REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1683 / 2012

In the matter between:

DAVID THEMBA **Applicant**

and

MINTROAD SAWMILLS (PTY) LTD **Respondent**

Heard: **15 October 2014**

Delivered: **12 November 2014**

Summary: Reinstatement – meaning considered – what constitutes compliance with reinstatement award

Reinstatement – restoration of status quo – does not create right to increases in the interim – unless right to increase founded in contract or legal provisions – applicant has right to increases in terms of collective agreements

Leave pay – reinstatement does not entitle employee to be paid out for leave pay in the interim – leave pay only payable on termination of employment

Reinstatement – determination of back pay resulting from legal proceedings in the interim leading to reinstatement not being effected – principles considered

Application proceedings – proper process is application for quantification –

applicant properly brought application to Labour Court – relief granted

JUDGMENT

SNYMAN, AJ

Introduction

[1] The applicant has brought an application in terms of which the applicant has applied that an arbitration award in his favour be made an order of court, his date of employment as reflected on his employment records be amended, and that remuneration and other benefits due to him as a result of a reinstatement award be quantified and the respondent then be ordered to pay the same. The applicant also seeks interest on any overdue payments. The respondent has opposed this application.

[2] The applicant has elected to bring this matter by way of motion proceedings. As such, and insofar as there are disputed facts, I have applied the normal principles in resolving such factual disputes in motion proceedings where final relief is sought, as enunciated in the judgment of *Plascon--Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[1] and have accepted the facts as contained in the respondent's answering affidavit where such factual disputes exist. The factual background as set out hereunder has been arrived at on this basis.

Background facts

[3] The applicant commenced employment with the respondent on 25 August 1995, and was then dismissed on 18 September 2009. On the date when the applicant was dismissed, he was earning R4 499.78 per month.

[4] The applicant then challenged his dismissal as an unfair dismissal to the CCMA. The matter came before Commissioner Sharmain Dadabhai for con/arb on 19 October 2009. Because there was no objection to con/arb, the matter proceeded directly to arbitration when conciliation failed. The

[1] 1984 (3) SA 623 (A) at 634E-635C; See also *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paras 26 – 27; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 *ILJ* 2031 (LAC) at para 38; *Geyser v MEC for Transport, Kwazulu-Natal* (2001) 22 *ILJ* 440 (LC) at para 32; *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* (1999) 20 *ILJ* 137 (LC) at para 26.

arbitration was however not completed on 19 October 2009 and became part heard. The arbitration was then concluded on 30 November 2009.

[5] In an arbitration award dated 28 December 2009, and issued under case number GAJB 31820 – 09, Commissioner Dadabhai found in favour of the applicant, concluding that his dismissal was substantively unfair on the basis of the sanction of dismissal being too harsh. Commissioner Dadabhai directed that the applicant be reinstated by the respondent on the same terms and conditions of employment, but without any back pay, and subject to a final written warning.

[6] Commissioner Dadabhai unfortunately did not indicate in his award when the applicant had to actually report for work. As such, it must be accepted that the reinstatement operated from the date of the award. The applicant stated that the award however only came to his attention on 11 January 2010, and on 12 January 2010, the applicant's trade union (NEWU), on his behalf, tendered the applicant's services on the basis that the applicant would report for duty on 13 January 2010. The applicant further stated that he in fact reported for work on 13 January 2010, as was tendered, but he was turned away by the respondent.

[7] The respondent then challenged the award of Commissioner Dadabhai on review to the Labour Court, in terms of section 145 of the LRA, under case number JR 89 / 10. The respondent refused to reinstate the applicant pending the final determination of this review application. The review application finally came before Van Niekerk J on 21 October 2011, and in a judgment handed down on 24 May 2012, Van Niekerk J dismissed the respondent's review application. The effect of this was that the original arbitration award by Commissioner Dadabhai was upheld, and stood to be complied with by the respondent.

[8] The applicant, following the handing down of the judgment of Van Niekerk J, reported for work on 28 May 2012. He was initially turned away by the respondent, but following correspondence between the applicant's trade union and the respondent's attorneys, the applicant was informed that he had to

report for work on 8 June 2012. The applicant then indeed reported for work on 8 June 2012 and remained working at the respondent.

[9] When the applicant reported for work on 8 June 2012, he was required to sign a new contract of employment. The contract stated, under the heading of "Commencement', that the applicant's reinstatement date was 8 June 2012. The contract also recorded that his weekly wage was R1 038.40. The applicant disagreed with these mentioned provisions, but he still signed the contract as evidence that he accepted his return to work, and recorded that he received the contract 'without prejudice'. As stated, the applicant has remained working ever since, but his pay slips reflected that his starting date of employment was 8 June 2012.

[10] The issue of the applicant's entitlement to increases and remuneration from the date of the award and until the actual date of giving effect to his reinstatement remained in contention. As a result, the respondent made no payment of these amounts upon the applicant returning to work. The applicant contended that he was entitled to a 9% increase for the year ending 1 December 2010, a 7.5% increase for the year ending 2 December 2011, and finally a 7% increase for the year ending 29 November 2012. The applicant then sought to quantify such increases, and the back pay due in terms of such increases. In short, the applicant contended that he was entitled to back pay from 28 December 2009 until 7 June 2012, with increases, and this amounted to a total of R157 014.50.

[11] In addition, the applicant has contended that he was entitled to 15 working days' paid leave per annum, and accordingly, he should be paid leave pay from 28 December 2009 to 7 June 2012. According to the applicant, this amounted to R6 939.55.

[12] Finally, the applicant stated that he was entitled to bonus payments for 2010 and 2011, since he was reinstated on 28 December 2009, and this amounted to R2 230.00 for 2010 and R2 400.00 for 2011.

[13] Finally, the applicant also claimed mora interest on all of the above amounts, calculated from 8 June 2012, based on a contention that the respondent was

in mora since that date.

[14] The applicant has also, as part of his application and in order to substantiate his contention that he is entitled to the increases prayed for, discovered two collective agreements concluded between the respondent and NEWU. It was common cause that the applicant was a member of the trade union NEWU, who also represented him in the arbitration, and corresponded with the respondent on his behalf. The first collective agreement is described as the 2009 / 2010 wage increase agreement, and in terms of this agreement, employees are afforded an agreed 9% increase applying for the period from 3 December 2009 to 1 December 2010. It was also agreed that employees would be entitled to a 10 days' remuneration bonus. The second agreement is the 2011/2012 wage increase agreement, and in this instance, the employees are afforded an agreed increase of 7% for the period 1 December 2011 to 29 November 2012, and again a 10 days' remuneration bonus. There does not appear to be any collective agreement for a wage increase and bonus for the 2010/2011 year.

[15] All that the applicant has provided, in respect of the 2010/2011 year, is a letter by the respondent dated 8 December 2010 sent to all employees, making an offer of a 7.5% increase, and an offer of a 7 days' remuenration bonus, and calling on employees to accept it. There is no evidence that this was ever accepted by NEWU or agreed to as being a generally applicable increase and bonus. All that the applicant has provided is an individual acceptance of this proposal by one individual employee (one M J Chauke), and this acceptance document in itself records that this employee accepts this proposal individually and of his own accord and distances himself from negotiations on these issues. Probabilities indicate that no agreement on an increase and bonus was concluded for the 2010/2011 year.

[16] The respondent's opposition to the applicant's claims for increases and bonuses is a simple one. The respondent contends that the collective agreements only apply to employees that are permanent employees at the time when the agreements were concluded. According to the respondent, the applicant was not a permanent employee at that point in time, and as such,

the collective agreements were not applicable to him. The respondent has also contended that there was no 2010/2011 collective agreement and all the applicant showed was acceptable of an increase and bonus by an individual employee, which does not continue a right to an increase and bonus for the applicant.

[17] As to leave pay, the respondent contended that the applicant is not entitled to be paid out leave pay, by virtue of the provisions of the BCEA.[2]

[18] The respondent however does concede that the applicant is entitled to remuneration for the period from 28 December 2009 to 7 June 2012 as a matter of general principle, and according to the respondent this amounts to R125 578.48. The respondent further contents that this amount is subject to UIF and statutory deductions.

[19] Based on all of the above background facts, the issue I now have to decide is whether the applicant is entitled to increases, what the quantum of the remuneration is that he is entitled to, whether he is entitled to bonuses, and finally whether he is entitled to leave pay and interest. I will now proceed to individually determine these issues.

<u>The issue of the increases and remuneration due</u>

[20] In deciding the issue of remuneration due, it is important to firstly consider and determine what exactly 'reinstatement' means where it comes to an award of reinstatement by an arbitrator. In terms of section 193(1) of the LRA: '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 ….'. This section does not dictate the terms applicable to such reinstatement, and leaves this up to the judge or arbitrator, with the only proviso being that it cannot operate earlier than the actual date on which the employee was dismissed.

[21] In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation*

[2] Basic Conditions of Employment Act 75 of 1997.

and Arbitration and Others[3] the Court specifically dealt with the meaning of 'reinstatement' awarded in terms of section 193 of the LRA. Nkabinde J had the following to say:[4]

> '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. …. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of s 193(1)*(a)* indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The ordinary meaning of the word 'reinstate' means that the reinstatement will not run from a date after the arbitration award. Ordinarily then, if a commissioner of the CCMA orders the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the commissioner decides to render the reinstatement retrospective.'

[22] In my view, the *ratio* in *Equity Aviation* is clear. Reinstatement means the restoration of the *status quo ante*. It is as if the employee was never dismissed. Where reinstatement is awarded, an employer will be in compliance with such an award if the employer, on (or as from) the date of the award having been made, takes the employee back into its service on the same terms and conditions of employment of the employee as it existed at the time of dismissal of the employee. Also, and as a necessary consequence, the original starting date of employment of the employee will remain the same and applicable, if such reinstatement is awarded.

[23] When it comes to the issue of the retrospectivity of reinstatement, this is

[3] (2008) 29 ILJ 2507 (CC).
[4] Id at para 36.

however, in terms of the above ratio in *Equity Aviation*, a completely different issue. Reinstatement is not necessarily coupled with retrospectivity and is not a *sine qua non* of it. Retrospectivity of reinstatement is a separate discretion that must be exercised by the arbitrator of the judge when deciding to award reinstatement. Retrospectivity, in simple terms, relates to what is commonly known as 'backpay', and constitutes what the arbitrator or judge expects an employer to pay the employee for the time the employee has been languishing without remuneration as a result of the employee's unfair dismissal. In short, reinstatement means taking the employee back on the same terms and conditions of employment as if the dismissal of the employee never occurred , which would apply as from the date of award of reinstatement and with continuity of employment intact. But the concept of reinstatement does not *per se* include the issue of back pay. Back pay is a separate issue and determination, albeit coupled with reinstatement.

[24] The Court in *Nel v Oudtshoorn Municipality and Another*[5] referred with approval to the following:

> '…. In *Jackson v Fisher's Foils Ltd* [1944] 1 All ER 421 Humpreys J quoted with approval the following dictum in *Dixon (William) Ltd v Patterson* 1943 SC (J) 78 as to the meaning of 'reinstatement':
>
> 'The natural and primary meaning of "to reinstate" as applied to a man who has been dismissed (*ex hypothesi* without justification) is to replace him in the position from which he was dismissed, and so to restore the *status quo ante* the dismissal.''

The Court concluded:[6]

> 'From the provisions of the LRA and the cases I have cited it is clear that by reinstating a dismissed employee the employer does not purport to conclude a fresh contract of employment. The employer merely restores the position to what it was before the dismissal. ….'

[25] The Labour Appeal Court followed the same approach in *Mediterranean*

[5] (2013) 34 ILJ 1737 (SCA) at para 8.
[6] Id at para 10.

Textile Mills (Pty) Ltd v SA Clothing and Textile Workers Union and Others[7] where the Court said:

> 'The term 'reinstatement' within the context of s 193(1)*(a)* of the LRA entails placing a dismissed employee back to his or her former position in employment as if he or she was never dismissed in the first place. This is the essence of retrospective reinstatement envisaged in s 193(1)*(a)* which, according to a recent Constitutional Court decision, *Equity Aviation Services Ltd v Commission for Conciliation, Mediation & Arbitration & others,* is- 'the primary statutory remedy in unfair dismissal disputes (in that) [i]t is aimed at placing an employee in the position he or she would have been but for the unfair dismissal'.'

[26] And recently, the Labour Court in *Myers v National Commissioner of the SA Police Service and Another*[8] held:

> 'The Constitutional Court in *Equity Aviation* interpreted the word 'reinstate' to mean that the employee must be put back into the same job or position that he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is aimed at placing the employee in the position he or she would have been, but for the unfair dismissal ….'

[27] The discretion as to whether backpay is awarded in the case of reinstatement, and also to what extent it is awarded (being the very issue of retrospectivity of the operation of the reinstatement) is not statutorily prescribed. It is for the arbitrator or judge to decide. Accordingly, and considering the above *ratio* in *Equity Aviation*, if a judge or arbitrator just awards reinstatement, and makes no determination on retrospectivity of the operation of reinstatement, reinstatement will only operate from the date of the award going forward. The arbitrator or the judge is in my view required to specifically address the issue of the retrospectivity or reinstatement, and determine the extent of the same in making the award. As the Court said in *Mediterranean Textile Mills*[9]:

> '…. a dismissed employee who is ordered to be reinstated should ordinarily

[7] (2012) 33 ILJ 160 (LAC) at para 26.
[8] (2014) 35 ILJ 1340 (LC) at para 14.
[9] (*supra*) at para 27. See also *CEPPWAWU and Another v Glass and Aluminium 2000 CC* (2002) 23 ILJ 695 (LAC) at para 52.

> be entitled to his or her full arrear remuneration (the so-called 'backpay') as if the dismissal never took place. However, the court or the arbitrator has the discretion in terms of determining the extent of the retrospective effect of the reinstatement, which the court or the arbitrator may fix 'from any date not earlier than the date of dismissal'.

[28] In *Republican Press (Pty) Ltd v Chemical Energy Paper Printing Wood and Allied Workers Union and Others*[10] the Court clarified the position on backpay as follows:

> '…. I do not think that the backpay to which a worker ordinarily becomes entitled when an order for reinstatement is made is to be equated with compensation …. As pointed out by Davis AJA in Kroukam, *(and I respectfully agree) an order of reinstatement restores the former contract and any amount that was payable to the worker under that contract necessarily becomes due to the worker on that ground alone. Perhaps a court (or an arbitrator) that makes such an order may also order that part of that remuneration shall not be recoverable (I make no finding on that point) but I agree with Davis AJA that the remuneration becomes due under the terms of the contract itself …. '*

[29] The exercise of the discretion as to the extent of retrospectivity (backpay) is firmly founded in the concept of what is fair to both parties. As Froneman J said in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others*[11]:

> 'The remedies awarded in terms of the provisions of s 193 of the LRA must be made in accordance with the approach set out in *Equity Aviation*. That approach is based on underlying fairness to both employee and employer. …'

And in *Mediterranean Textile Mills*[12] the Court said 'fairness ought to be assessed objectively on the facts of each case', and then referred with approval to the following passage from *National Union of Metalworkers of SA v Vetsak*

[10] (2007) 28 ILJ 2503 (SCA) at para 19.
[11] (2010) 31 ILJ 273 (CC) at para 42.
[12] (*supra*) at para 43.

Co-operative Ltd and Others[13]:

> 'Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances *(NUM v Free State Cons* at 446I). And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act.'

[30] The matter now before me is actually a case in point where it comes to the issue of the nature of the reinstatement award, on the one hand, and its retrospectivity, on the other. The Commissioner awarded reinstatement of the applicant on the same terms and conditions of employment. But the Commissioner held that the reinstatement did not operate retrospectively. In terms of the above reasoning, this means that the *status quo ante* is restored, and the applicant is restored into employment at the respondent in terms of his original contract of employment, with continuity of service intact, effective from the date of the award of 28 December 2009 going forward. But the applicant is not entitled to any backpay until 28 December 2009.

[31] However, and going forward from 28 December 2009, the issue is not one concerning retrospectivity of the reinstatement. The applicant has been reinstated, and this reinstatement applied from 28 December 2009. The pending challenge by the respondent of the arbitration award by way of the review application does not change this. This means that the applicant's entitlement to be paid by the respondent whilst the review is pending does not arise from the reinstatement award, but actually arises directly from his contract of employment which has been restored to all its former glory by the reinstatement. Contractually, the applicant is an employee of the respondent and as from 28 December 2009 he is entitled to be paid his salary in terms of his contract of employment, being such an employee. This is in line with the reasoning of the Court in *Republican Press* referred to above.

[32] Now it is true that the applicant did not actually work in terms of his contract of employment, from 28 December 2009 to 8 June 2012, the latter being the

[13] (1996) 17 ILJ 455 (A). See also *Equity Aviation* (*supra*) at para 39.

date when he finally actually resumed his duties. Normally, payment in terms of a contract of employment is a *quid pro quo* for work actually performed. But the reality is that whilst the respondent, as employer, indeed has the right to review in terms of section 145 of the LRA, the exercise of such right has consequences. The simple fact is that by exercising this right, and then requiring the employee (applicant) not to report for work whilst the exercise of this right is ongoing, it is the employer (respondent) that by way of its own conduct is preventing the employee from rendering work under the employment contract. The employer simply cannot then benefit from this conduct by contending that the employee did not work and thus should not be paid, because the right to be paid is founded on rendering work in terms of the employment contract. *In casu*, the respondent decided on its course of action, and must live with all the consequences resulting from such decision. The Court specifically dealt with this in *Equity Aviation*, and said:[14]

> 'Equity argues that the order of perceived retrospectivity is unduly harsh on its business, not least as it (Equity) has not benefited from Mr Mawelele's services in the interim period. Equity seems to lose sight of the fact that a remedy of reinstatement is always granted to an employee wishing to offer his or her services to his or her employer. There is no evidence that Equity offered the employee a job and no contention to that effect has been made. Moreover, it is not suggested that there is any evidence which is relevant that ought to have been, but was not included in the record.
>
> The principle of the right of election is a fundamental one in our law. Equity made an election not to ask Mr Mawelele to render his services, nor did they offer him alternative employment. When exercising an election, the law does not allow a party to blow hot and cold. A right of election, once exercised, is irrevocable particularly when the volte face is prejudicial or is unfair to another. As long as an employee makes himself or herself available to perform his or her contractual obligation in terms of the contract of employment, he or she is entitled to payment despite the fact that the employer did not use his or her services ….'

[33] Accordingly, and as a matter of general principle, the applicant is entitled to be

[14] (*supra*) at paras 53 – 54.

paid his contractually agreed remuneration, as it existed in his contract of employment as at 18 September 2009 when he was dismissed, as from 28 December 2009. This is the contract of employment that was restored as a result of the reinstatement award. This right to be so paid accrued on 28 December 2009, and continued until the applicant finally returned to work on 8 June 2012. At the very least, therefore, the applicant is entitled to his salary of R4 499.78 per month for this period, which the respondent seems to have conceded to be the case, in the answering affidavit.

[34] The applicant has not discovered his original contract of employment in the application. The applicant has provided the contract that he signed when he returned to work in June 2012, but has not provided the rules and regulations referred to in such contract. Where it comes to issues such as the applicant's right to increases as from 28 December 2009, which is the next issue to consider, the applicant has to show that he has the right to such increases in terms of his contract of employment. The simple point is that it must be accepted the applicant was never dismissed, and as such, and any right he has to payment must be founded on his contract of employment and terms, or on applicable collective agreements, or finally on applicable statutory instruments (such as the BCEA). This means that the applicant has to show a contractual or statutory right to an increase, in order to be able to claim the same. In *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Another*[15] the Court said the following:

> '…. The dispute of the individual applicants, at its core, is nothing more than an attempt to get an increase so that they can earn the same as their other deputy director colleagues. …. The individual applicants are thus bound to their current contractual arrangement, which remains unchanged. In *SA Maritime Safety Authority v McKenzie*, the court held that rights arising from a contract depend upon the actual or imputed consent of the parties, which in this case, as to the right the individual applicants seek to enforce, does not exist.'

[15] (2013) 34 ILJ 690 (LC) at para 35. See also *Department of Justice and Constitutional Development v Van der Merwe NO and Others* (2010) 31 ILJ 1184 (LC) at para 32.

[35] Also, and in *Mans v Mondi Kraft Ltd*[16] the Court said:

> 'Mr Mans does not have a contractual right to an increase. He has a contractual right that each year his employer must exercise a discretion whether to increase his salary or not. This discretion, according to the paragraph cited above, may permit the salary (possibly the salary package) to be reviewed. ….
>
> Therefore, if there is no obligation to make an offer of a salary increase, the employer is at liberty to make an offer embracing the whole salary package including benefits in kind for the labour of an employee. This offer is made in the course of individual bargaining and may be influenced by market forces and economic considerations. It may be better than the existing contract or it may go the other way. Salaries usually progress upwards but the market is not bound to increase salaries. An employer in terms of our common law may simply do nothing if the law does not require any action. The effect of doing nothing in inflationary time may be to place the employee under siege until economic forces induce the employee to accept the offer. The common law does not regard this as unlawful nor unfair.'

I agree with these sentiments, which in my view would directly apply to whether the applicant is entitled to claim increases as from 28 December 2009.

[36] Accordingly, and simply put, if the applicant cannot show an actual contractual or statutory right to an increase as from 28 December 2009, he simply cannot claim it. The fact that other employees may have received increases pursuant to an agreement concluded between the employer and that other individual employee in particular, cannot assist the applicant in establishing a right to an increase. The fact that other employees and the respondent individually agreed to increases cannot create a right to an increase for the applicant. Insofar as it concerns the applicant's individual contract of employment, no right to an increase has been established as flowing from such contract. In fact, and from the affidavits, it is in my view clear that increases in the

[16] (2000) 21 ILJ 213 (LC) at paras 11 and 13.

respondent are a discretionary issue negotiated annually and would only be effected if specifically agreed to for that year. The applicant thus has no right to increase in terms of his individual contract of employment and simply cannot claim the same if he seeks to rely on such contract.

[37] I have also not been pointed to any relevant statutory provision that would entitle the applicant to an increase. A pertinent example would be a Sectoral Determination that is issued by the Minister of Labour under the provisions of the BCEA, and in such a determination wage increases may be prescribed and regulated. Of course, and in such a case, the applicant would be entitled to an increase, for the simple reason that he would have a statutory right to it. But, as I have said, no such statutory right to an increase has been shown to exist *in casu*.

[38] This now brings me to the collective agreements referred to above. The applicant was quite prudent in including these agreements in his application. The fact is that the applicant has thus demonstrated the existence of two collective agreements which specifically determine the issue of wage increases for, in particular, NEWU members, such as the applicant. These collective agreements are concluded between the respondent and NEWU, and clearly and specifically create a right an increase for the members of NEWU, such as the applicant. As I have said above, the right to an increase can be established by a collective agreement. In *Public Servants Association on behalf of PSA Members v National Prosecuting Authority and Another*[17] the Court, albeit in the context of distinguishing between disputes of interest and disputes of right, said:

> '…. In general, disputes of right can be defined as being concerned with the infringement, application or interpretation of existing rights contained in a contract of employment, a collective agreement or a statute such as the Labour Relations Act. ….'

A collective agreement as a source of a right relating to employment conditions of individual employees, is clearly contemplated by this *ratio*. In

[17] (2012) 33 ILJ 1831 (LAC) at para 30.

Member of the Executive Council: Department of Health (Eastern Cape) v Van der Walt NO and Others[18], Van Niekerk J held as follows in upholding an arbitration award:

> 'It follows from the fact that the arbitrator had before him a succession of collective agreements, some of which created an entitlement that had prescribed, that the calculations performed by Wiggill would need to be revisited for the purposes of determining quantum. Moreover, the succession of collective agreements and the variation in their terms raised the possibility that the arbitrator could find that some of them created a right to an increase ….'

[39] Therefore, and in terms of the 2009 / 2010 wage collective agreement, the 9% increase applied as from 3 December 2009. The applicant, as from 28 December 2009, was thus entitled to such 9% increase on his original salary as it existed at the time of his dismissal. And further, in terms of the 2011 / 2012 wage collective agreement, the applicant was entitled to a further 7% increase as from 1 December 2011. The right to these increases flow directly from these collective agreements into the applicant's individual contract and terms of employment.

[40] But there is no collective agreement for the 2010 / 2011 period. It would seem from the affidavit that no such agreement could be concluded, and then there were individual wage increase agreements between the respondent and individual employees directly. The applicant, in my view, has accordingly shown no right to an increase for that period. The applicant, of course, would still be entitled to the increased salary brought about by the December 2009 9% wage increase during this period, but not to any increase for this period. I must accept the respondent's contentions in this regard that all the applicant has shown is individual negotiations between the respondent and individual employees, and this simply cannot create a right to an increase for the applicant. I thus conclude that the applicant is not entitled to the claimed 7.5% increase for this 2010 / 2011 period.

[41] The respondent's contention that the applicant is not entitled to increases in

[18] (2011) 32 ILJ 944 (LC) at para 24.

terms of the collective agreements, because he was not a permanent employee at the time when the agreements were concluded, has no merit. It is in effect, in simple terms, the same argument that an employee is not entitled to be paid following reinstatement and pending further legal challenge by the employer, because the employee did not work, which argument was specifically rejected in *Equity Aviation*. The fact is that as a point of departure, the effect of the reinstatement order, as I have fully discussed above, is that the applicant was never dismissed. He thus remained as a permanent employee and was such when the 2009 / 2010 collective agreement was concluded. And also, was it not for the respondent deciding to exercise its right to review, the applicant would also have been there as a permanent employee when the 2011 / 2012 collective agreement was concluded. The respondent simply cannot profit in this regard, as a result of its own conduct. I therefore reject the respondent's defense with regard to these collective agreements not applying to the applicant, for the simple reason that the applicant was at all relevant times, and always remained, a permanent employee of the respondent, even if he was not actually rendering services by working. In short, the respondent prevented him from working, and cannot benefit from this.

[42] I thus determine that the applicant is entitled to be remunerated at a monthly salary of R4 904.76 as from 28 December 2009 to 30 November 2011, being his original monthly contract salary of R4 499.78 plus the 9% increase amounting to R404.98. Then, and as from 1 December 2011 to 7 June 2012, the applicant is entitled to be remunerated at a monthly salary of R5 248.09, being the applicant's increased monthly salary of R4 904.76 plus the 7% increase amounting to R343.33. This amounts to a total of R146 203.79, which I will pursuant to this judgment order the respondent to pay to the applicant.

[43] The respondent has asked in the answering affidavit that it be permitted to pay the amount due to the applicant in respect of the arrear remuneration, in instalments over 6 months. Other than complaining that he has not even been paid what the respondent actually conceded was due, the applicant, in the

replying affidavit, does not really take issue with this request. Considering that the applicant is still employed with the respondent and currently earning his normal remuneration as well, I can see no reason, in the interest of fairness to the respondent as well, why the respondent should not be allowed to pay the amount due in terms of this judgment over a period of 6 months. I however do intend to attach a specific condition to this indulgence, being that if any instalment payment is not made on due date, the full outstanding balance of amount would immediately become due and payable.

The issue of the bonuses

[44] Where it comes to the issue of bonuses, the same considerations relating to the applicant's right to increases as discussed above applies. The applicant has to show that he has a right to these bonus payments either in terms of his employment contract, collective agreement or statute. Again, the applicant has no right to the bonus payments he claimed, in terms of his individual contract employment or statute, thus only leaving the two collective agreements already referred to as being a possible basis to establish such a right.

[45] The two collective agreements indeed provide for bonus payments to employees, and in particular members of NEWU such as the applicant. Provision is made for a bonus payment equivalent to 10 days' remuneration, in the 2009 / 2010 collective agreement. Also, the 2011 / 2012 collective agreement makes similar provision for a bonus equivalent to 10 days' remuneration. Unfortunately, the collective agreements do not specify when these bonuses are actually due to be paid, but it would seem from the affidavits and a proper reading of the agreements that it is at the end of the agreement period. The applicant was thus entitled to the one bonus payment at end November 2010, and the other at the end of November 2012.

[46] The bonus payment due at end November 2012 is not covered by the applicant's claim *in casu*, which only applies and related to period to 7 June 2012. However, the bonus payment due at the end of November 2010 would be due to the applicant. Considering the applicant's monthly salary of

R4 904.76 at that time, the daily payment rate of the applicant would be R226.39. A bonus of 10 days' remuneration thus amounts to R2 263.90, which the applicant is entitled to.

The issue of the leave pay

[47] When the application was argued before me, Mr Sebola who represented the applicant, argued that the applicant would not persist with the leave pay claim. This concession was wisely made. In terms of section 40(a) of the BCEA, an employer must only pay an employee for paid time off (leave) that has not been taken upon termination of employment. In this case, and considering the application of the reinstatement award in favour of the applicant, his employment certainly did not terminate and he remains employed.

[48] In *Ludick v Rural Maintenance (Pty) Ltd*[19] the Court dealt with the leave provisions of the BCEA and said:

> 'The effect of these provisions, broadly speaking, is that on termination of employment, an employer is obliged to pay to an employee his or her full remuneration in respect of annual leave accrued but not granted before the date of termination, together with a pro rata amount in respect of the then current leave cycle.'

Accordingly, as the applicant's employ did not terminate, he is not entitled to leave payment and his leave continued to accrue in the course of his employment with the respondent.[20]

The issue of interest

[49] This leaves only the issue of interest, for consideration. As stated above, the applicant contends that the respondent was in *mora* from the point in time when he returned to work on 8 June 2012 and he was then not paid the remuneration, bonuses and leave pay he accrued in the interim until then, immediately upon his return.

[19] (2014) 35 ILJ 1322 (LC) at para 8.
[20] See Ludick (*supra*) at para 19.

[50] The issue of *mora* interest was specifically dealt with in the judgment of *Top v Top Reizen CC*[21]. Van Zyl AJ, in a case where an applicant specifically contended that the respondent was in *mora* for not paying compensation awarded under section 193(1)(c) of the LRA, in support of a claim for interest, analysed the common law position and said:[22]

> 'The common-law position with regard to interest is that as a general rule a debtor is only liable for interest on the principal debt if he is in mora ….'

The learned Judge then said:[23]

> 'A further rule is that a debtor is not in mora and liable for the payment of interest when he did not know and could not ascertain the amount which he had to pay. Accordingly, interest would not commence to accrue or be awarded if the claim is for an unliquidated amount …. The position may be different where the amount payable was readily ascertainable by the debtor, or is the subject of agreement between the parties ….'

The learned Judge concluded:[24]

> 'To summarize: the ordinary rule is that a debtor's liability for interest only arises when the debt has been liquidated, that is, if the debt is capable of prompt ascertainment, if the quantum thereof has been determined by agreement between the parties, by an order of court or otherwise …. A court of law does not have a discretion to either reduce or refuse an award of interest once the debtor is in mora.'

[51] Van Zyl AJ in *Top Reizen* also dealt with section 2A of the Prescribed Rate of Interest Act[25] and said:[26]

> 'The purpose of this section is clearly three fold. Firstly, it provides for the automatic award of interest on an unliquidated debt which at common law was not possible until the debt had been liquidated by agreement between the

[21] (2006) 27 ILJ 1948 (LC).
[22] Id at para 11.
[23] Id at para 12.
[24] Id at para 15.
[25] Act 55 of 1975 (as amended).
[26] Id at para 18.

> parties or by a court of law or arbitrator. Secondly, it provides for the interruption of the running of interest in certain circumstances. Lastly, it empowers the court or arbitrator, in the last instance and in order to avoid inequitable results, inter alia to fix the rate of interest and the date from which it is to run ….'

[52] The reasoning of the Court in *Top Reizen* was followed in *Public Servants Association of SA on behalf of Malepe v Department of Justice and Constitutional Development and Another*[27] where Lagrange J said:

> 'Van Zyl AJ's analysis of the legal position on the payment of interest may be summarized in point form as follows:
>
> 11.1 under the common law a debtor is only liable for interest on the principal debt if he is in mora;
>
> 11.2 a debtor is not in mora and therefore not liable for the payment of interest if the debtor could not know or determine the amount to be paid;
>
> 11.3 in the case of illiquid claims that cannot be readily ascertained or not fixed by agreement, interest accrues from the date of judgment if it was specifically claimed, and
>
> 11.4 the liability to pay mora interest automatically attaches to the principal obligation by operation of law so that once the liability of the debtor to pay mora interest has been established the creditor is entitled thereto as a matter of right and not at the discretion of the court.'

[53] Now, and when I in turn apply the same reasoning to the matter *in casu*, the first point that must be made is that the remuneration claimed by the applicant in this application was not awarded by Commissioner Dadabhai. Interest was not claimed by the applicant in those proceedings, nor did the issue of interest arise in the arbitration or review proceedings. Also, the very purpose of the current proceedings is to establish the extent of the liability of the respondent and also whether it is so liable, following the reinstatement. n my view, the debt was certainly not readily ascertainable and it is only by way of the order granted in this judgment that the debt due by the respondent to the applicant

[27] (2014) 35 ILJ 1622 (LC) at para 11.

is properly quantified, and that the respondent would know what is due to be paid to the applicant. The respondent would only be in *mora* if the respondent, following this judgment, does not pay the judgment debt. In any event, I am empowered, where it is necessary to avoid an inequitable result, to determine the date from which interest is to start running, even if the applicant is by law entitled to the same.

[54] I therefore conclude that interest is not payable as from 8 June 2012, as the applicant has asked for. Interest at the legally prescribed rate (currently 9%) will only accrue should the respondent fail to pay the amount it is ordered to pay in terms of this judgment, by the due date determined for payment.

Concluding remarks

[55] The respondent, despite having complied with the reinstatement part of the arbitration award, has not paid contractual remuneration due to the applicant as a result of the arbitration award. As such, there is proper basis for still making the arbitration award an order of court, and I intend to grant the applicant such relief. Mr Beaton, for the respondent, in any event indicated to me in argument that the respondent has no objection to the arbitration award in favour of the applicant being made an order of court.

[56] The applicant has also asked for declaratory relief in the form of his starting date of employment, currently reflected in the employment records of the respondent as being 8 June 2012, being altered to reflect his original starting date of employment of 25 August 1995. Considering the very nature of the award of reinstatement, which I have discussed in detail above, there is no reason not to grant this relief, considering that 25 August 1995 is the proper date of commencement of the employment of the applicant with the respondent.

[57] For the reasons set out in this judgment, I also conclude that the applicant is entitled to the payment of accrued remuneration from 28 December 2009 to 7 June 2012, together with actual accrued increases, in the total sum of R146 203.79. The applicant is also entitled to the one bonus payment of R2 263.90.

[58] The respondent has contended that all these payments are subject to the deduction of UIF and statutory taxation deductions. The respondent is undoubtedly correct. Because of the fact that the applicant, considering the reinstatement award, was actually never dismissed, he remains compelled by law to continue to contribute to UIF. Similarly, and by law, the respondent is obliged to deduct and pay over taxation to SARS. Section 34(1)(b) of the BCEA permits deductions from an employee's remuneration if the deduction is required or permitted in terms of a law. The statutory provisions relating to taxation and UIF are undoubtedly such laws.

[59] In *Penny v 600 SA Holdings (Pty) Ltd*[28] the Court specifically dealt the deduction from income tax from the remuneration of an employee, and said:[29]

> 'An employer has a statutory obligation in terms of the Income Tax Act 58 of 1962 (the Income Tax Act) to deduct the required tax from any remuneration which it pays to an employee. Gross income is defined in s 1*(d)* of the Income Tax Act as:
>
> 'Any amount, including any voluntary award, received or accrued in respect of the relinquishment, termination, loss, repudiation, cancellation or variation of any office or employment or any appointment (or right or claim to be appointed) to any office or employment. ....'
>
> Part 1 of schedule 4, item 1 defines remuneration as:
>
> 'Means any amount of income which is paid or is payable to any person by way of any salary, leave pay, allowance, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and whether or not in respect of services rendered.' ….'

The Court concluded that compensation awarded in an arbitration award indeed constituted remuneration and held that where the respondent in that matter tendered to pay over to the applicant the amount of the award, but less taxation deducted, that constituted a tender of proper compliance with the

[28] (2003) 24 ILJ 967 (LC).
[29] Id at paras 10 – 11.

award.[30]

[60] In the judgments of *Naidoo v Careways Group (Pty) Ltd and Another*[31] and *Barnard v Shellard Media (Pty) Ltd*[32] Molahlehi J followed the same approach and held that the employer has a duty to make taxation deductions from the employee's salary in terms of the Income Tax Act, where it comes to any remuneration paid to the employee. In *Motor Industry Staff Association and Another v Club Motors, A Division of Barlow Motor Investments (Pty) Ltd*[33], the Court dealt with a retrenchment package and held:

> 'It follows that where the retrenchment package which the employer undertakes to pay is not a figure net of tax, the employer is obliged to G deduct the tax and pay same to the commissioner. Nothing recorded in the agreement can override this obligation. In such a case an employer who deducts the tax , accounts to the commissioner for the tax and pays the balance to the employee must be regarded as having complied with the terms of the agreement ….'

The exact same principles must apply to all remuneration accrued to the applicant for the period from 28 December 2009 to 7 June 2012. After all, it is nothing else but salary payments accruing to him in terms of a contract of employment. This has to be considered to be income in terms of the Income Tax Act. The respondent is thus compelled to deduct tax from this payment. The same considerations arise with regard to the bonus payment.

Costs

[61] This then only leaves the issue of costs. Now it is true that the applicant was largely successful in this application. But I do consider that the respondent never really disputed liability towards the applicant for payment of remuneration that accrued pending the finalization of the review. All that unfortunately happened is that the parties simply could not agree on a quantum for payment. I also do consider that the respondent's contentions

[30] See para 17 of the judgment.
[31] (2014) 35 ILJ 181 (LC) at para 27.
[32] (2000) 21 ILJ 2248 (LC) at para 14.
[33] (2003) 24 ILJ 421 (LC) at para 13.

about the applicability of the collective agreements are somewhat opportunistic, but at least the respondent never sought to dispute the substance of the claim of the applicant. The real issues were properly defined and limited in the affidavits, and both parties conducted their respective cases with the necessary circumspection and focus, evidenced by the fact that they both made concessions in argument when needed. In the end, it was justified to seek the assistance of this Court with regard to the quantification of what was due to the applicant. As I have a wide discretion in terms of section 162 here it comes to the issue of costs, it is my conclusion, in all the circumstances mentioned and considering what is fair to both parties, that no order as to costs be made.

Order

[62] In the premises, I make the following order:

1. The arbitration award issued by commissioner Sharmain Dadabhai on 28 December 2009 under case number GAJB 31820 – 09 is made an order of court.

2. It is declared that the applicant's starting date of employment with the respondent is 25 August 1995, and it is directed that the applicant's employment records at the respondent be amended accordingly.

3. The respondent is ordered to pay the applicant the sum of R148 467.69, being the total of the remuneration and bonus due to the applicant, for the period between 28 December 2009 and 7 June 2012. The respondent shall be entitled to first deduct statutory deductions for taxation and UIF from this amount of R148 467.69 prior to making payment to the applicant.

4. The respondent is ordered to pay this amount of R148 467.69 less statutory deductions for taxation and UIF, to the applicant, in 6(six) equal monthly instalments, the first instalment being payable along with the applicant's normal salary for December 2014, and the remaining 5(five) instalments along with the applicant's following 5 monthly salary

payments.

5. Should any of the instalments not be paid by the respondent to the applicant on due date as prescribed by this order, the full outstanding balance of the amount due to the applicant at that time shall become immediately due, owing and payable by the respondent to the applicant.

6. Should the respondent fail to make any payment due to the applicant in terms of this order, interest at the legally prescribed rate of 9% per annum shall accrue on any overdue amount from due date and until date of actual payment.

7. There is no order as to costs.

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Snyman, AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant:	Advocate M S Sebola
Instructed by:	Ntshupetsang Attorneys
For the Respondent:	Advocate R G Beaton SC
Instructed by:	De Villiers and Du Plessis Attorneys