowledge*, save where the context clearly indicates otherwise". (Emphasis added.)

Nobody deposed to an affidavit and said that those facts could not have been within Ms Edy's personal knowledge because she was not present at the arbitration proceedings. In those circumstances, Ms Edy's statement cannot be hearsay.

[172] The concurring judgment also says that a letter in the record addressed by Toyota's attorneys to the transcribers reflected Mr Kilian as the sole representative of Toyota at the arbitration. Reliance on the fact that Ms Edy's name does not appear in that letter as a reason to justify the conclusion that Ms Edy did not attend the arbitration is, with respect, difficult to understand. First, there is no reason to suggest that the purpose of that letter, addressed as it was to the transcribers, was anything more than to inform the transcribers who Toyota's official representative in the arbitration was.

[173] The letter does not purport to inform the transcribers of anyone else from Toyota who may have been with Mr Kilian at the arbitration but was not an official

[107] This Court decided in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* ZACC 22; [2007]; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) (*Sidumo*) that an arbitration award issued by a commissioner of the CCMA in dismissal disputes under the LRA constitutes administrative action.

representative of Toyota. All of us know of many situations in practice where an advocate or attorney goes to court or to an arbitration with someone, for example, a candidate attorney, a para-legal or a member of the firm's administrative staff and such person does not get reflected in the record of the proceedings because his or her presence was not official. The same could have happened in Ms Edy's case. Therefore, the view that Ms Edy did not attend the arbitration and that her evidence is hearsay is without any merit and is based on speculation. There would also have been no basis for the Labour Court to reject Ms Edy's undisputed evidence that she had personal knowledge of the facts to which she deposed.

[174] What counts in determining whether the Labour Court was required to take Toyota's evidence as true is that there was no one, whether the Commissioner or someone else, who filed an affidavit disputing the averment in Toyota's founding affidavit. The motivation for the decision of the Commissioner or that of the union not to file an affidavit disputing Toyota's evidence is irrelevant. The fact of the matter is that neither filed an affidavit disputing Toyota's evidence that the Commissioner prevented it from adequately cross-examining Mr Makhotla on his contradictory explanations. Furthermore, no reliance can be placed upon the Commissioner's notes to contradict Ms Edy's evidence given under oath that the Commissioner prevented Toyota from adequately cross-examining Mr Makhotla on his contradictory explanations. First, everybody accepts that the Commissioner's notes are not necessarily a true reflection of what occurred in the arbitration proceedings. Second, definitely Toyota disputes their accuracy and nobody, including the Commissioner and the union, deposed to an affidavit saying that those notes are a true reflection of what happened in the arbitration proceedings.

[175] It is true that, generally speaking, an arbitrator does not depose to an affidavit when his or her award is taken on review. However, this is a general rule to which, as is the case with all general rules, there are exceptions. When an allegation is made about the conduct of an arbitrator during arbitration which implies on the face of it unacceptable conduct or partiality, the arbitrator would be expected to file an affidavit.

[176] The averment in Toyota's affidavit that the Commissioner had prevented Toyota from adequately cross-examining Mr Makhotla on his conflicting explanations which was the most crucial part of Toyota's case would impute improper conduct on the part of the arbitrator unless it was explained or justified. The need for an arbitrator to file an affidavit to either deny the allegations or explain or justify his conduct was greater in this case as there was no transcript of the arbitration proceedings on which the Commissioner could rely to reflect the correct picture if he did not file an affidavit.

[177] The concurrence says that it is difficult to comprehend a case where resignation takes place before dismissal. The answer is simple. In the present case that would have happened if on 24 March 2011 the chairman of the disciplinary inquiry had, after finding Mr Makhotla guilty of misconduct, adjourned the disciplinary hearing to after 31 March 2011 for mitigation and had decided at some stage in April 2011 to dismiss Mr Makhotla. By then Mr Makhotla's resignation would have taken effect on 31 March 2011. Mr Makhotla could have sought reinstatement because he would have changed his mind about resignation but would have done so too late.

[178] If an employee communicates to the employer a decision to resign from the employer's employ, our law is clear. It is that whether the resignation takes effect or not does not depend on the employer's acceptance or rejection of the employee's resignation. Not only is there a long line of cases which support this view both before and after the advent of democracy but also this view is supported by a number of academic writers.[108]

[108] *African National Congress v Municipal Manager, George Local Municipality & Others* [2009] ZASCA 139; (2010) 31 ILJ 69 (SCA) (*ANC*) at para 11; *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) (*Stewart Wrightson*) at 954A-B; *Rosebank Television & Appliance Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd* 1969 (1) SA 300 (T) (*Rosebank*); *Potgietersrust Hospital Board v Simons* 1943 TPD 269 (*Potgietersrust*); *Rustenburg Town Council v Minister of Labour & Others* 1942 TPD 220 (*Rustenburg*); *Lottering and Others v Stellenbosch Municipality* [2010] ZALC 67; [2010] 12 BLLR 1306 (LC); (2010) 31 ILJ 2923 (LC) (*Lottering*); *Sihlali v South African Broadcasting Corporation Ltd* [2010] ZALC 1; (2010) 31 ILJ 1477 (LC); [2010] 5 BLLR 542 (LC) (*Sihlali*) at para 11; *Du Toit v SASKO (Pty) Ltd* (1999) 20 ILJ 1253 (LC); Grogan *Dismissal, Discrimination, and Unfair Labour Practices* (Juta & Co Ltd, Durban 2007) at 157; Le Roux and Van Neikerk *South African Law of Unfair Dismissal* 1 ed (Juta & Co Ltd, Kenwyn 1994) at 86; Kerr *Law of Lease* 1 ed (Butterworths, Durban 1969) at 153; Wallis *Labour and Employment Law* Service 5 (1995) at para 33; and

[179] The principle that resignation is a unilateral act and, once given, it cannot be withdrawn except with the consent of the employer is also to be found in the law of lease. Kerr, in *The Law of Lease* expresses the view thus in the context of a lease: "Notice is a unilateral act and once given it is final – it cannot be withdrawn, except with the consent of the other party, not even if it was given in advance and the period of the lease with which it is to run has not yet commenced."[109] In fact, in his work: *Labour and Employment Law*, MJD Wallis SC articulates this principle thus:

> "The giving of notice is a unilateral act requiring no acceptance by the recipient for it to be effective. *Consequently notice once given cannot be withdrawn except by agreement*."[110] (Emphasis added.)

[180] In the light of the above principle, the fact that Toyota said to Mr Makhotla that it did not accept his resignation did not, as a matter of law, change anything regarding the resignation. Had Mr Makhotla not been dismissed on 24 March 2011, his resignation would have taken effect on 31 March 2011 in the same way it would have done if Toyota had said nothing to Mr Makhotla about the resignation. Therefore, the position is simply that, but for his dismissal on 24 March 2011, Mr Makhotla would have left Toyota's employ on 31 March 2011. After all, in saying that it did not accept the resignation, Toyota did not seek to convey that it was still keen to continue an employment relationship with Mr Makhotla. The context in which this was said makes it clear that Toyota realised that Mr Makhotla was trying to use the resignation to avoid facing a disciplinary inquiry and Toyota meant that would not stop it from subjecting him to a disciplinary inquiry for his breach of workplace discipline.

[181] The concurrence further states that it appears that Mr Makhotla may have sought to withdraw his resignation in this case. This statement is not supported by any

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Brassey *Employment and Labour Law* (Juta & Co, Kenwyn 2000) Vol III at A8-26 (as quoted by Cheadle AJ in *Lottering and Others v Stellenbosch Municipality* at para 23).

[109] Kerr *The Law of Lease* above n 108.

[110] Wallis *Labour and Employment Law* above n 108.

evidence whatsoever on record. At no stage before his dismissal did Mr Makhotla approach Toyota and attempt to withdraw the resignation. If he had attempted, his withdrawal would only have been effective in law if Toyota granted its consent. The concurrence says: "In those circumstances there may have been an agreement, express or tacit, to permit Mr Makhotla to withdraw his resignation. We cannot tell because the point was not canvassed".[111] There is no basis for the suggestion that Mr Makhotla may have tried to withdraw his resignation. Mr Makhotla testified that he submitted his resignation because he was angry. If there had been any subsequent agreement between the parties that he could withdraw the resignation, he would have mentioned that at the stage of his evidence. He did not.

[182] In determining what the appropriate remedy was, the Commissioner was obliged to have regard to all the relevant facts of the case including the fact that Mr Makhotla was dismissed at a time when he was serving a notice period and was left with seven days before his contract would come to an end by resignation. The Commissioner was obliged to take this into account irrespective of whether anybody had raised it. He was so obliged because (a) he was legally required to issue a reasonable award and (b) if he did not apply his mind to this, he could easily issue an unreasonable award. This is what actually happened because he failed to apply his mind to these facts. He was also obliged to take that fact into account in order to satisfy himself that he was not dealing with a situation falling under section 193(2)(c) of the LRA. That is a situation in which reinstatement is not competent because it is not practicable.

[183] The last point dealt with in the concurrence is the proposition I make in this judgment that "an employee has no right of withdrawing a valid and lawful resignation once it has been communicated to the employer except with the consent of the employer". The concurrence proceeds from the premise that this principle only finds support in so-called "old cases". That is not true. There are also cases handed down by various courts after the advent of democracy which support or affirm the

[111] Concurring judgment at [203].

principle. Not every principle that existed prior to the advent of democracy was bad. In fact in labour and employment law there are many principles which existed before 1994 which we took over into the era of democracy.

[184] This principle enables an employee to leave an employer's employ easily when he or she wants to because it says that whether his resignation takes effect or not will not depend on the employer's blessing. The principle says the employee's resignation will take effect even if the employer says to the employee: "You are not going anywhere!" The concurrence seems to advocate the opposite of this principle. The opposite of this principle would be to the effect that, when an employee communicates to his or her employer his or her decision to resign, his or her resignation will not take effect unless the employer gives its consent. In *Sihlali* the Labour Court emphatically rejected the proposition that the employer's consent is required before an employee's resignation may take effect. These are the terms in which it rejected the proposition:

> "If a resignation were to be valid only once it is accepted by an employer, the latter would in effect be entitled, by a simple stratagem of refusing to accept a tendered resignation, to require an employee to remain in employment against his or her will. This cannot be – it would reduce the employment relationship to a form of indentured labour."[112]

A situation where an employer could force an employee to continue to work for him against his will is difficult to reconcile with this country's current constitutional values.

[185] In any event our law provides employees with protection even where they have resigned voluntarily if their employer has made continued employment intolerable. Under the LRA, that constitutes constructive dismissal and the LRA has a remedy for it. Our law also provides protection for a situation where an employee sent the employer a resignation letter but changes his or her mind before the letter reaches the

[112] *Sihlali* above n 108 at para 11.

employer. In such a case the employee may unilaterally withdraw the resignation by informing the employer to disregard such a letter when it arrives. The *ANC* case[113] is a good example of a case where a resignation was withdrawn unilaterally before the resignation letter could be read by the Municipal Manager and as a result of the withdrawal the resignation did not take effect. Then our law says that, where the resignation has reached the attention of the employer, the employee may not withdraw it unilaterally but can only withdraw it with the consent of the employer. Accordingly, our law provides for all three situations and in all three situations it cannot be said that the law is unfair on the employee. The employee must simply make sure that he or she does not make a decision to resign and communicate it to the employer without carefully considering whether that decision is what he or she wants.

[186] I am of the view that the problem of missing tapes and incomplete records of arbitration proceedings conducted under the auspices of the CCMA and bargaining councils has been going on for too long. I do not know what has been done to deal with it but it seems to be going on. It seems to me that the CCMA and bargaining councils may require some guidance in this regard to try and avoid or minimise these problems.

[187] In order to try and minimise the risk of incomplete or missing records of arbitration proceedings, both the CCMA and bargaining councils may wish to consider adding the following measures to whatever measures they have put in place:

(a) at the commencement of every arbitration the parties and the arbitrator should inspect the recording machine or device to satisfy themselves that it functions properly; the arbitrator and the parties should sign a certificate to confirm that they did this and the machine was working properly at the commencement of the arbitration;

[113] *ANC* above n 108.

(b) on the morning of each day on which the arbitration continues the arbitrator must also inspect the machine satisfy himself or herself that it is still functioning properly;

(c) sometime around the middle of the day when the arbitration proceedings continue, the arbitrator must again satisfy himself or herself that the recording machine is still functioning properly;

(d) at the end of each day the arbitrator must again check that the machine is still functioning properly;

(e) at the end of the arbitration proceedings the arbitrator should once again check that the recording machine was still functioning properly when the hearing came to an end and sign a certificate to the effect that during the proceedings he or she inspected the functioning of the recording machine at the given intervals and on each occasion found the machine to be functioning properly or not properly, as the case may be. Where he found it not functioning properly, he or she should state this and set out the steps that he or she took to have the situation rectified; and

(f) at the end of the arbitration proceedings or when the arbitration is postponed, the arbitrator must, if he or she hands over the tapes and other documents to anybody such as employees of the CCMA or of a bargaining council, certify to whom he or she handed them over, when that was and such person must also sign a certificate confirming this.

[188] The above steps will make sure that, where the recording machine does not function properly, this is picked up early and, if need be, it is rectified before it is too late. These steps will ensure that somebody can be held accountable to the parties if the tapes and other documents go missing or get lost after the arbitration proceedings have run their course or between postponements. Courts should not have the situation we have had in this case where the CCMA could not tell us what happened. It and the Commissioner have not told us whether the recording machine was functioning properly throughout the arbitration proceedings or whether it stopped functioning at a

certain stage and nobody noticed. They also cannot tell us whether what has caused this problem is something that happened to the tapes in the post-arbitration period. We have not even been told whether the CCMA investigated this matter and established whether it occurred because of any failure by any of its employees to do his or her job and what steps have been taken against such an employee.

[189] Courts should start to be very strict and firm with the CCMA and bargaining councils with regard to their duty to ensure that proper and complete records of arbitration proceedings conducted under their auspices are kept. In appropriate cases costs orders against the CCMA and bargaining councils may have to be seriously considered if this problem persists and no proper explanation is placed before the Court as to what reasonable steps were taken to avoid it.

[190] I would grant leave to appeal, uphold the appeal, set aside the orders made by the Labour Court and replace them with orders dismissing the union's application to have Toyota's review application dismissed without the adjudication of the merits and also dismissing the union's application to make the arbitration award an order of the Labour Court. I would then put the parties on terms for the further conduct of the review application in the Labour Court. I would not make any order as to costs.

WALLIS AJ (Cameron J and Van der Westhuizen J concurring):

[191] I concur in the main judgment prepared by Nkabinde J. With respect, whilst I have no quarrel with many of the principles in the judgment of Zondo J, I think it unduly discounts the extraordinary delays in Toyota pursuing the review in the Labour Court and its failure to provide any explanation for those delays. As the main judgment stresses, the aim of the LRA was to ensure that labour disputes were dealt with expeditiously, and protracted review proceedings pursued in a desultory manner, as in this case, undermine that purpose. I have some sympathy for my colleague's criticisms of the commissioner's approach to the merits of the dispute over dismissal,

but there comes a time in any case where a party's disregard for procedure and delay in pursuing the matter is so extensive that they will be penalised irrespective of the merits of the case. But that is not the reason for this concurrence. I write for two reasons. First, to deal with the conclusion by Zondo J that Toyota had reasonable prospects of showing that there was a gross irregularity in the arbitration before the CCMA, on the ground that the commissioner prevented Toyota's representative from cross-examining Mr Makhotla. An aspect of this is my colleague's view that the commissioner should have delivered an affidavit to deal with that allegation. Second, to express reservations about my colleague's approach to the legal effect of an employee's resignation.

Gross irregularity

[192] In the application for review of the CCMA award, Toyota advanced as one of its grounds of review that the arbitrator prevented its representative from cross-examining Mr Makhotla on the differing explanations he advanced at different times for his absence. I agree with Zondo J that, if the commissioner did that, it would have been a gross irregularity in the conduct of the arbitration. We part company in regard to his finding that Toyota's allegations in this regard had to be accepted by the Labour Court in the absence of any rebuttal from the commissioner.

[193] Mr Kilian, Toyota's Senior Industrial Relations Manager, represented it at the arbitration. But the affidavit deposed in support of the review emanated from Ms Edy, who is employed by the company as an Industrial Relations Specialist. There is nothing to indicate that she played any role in the arbitration or was present during the hearing and the arbitrator's award does not reflect her participation. A letter in the record addressed by Toyota's attorneys to the transcribers of the record reflected Mr Kilian as the sole representative of Toyota at the hearing. Ms Edy's evidence on the point was accordingly on its face both hearsay and not the best evidence of what occurred, notwithstanding her claim (one inserted by lawyers as a matter of routine in affidavits) to have personal knowledge of the matters to which she was deposing.

Singularly absent from the papers is an affidavit from Mr Kilian explaining exactly what happened and what he did about it.

[194] The need for such an affidavit was clear. In the award the commissioner dealt expressly with Mr Kilian's contention that Mr Makhotla had furnished three different and inconsistent explanations for his absence from work. He referred to the cross-examination of Mr Makhotla and said that the latter had throughout insisted that the only reason for his absence was that he had to rescue some abducted girls. On this basis he held that Mr Makhotla had not provided three conflicting reasons for his absence. That there was indeed cross-examination on this topic is apparent from his notes, a portion of which is quoted in [48] of the main judgment. Was the commissioner lying when he said that and were his notes adapted to accommodate the lie? Unsurprisingly, Toyota does not make that allegation.

[195] More pertinently, in Mr Kilian's written argument before the commissioner, when dealing with Mr Makhotla's evidence, under the heading of "cross-examination", one of his submissions was that:

> "He cannot explain the 3 different reasons given by him at different times for his absence. 1) Sms – clear his head – Ornica 2) not feeling well – Hawkins 3) Girl abducted – Ornica and enquiry."

When Mr Makhotla pointed this out, in his application to dismiss the review in the light of the delays, it still did not prompt Toyota to deliver an affidavit by Mr Kilian. Instead a different Industrial Relations Specialist, this time Ms Punchoo, also claiming personal knowledge of matters, deposed to an affidavit in which she simply said that it was denied that the closing argument proved that there had been cross-examination. She was the deponent to the affidavits in this Court. At no stage did she or Ms Edy claim to have been present during the arbitration.

[196] Toyota was aware that Mr Makhotla and the union disputed these allegations. They had said as much at the meeting to reconstruct the record on 28 November 2012.

There was therefore an urgent need to obtain an affidavit from Mr Kilian to substantiate these hearsay and disputed allegations, but none was produced in the eight months that followed before the application to dismiss came before the Labour Court, and none was produced in these proceedings. But Zondo J's judgment does not deal with, much less place any store by, the absence of an affidavit from Mr Kilian.

[197] Despite these gaping deficiencies in Toyota's case on this point, my colleague would hold that the Labour Court was obliged to accept them at face value in the application for dismissal, because there was no affidavit before it from the commissioner disputing the allegation that he prevented cross-examination on this topic. He builds upon that to make a finding that Toyota had reasonable prospects of showing that this constituted a gross irregularity in the arbitration proceedings before the CCMA. I disagree and, in particular, disagree with the suggestion that it was appropriate for the commissioner to intervene in these proceedings for that purpose. Such an intervention by an arbitrator is most unusual and frequently undesirable because the arbitrator should be above the fray. An intervention, in effect in support of the award, may be seen as evidence of partiality.

[198] The conventional approach is for the arbitrator to abide the decision of the court on an application for review or the setting aside of the award. Those with vast experience of review proceedings in the Labour Court directed at challenging CCMA awards will know better than I whether it is common for commissioners to file affidavits and seek to rebut review grounds where no order is sought against them personally, but my impression is that this is extremely rare and my colleague does not suggest otherwise. It is equally rare in regard to applications to set aside conventional arbitration awards under the Arbitration Act.

[199] An arbitrator is properly cited in any decision to review the award. Their participation in the proceedings is, however, unusual.[114] Where they do not enter the lists that is not an acknowledgment that the allegations made in regard to their award, be they of gross irregularity or otherwise, are admitted. All that their abstention means is that they are willing to abide the court's adjudication of the review without taking sides. That is very frequently done because the arbitrator wishes to avoid any impression of partiality or defensiveness over the award and knows that the successful party to the arbitration can rebut the complaints made by the applicant. That was the case in this instance. For all we know, had the time come for Mr Makhotla to deliver his opposing affidavit – and, as explained in the main judgment, that time had not yet come – an affidavit would have been sought from the commissioner on this point. In those circumstances I am unable to agree with my colleague when, in [53] of his judgment, he remarks adversely on the commissioner's failure to deliver an affidavit, and uses that fact to support his approach that there were reasonable prospects of showing that the arbitrator committed a gross irregularity. In my view that finding is not one that can be made in this case.

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[114] *Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another* 1992 (1) SA 89 (W) at 92A-D where Preiss J said:

> "The arbitrator, who was cited as the second respondent, elected to file an answering affidavit, at the end of which he sought the dismissal of the application and an order that his costs of opposition be paid. In this regard his joinder of issue, though uncommon, is perfectly proper. In the case of *Port Sudan v Chettiar* [1977] 1 Ll LR 166 (QB) at 178, Donaldson J said the following:
>
> > 'The modern practice is for a notice of motion alleging misconduct, whether technical or actual, to be served upon the arbitrator or umpire concerned. He then has a choice whether–
> >
> > (a) to take a full part in the proceedings as an active party; or
> >
> > (b) to file an affidavit setting out any facts which he considers may be of assistance to the Court; or
> >
> > (c) to take no action, in which case it will be assumed only that he has no wish to do more than accept the decision of the Court.
> >
> > This practice is based upon the consideration of natural justice, that no one should have his conduct criticised without being given an opportunity for replying or explaining.'"

Resignation

[200] My second concern arises from my colleague's discussion of the implications of Mr Makhotla having tendered his resignation on 7 March 2011, after he had been apprised of the fact that Toyota intended to pursue disciplinary proceedings against him arising from his absence without leave. I start by identifying where we have common ground. If an employee's resignation flows from the employer rendering continued employment intolerable, that is an unfair dismissal and is dealt with like any other unfair dismissal under the LRA. Once the employee's employment has come to an end in consequence of resignation, it is generally speaking no longer open to the employer to conduct disciplinary proceedings against the employee, at least not with a view to terminating their employment.[115] If by the time an unfair dismissal dispute has been resolved the employee's employment would have terminated, for example, because a fixed term contract of employment had expired or they had passed the age for retirement, it is not open to the commissioner to reinstate them.

[201] In [143] of his judgment Zondo J says: "if, in the present case, the resignation had preceded the dismissal, the CCMA would have had no jurisdiction and an award would not have been competent because an employee who resigned cannot be reinstated". But it is difficult to comprehend on what basis such an employee would be seeking their reinstatement. Apparently the suggestion is that there may have been a change of heart after the resignation took effect, but that is rare and the claim for reinstatement would fail. If the employee claimed that the employer made continued employment intolerable, that is an unfair dismissal, but it is the paradigmatic case where reinstatement is neither sought nor granted. After all if continued employment has been rendered intolerable the employee is hardly likely to seek reinstatement. And, if they have resigned and are content with that, they will also not do so. Indeed there would be no basis at all for them to approach the CCMA.

[115] I do not wish to say definitively that this is impermissible where an issue, such as a forfeiture of the entitlement to exercise share options, is engaged. If a dishonest employee resigns ahead of being discovered, and the terms upon which a benefit was afforded to them provided that they would forfeit that benefit if dismissed for dishonesty, it would be an unacceptable conclusion to say that, as they had resigned, they could no longer be dismissed and hence remained entitled to the benefit. Accordingly I would reserve this question for another day. To that extent I have reservations about the definite statement in [142] of Zondo J's judgment.

[202] The only situation where the problem may arise is a case like the present where the employee has tendered their resignation, but is dismissed before the resignation can take effect. Here there are two possible scenarios. If the employee seriously intended to resign and persisted in that stance, why would they either participate in the disciplinary proceedings leading up to their dismissal, or approach the CCMA? Their only purpose in doing so would be to have the blot of dismissal removed from their record, or to avoid the forfeiture of a benefit, or something similar. They would not be seeking reinstatement. That leaves only the situation of an employee who tenders their resignation, but subsequently, and before it has taken effect and brought about the termination of the contract of employment, repents of that decision and seeks to withdraw from it. That appears to have been the situation with Mr Makhotla.

[203] The main judgment amply explains in [49] why this is not a point on which Toyota can rely at this stage. It is plainly one devised long after the event, having not featured at the internal disciplinary hearing; before the CCMA; in either the founding affidavit or the supplementary affidavit in the review application; or before Fourie AJ in the Labour Court. The evidence was that the resignation was not accepted and it was not thought of again until the application for leave to appeal to this Court. In those circumstances there may have been an agreement, express or tacit, to permit Mr Makhotla to withdraw his resignation. We cannot tell because the point was not canvassed.

[204] My further concern lies with the legal proposition at the commencement of [144] of Zondo J's judgment that "an employee has no right of withdrawing a valid and lawful resignation once it has been communicated to the employer except with the consent of the employer". That proposition is derived from an old case in the then Transvaal Provincial Division.[116] In *Rustenburg* the town council had met to discuss

[116] *Rustenburg* above n 108 at 224 followed in *Potgietersrust* above n 108 at 274. *Rustenburg* was cited in *Rosebank* above n 108 at 302 and *Air Traffic and Navigation Services v Esterhuizen* [2014] ZASCA 138 at para 17 but neither of those cases dealt with this issue.

certain differences that were said to have arisen between employees in its electricity department. On being informed that the differences had been resolved it decided to take no further action. The following morning the town clerk was handed three notices of resignation by various officials in the electricity department, including the electrical engineer. Later that day the engineer called upon the town clerk in his office and asked to see the letters. They were handed to him and he proceeded to destroy them, apparently because he had been advised by the mayor to withdraw his resignation. He had authority to act on behalf of the other two officials. The council then met and resolved to accept the withdrawal of the resignations of the other two, but not that of the engineer.

[205] Through his trade union the engineer applied to the Minister of Labour for the appointment of a conciliation board and such a board was appointed.[117] The council successfully applied for the board to be set aside, on the basis that the engineer's employment had terminated as a result of his own voluntary act and not as a result of an act by the council. The Court rejected an argument that the resignation had been withdrawn, saying:

> "The giving of notice is an unilateral act: it requires no acceptance thereof or concurrence therein by the party receiving notice, nor is such party entitled to refuse to accept such notice and to decline to act upon it. If so, it seems to me to follow that notice once given is final, and cannot be withdrawn - except obviously by consent".[118]

[206] *Potgietersrust* concerned the matron of a hospital, about whose conduct and performance there had been complaints. These were considered by the hospital board, which then called her into a meeting and asked for her resignation. She agreed to resign with effect from 31 December. The chair of the board testified that the matron was confused at the time. The secretary said that immediately after the meeting she sought to withdraw the resignation and make it effective from the end of January the following year. The board refused to permit this, and when she did not leave the

[117] In terms of the Industrial Conciliation Act 36 of 1937.

[118] *Rustenburg* above n 108 at 224.

premises and continued to work and interfere with the duties of the nursing staff, it brought urgent proceedings for an interdict and her ejectment from the premises. That order was granted on the authority of *Rustenburg*.

[207] Are these old cases still good law in the light of the constitutional protection that workers now enjoy to fair labour practices,[119] and the injunction that in appropriate cases the court must develop the common law to give effect to the nature, purport and objects of the Bill of Rights?[120] There is ample jurisprudence in this Court that not everything that is old is bad.[121] But, while viewing the outcome of cases decided in a different time and under different circumstances and condemning them as unfair, may be facile when done with the benefit of hindsight and dramatic changes in society, it nonetheless seems to me that the outcome of these two cases does not measure up to our modern notions of fairness in the context of employment.

[208] Why should an employee, who acts on impulse and resigns in a fit of pique, be precluded, when tempers have cooled and common sense prevails, from withdrawing a notice of resignation on which the employer has not acted? Why should a notice of resignation that the employer refuses to recognise bind the employee, so that the employer that rejected it may thereafter rely upon it? That is what occurred in this case. Mr Makhotla's superior discussed his resignation with the human resources department and the vice-president of the company, and said they refused to accept it. Toyota insisted on continuing with disciplinary proceedings that had been rendered academic, if in truth they accepted that Mr Makhotla was going to leave at the end of the month. That having been their attitude, it hardly lies with them, at this late stage, to say, as a defence to a claim that he was unfairly dismissed, that it does not matter because he had already decided to leave. And of course if that were the case any award to him would be minimal. Zondo J describes this as speculation. But, if that

[119] Section 23(1) of the Constitution.

[120] Section 39(2) of the Constitution.

[121] For a recent example see *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another* [2015] ZACC 34 at para 37.

characterisation is correct, that is because this was not Toyota's case and these issues were not explored on the facts at any stage of the proceedings. They were raised for the first time in this Court.

[209] We have not received argument on these interesting and difficult points. Should the old view be retained as still applicable to our day and age? My colleague obviously thinks it should.[122] I am less certain.[123] Should it be altered, and, if so, how? I do not suggest (as did the Labour Court in *Sihlali*) that a corollary of allowing an employee to withdraw their resignation would be that the employer, by refusing to accept it, could force the employee to remain in their employment. One possibility would be to require the acceptance of a resignation by the employer before it became binding on the employee. Another would be to construe a notice of resignation as precatory in effect and capable of being withdrawn up to the point where the employer has acted on it to its prejudice. A third, consonant with the constitutional right to fair labour practices, would be to say that an employer may not rely upon a resignation that has been withdrawn, if it would in all the circumstances be unfair for it to do so. Conceivably there are other possibilities. It is unnecessary and impossible to determine this issue at this stage in this case. The question must be left open to be dealt with on another day and in another case where it more appropriately arises, preferably after careful consideration by the Labour Court and the Labour Appeal Court. In this case, with the additional remarks expressed above, I concur in the main judgment, which addresses all the issues that properly arise for determination here.

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[122] In note 108 Zondo J cites a number of cases as supporting his view. But several of them do not. *Rosebank* does not deal with the ability of an employee to withdraw their resignation. *Stewart Wrightson* at 954A-B addresses the question whether a repudiation of a contract, not a termination by notice, requires communication of an acceptance by the other party in order for that party to claim that it brought the contract to an end. *ANC* dealt with a notice of resignation by a municipal councillor that was not opened or read by the town clerk before being withdrawn. In para 17 of that judgment, Maya JA said that it was unnecessary to decide whether, if it had been opened and read, it could have been withdrawn. *Lottering* and *Sihlali* at para 11 are cases in the Labour Court in which the traditional view was endorsed.

[123] My colleague cites as supporting his view what I wrote twenty years ago in *Labour and Employment Law*, Butterworths, 1995 at 33. Like Bramwell B in *Andrews v Styrap* (1872) 26 LT 704 at 706 "[t]he matter does not appear to me now as it appears to have appeared to me then".

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