IN THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Case Number 68/2002
Reportable

In the matter between

CHEVRON ENGINEERING (PTY) LTD Appellant

And

NKAMBULE, JOSEPH AND 23 OTHERS Respondents

CORAM: MPATI DP; ZULMAN JA, FARLAM JA, LEWIS JA AND MLAMBO AJA

HEARD: 10 NOVEMBER 2003

DELIVERED: 2 DECEMBER 2003

SUMMARY: Labour Relations Act 28 of 1956 – s 46(9)(c) read with s 49(3)(b) – Industrial Court precluded from granting reinstatement order retrospective beyond six months.

JUDGMENT

MLAMBO AJA

[1] This is an appeal against a judgment and order of the Labour Appeal Court upholding an Industrial Court order which

reinstated the respondents in the appellant's employment retrospectively to the date of their dismissal.

[2] The appellant, a manufacturer of tubeless steel pipe fittings and irrigation equipment, dismissed its entire production workforce save for one employee, on 23 March 1995, for participation in an illegal strike. The strike was the culmination of a dispute between the parties relating to their religious practices.

[3] From January 1995 the employees of the appellant directed numerous requests to the appellant's owner and managing director, Mr Edgar Rudge, for permission to bring an African traditional healer to the appellant's premises to cleanse it of some 'muti' which was allegedly causing illness amongst the employees. Rudge considered these requests an affront to his deep Christian faith, and told the employees as much. Repeatedly he informed the employees that he would only allow 'a man of God', as he put it, to solve the problem. The National Union of Metalworkers of South Africa (NUMSA), which represented a majority of the appellant's workforce, did not support the employees' requests.

[4] With no breakthrough in the impasse all the 124 production employees, both unionised and non-unionised, save for one, embarked on a strike on 23 March 1995. The appellant issued three ultimata at 8h30, 10h30 and 15h30 calling on the employees to return to work. The third and final ultimatum concluded with the following:

'Take therefore notice that unless you resume your work by end of business today, you will be dismissed.'

That ultimatum, like the two earlier ones, was not heeded by the striking employees even after Rudge involved NUMSA, which did not support the strike, as well as a call he made to the local branch of the African National Congress. When the employees failed to heed the afternoon ultimatum the appellant dismissed them and Rudge advised them of it the next morning when they returned to the premises.

[5] After advising the employees of their dismissal Rudge also advised them that the appellant would be closed for some time, during which management would decide, after consulting its main customers, how best to continue with business operations. Rudge also advised the dismissed employees that the appellant could re-open on 3 April 1995 'to receive job applications for those jobs which will still be available'. He also informed them that the appellant reserved the right to appoint 'the best applicant for a particular job, and therefore cannot guarantee re-employment to any particular ex-employee'.

[6] On the morning of 3 April 1995 the dismissed employees assembled outside the appellant's premises. In the course of the morning Rudge put up two lists on a wooden pole: one was of the 100 employees offered re-employment, and the other list comprised the names of the 24 employees who were not offered re-employment.

[7] At about midday on the same day a certain Mr Maluleka, whose assistance had been solicited by shopstewards, arrived at the appellant's premises. He was presented to Rudge as a Christian prophet who had agreed to cleanse the premises of the 'muti'. After satisfying himself that Maluleka was 'a man of God', Rudge allowed him to do his 'work'. Maluleka proceeded to perform a ritual in the course of which he dug up a horn. He identified it as the 'muti' that was causing illness amongst the workforce, burnt it to the apparent satisfaction of the employees, and left.

[8] The 100 employees offered re-employment were re-employed on 4 April 1995. The respondents are some of the employees not re-employed. They contested the fairness of their

dismissal and instituted proceedings in terms of s 46(9) of the now-repealed Labour Relations Act 28 of 1956 (the Act), in the Industrial Court.

[9] During May to August 1997 the Industrial Court (per M D Legodi) heard the matter and issued a determination on 21 November 1997 holding that the dismissal of the employees was unfair and amounted to an unfair labour practice within the meaning of the Act. The appellant, not satisfied with the Industrial Court determination, instituted review proceedings in the Pretoria High Court on 25 March 1998. On 16 March 1999 the High Court reviewed and set aside the Industrial Court determination.

[10] The unfair labour practice proceedings started afresh in the Industrial Court on 19 May 1999, this time before M A E Bulbulia SC. At the commencement of those proceedings the respondents formally amended their statement of case also to include the selective re-employment of some dismissed employees as an unfair labour practice.

[11] On 15 October 1999 the Industrial Court determined the dispute in favour of the respondents, holding that their dismissal and the selective re-employment of some employees was unfair and amounted to an unfair labour practice. The Industrial Court ordered the appellant to reinstate the respondents retrospectively to the date of their dismissal, ie 24 March 1995, a period of 4 years and 7 months.

[12] It is not apparent from the Industrial Court determination whether consideration was given to the applicability of ss 46(9)(c) and 49(3)(b), nor on what basis the retrospective reinstatement order was made. Its justification, however, appears to emanate from the Industrial Court's reasoning that:

'In my view all the dismissed strikers should, in the first instance, have been re-employed after which the respondent could have implemented a fair retrenchment procedure in the light of objective criteria so as to dispense with the services of those employees who were no longer indispensable to the company. By not doing so, the respondent acted unfairly and in a manner which was arbitrary and subjective.'

[13] On 1 December 1999 the appellant lodged an appeal to the Labour Appeal Court (Court *a quo*) against the Industrial Court determination and the reinstatement order. The respondents filed a conditional cross-appeal that, in the event of the appeal succeeding, they be awarded compensation. However, they abandoned their cross appeal. In the course of arguing the appeal in the court a *quo* counsel for the appellant conceded that the selective re-employment was procedurally unfair and that reinstatement was the appropriate remedy. The appellant, however, contended that the Industrial Court was precluded by s 46(9)(c) read with s 49(3)(b) of the Act, from granting a reinstatement order retrospectively in excess of six months.

[14] The court *a quo* found that by selectively re-employing other employees engaged in the same conduct as the respondents, the appellant had treated the respondents in a 'shameful manner'. The court a *quo* went on to uphold the Industrial Court determination that the selective re-employment of some dismissed employees had been unfair and amounted to an unfair labour practice. The majority in that court (Zondo JP and Nicholson JA, Nugent AJA dissenting) concluded that the Industrial Court was not precluded by s 46(9)(c) read with s 49(3)(b) of the Act from

granting a reinstatement order retrospective for longer than six months and upheld the Industrial Court's reinstatement order with costs. The court *a quo* expressed no opinion on that part of the appeal dealing with the fairness of the dismissal of the respondents.[1]

[15] The appellant now appeals to this Court against the whole judgment of the court a *quo*, it having been held by this Court that the appellant had a right of appeal to this Court without leave.[2]

[16] In this appeal the appellant takes issue only with the reinstatement order of the Industrial Court. In the first place the appellant reiterates that the Industrial Court was precluded by s 46(9)(c) read with s 49(3)(b) of the Act from granting a reinstatement order retrospective for longer than six months. Secondly, the appellant contends that on the facts of this case, and having conceded that reinstatement was appropriate, retrospectivity was inappropriate. On the other hand counsel for the respondents submitted that the court a *quo* was correct in upholding the Industrial Court's reinstatement order. Counsel for the respondents submitted that the provisions of Section 49 were

[1] *Chevron Engineering (Pty) Ltd v Nkambule and others* (2001) 22 ILJ 627 (LAC)
[2] *Chevron Engineering (Pty)Ltd v Nkambule 2003(5)* SA 206 (SCA)

not axiomatically applicable to Industrial Court determinations. He submitted, however, in the altenative, that should the appellant's submission on retrospectivity be upheld, this Court should award the respondents reinstatement retrospective for six months, and compensation. I consider first the competence of the Industrial Court to grant a reinstatement order retrospective for longer than six months.

[17] Section 46(9)(c) provided:

'The Industrial Court shall as soon as possible after receipt of the reference in terms of paragraph (b), determine the dispute on such terms as it may deem reasonable, including but not limited to the ordering of reinstatement or compensation**,** *and the provisions of sections 49 to 58, 62 and 71 shall mutatis mutandis apply* in respect of any determination made in terms of this subsection *in so far as such provisions can be so applied*: Provided that such determination may include any alleged unfair labour practice which is substantially contemplated by the referral to the industrial council or with the terms of reference of the conciliation board, determined in terms of section 35(3)(b).' (Emphasis added).

[18] In turn Section 49(3) provided:

'The arbitrator, arbitrators, umpire or tribunal, as the case may be, shall fix the date from which the award shall be binding, which date may be the date on which the award is made or an earlier or later date, as to him, them or it may seem equitable: Provided that-

(a) …….

(b) no provision of an award shall be made binding from a date earlier than six months prior to the date on which the award is made, or from a date earlier than the date upon which in the opinion of the arbitrator, arbitrators, umpire, or tribunal, as the case may be, the dispute came into existence, whichever date is the later; and

(c) an award may provide for the payment to employees of an amount in lieu of any or all of the benefits to which such employees become entitled by reason of the fact that any provision of the award is made binding in respect of any period prior to the date on which such award is made.'

[19] The majority in the court *a quo,* in concluding that the limitation found in s 49(3)(b) did not apply to Industrial Court determinations, reasoned thus*:*

'(33) In this matter both counsel accepted that the six month limitation does not apply to compensation ordered in terms of section 46(9). I am of the opinion that this is the correct legal position. However Mr Pretorius persisted in the submission that the limitation applies to reinstatement orders.
(34) The question which arises is what purpose would the legislature have sought to achieve by placing such a limitation on the extent of the retrospectivity of reinstatement orders when it did not place any limitation on the amount of compensation that could be awarded? This question arises because the effect of making a reinstatement order retrospective is that the employee becomes entitled to back pay and other benefits. It is also clear that an order of compensation may include lost income. The effect of this is that an employee may secure payment of the remuneration he would have been paid, had he not been dismissed, by seeking a retrospective reinstatement order or by seeking compensation for loss of income. If that is permissible, and counsel did not contend otherwise, then I have grave

difficulties with the submission that the six month limitation applies to a reinstatement order because then such a limitation would serve no purpose. In my view a court should not lightly conclude that the legislature has enacted a purposeless provision.'

[20] The crucial section is 46(9)(c). One must determine its proper meaning read within the context of s 46 as a whole. The section is headed: 'Compulsory arbitration' and deals almost exclusively with the resolution of disputes, between employers and employees engaged in essential services, through compulsory arbitration. In terms of s 17(11)(c)[3] one of the functions of the Industrial Court was to conduct arbitrations referred to it in terms of s 46.

[21] Section 46(9), however, was the exception to the compulsory arbitration scheme of s 46. This subsection dealt with the function of the Industrial Court to make determinations (as opposed to arbitrations). This was specifically provided for in s 17(11)(F).[4] In terms of s 46(9) the Industrial Court had the function to determine disputes involving parties not engaged in essential services. The case before us is one such matter.

[3] This section provided: 'The function of the industrial court shall be –to conduct arbitrations referred to it in terms of Section 45, 46 or 49.

[4] This section provided: 'The functions of the industrial court shall be – to make determinations in terms of section 46 (9),'

[22] In this appeal this Court is, therefore, essentially called upon to determine the meaning of s 46(9)(c), in particular the phrases 'shall *mutatis mutandis* apply' and 'in so far as such provisions can be so applied …'. The former phrase is the definitive one in the sense that once its ordinary grammatical meaning is established the latter phrase serves only to qualify the application of the subsection.

[23] The phrase '*mutatis mutandis'* has been authoritatively interpreted to mean 'with the necessary changes'. See in this regard *Touriel v Minister of Internal Affairs, Southern Rhodesia* 1946 AD 535 at 544 – 545.

[24] Applying this interpretation to the clear language of s 46(9)(c) the presence of the word 'shall' makes the provisions of the sections listed peremptory, with whatever changes are necessary, unless there are factors rendering them not applicable. In other words the provisions of s 49 in particular, are made applicable to determinations in terms of s 46(9)(c) unless there are factors which render them not applicable.

[25] One of the reasons advanced by the court *a quo* that s 49(3)(b) is not applicable, is that s 46(9)(c) would serve no purpose if employees would be able to secure payment in full of remuneration they would have received, had they not been

dismissed, through a retrospective reinstatement order or through compensation. This reasoning overlooks the plain language of s 49(3)(b) to the effect that no award shall be made binding 'from a date earlier than six months prior to the date on which the award is made' or from the date on which the dispute came into existence. This wording is clearly directed at retrospectivity which only applies to reinstatement as opposed to compensation orders. Understood in this context there can therefore be no prospect of a retrospective reinstatement order being equated to a compensation order. A compensation order is, by its nature, a monetary award and can never be made retrospective, hence the inapplicabililty of the six month limit to it.[5]

[26] In *Trident steel (Pty) (Ltd) v John NO and others* (1987) ILJ 27 (W) Ackermann J had occasion to consider the meaning of s 46(9)(c). That matter was concerned with a review of an Industrial Court determination in which the Industrial Court had, *inter alia*, ordered the reinstatement of employees retrospectively for six months. The court held that the six month limit in s 49(3)(b) was indeed applicable to reinstatement orders of the Industrial Court. The Court stated at 37B-D:

[5] *Amalgamated Beverage Industries (Pty)Ltd v Jonker* (1994) 14 ILJ 1232 (LAC) at 1255 G, *Nelspruit Drycleaners (Pty)Ltd v SA Commercial Catering and Allied Workers Union and Others* (1994) ILJ 15 283 (LAC) at 288 E-F.

‘Mr Brassey analysed the sections in the mutatis and mutandis provisions and argued that they afforded an indication that “determine” had a wide meaning and included consequential relief of the nature granted here. I am unable to agree with this approach which, in my view, is logically unsound. The sections in question are to be applied “mutatis mutandis” to the ‘determination’only ‘in so far as [they] can be so applied’. It seems to me that the starting point must necessarily be the nature and scope of the determination. Without first establishing this, it is not possible to say which of the mutatis mutandis provisions “can be so applied”. It is not logically permissible, in my view, first to look at such provisions and then by a process of inductive reasoning from such provisions to try and establish what “determine” means.’

The court continued (at 38J – 39A):

‘These observations must, in my view, be equally applicable to the construction of s 46(9)(c) and would dispose of this aspect of Mr Doctor’s argument. It was also contended that it could not have been the legislature’s intention to confer such extensive powers on the industrial court where no limitation was placed thereon. In the present case the order made concerning the payment of wages and the according of other benefits was limited to a period of six months from the date of dismissal of the employee respondents. It could equally have been 60 months, so the argument ran. This argument loses sight in my view, of the provisions of s 49(3)(b) and (c) of the Act (which is one of the sections which is made applicable mutatis mutandis to the determination in terms of s 46(9)(c) which would limit the reinstatement or amounts paid in lieu of the benefits accruing from reinstatement to a period of or amount calculated over, a maximum of six months.’

This, in my view, is a correct interpretation of Section 46(9)(c).

[27] The reasoning of the court a *quo* that through the application

of s 43 an employer may pay more than six months remuneration to employees in whose favour a s 43 (status quo) order is made, is similarly without merit. What must be understood is that a status quo order was interim, whereas a reinstatement order in terms of s 46(9) was final. It is correct, as stated by the court *a quo*, that status quo orders could be made retrospective for ninety days and be extended thereafter for periods of thirty days at a time. It is, however, debatable that the effect of a status quo order could, in certain cases, lead to an employer paying more than six months remuneration pending the final determination of the dispute in terms of s 46(9).

[28] The court *a quo* does not mention, however, that the extension of a status quo order was not automatic. The Industrial Court's power to extend a status quo order was discretionary and the court, of necessity, considered a number of factors such as delays in the finalisation of the dispute in terms of s 46(9), efforts by the parties to resolve the dispute, alternative employment secured by the employees as well as efforts by the employees to mitigate their losses through alternative employment. The court *a quo* also fails to mention that, though it was possible to obtain an extension of a status quo order, it was almost impossible to

achieve extensions beyond six months. In granting extensions the Industrial Court always kept in mind that the employees could also be granted retrospective reinstatement and compensation in terms of section 46(9). Furthermore, in considering whether to grant retrospective reinstatement in terms of section 46(9), the Industrial Court always took account of status quo relief granted to the employees and in appropriate cases no retrospective reinstatement relief was granted where that had already been achieved through a status quo order.

[29] One must conclude, therefore, that in terms of s 46(9)(c), read with s 49(3)(b), the Industrial Court was precluded from granting a reinstatement order retrospective beyond six months from the date of the order. It follows that in this case the Industrial Court lacked such power and the court a *quo* was clearly wrong in confirming the Industrial Court's reinstatement order.

[30] Having found that the Industrial Court did not have the power to order reinstatement retrospectively for a period longer than six months, this Court must consider what appropriate relief to grant to the respondents. The power to grant relief in unfair labour practice disputes is discretionary and must be fair to the employer

and employees. It is permissible to order reinstatement and compensation in the same case as long as it is deemed reasonable and fair to both parties.[6]

[31] In considering the amount of compensation payable a number of factors are taken into account, such as the reason for the dismissal, the conduct of the parties during the currency of the dispute, evidence of any loss occasioned to the employees due to the dismissal, as well as evidence of the likely impact of a compensation order on the employer. The approach to the grant of relief either by way of reinstatement and/or compensation was aptly spelt out by Nugent AJ in *Camdons Realty (Pty) Ltd and another v Hart* (1993) 14 ILJ 1008 (LAC) at 1018D–1019B, where he stated, with reference to s 46(9) determinations:

'The Section confers a discretion on the Industrial Court. It has a discretion to determine whether compensation should be awarded at all, and if so, to determine what amount is reasonable. ….

It must be borne in mind that discretion is not the equivalent of caprice. The Industrial Court is bound to exercise a discretion, and to do so within the limits imposed on it by the Act.

If it chooses to award compensation, what it awards must be compensation properly so called. Compensation is not synonymous with a gratuity. In its ordinary meaning the term envisages an amount to make amends for a wrong which has been inflicted.

…

The primary enquiry must accordingly be to determine what that loss is, taking into account that an unfair dismissal can take various forms, and that the loss must be causally related to the particular act which has been found to be unfair. The loss resulting from an unfair dismissal may itself take various forms. Quite obviously the employee may sustain direct loss of remuneration until he finds or may reasonably be expected to find alternative employment, but in my view it need not necessarily be confined to this. The dismissal may result in other, less obvious harm, as for example a blemish on the employees' employment record. If the Industrial Court is satisfied that such a loss has occurred, and it is able on the evidence before it to place a value on

[6] *National Union of Metalworkers of SA v Henred Freuhauf Trailers* 1995(4) SA 456 (AD) at 462 G-H.

that loss, in my view it is entitled to take it into account in its assessment. An assessment of the loss which has been sustained does not, however, conclude the enquiry. The court may determine the dispute only on terms which it considers reasonable. This in itself contemplates that a claimant will not necessarily recover the full amount of his loss, but only such an amount thereof as may be considered to be reasonable. While there may be circumstances in which it would be reasonable to compensate the employee to the full extent of his loss, this will not inevitably be so. In considering what is reasonable, not only the interests of the employee, but also the interest of the employer must be taken into account (see *Alert Employment Personnel v Leech*).'

[32] Evidence of loss as stated in *Camdons* (*supra*) as well as attempts to mitigate such loss has been regarded as crucial in a number of Labour Appeal Court cases).[7] In *Performing Arts Council v Paper Printing Wood and Allied Workers* 1994 (2) SA 204 AD Goldstone JA stated (at 219 A – C)

'In every case the industrial court must make a reasonable determination. In some cases fairness and justice may dictate that reinstatement is the proper relief. In others compensation or some other form of relief may be more appropriate. Each case must depend on its own facts. A rule of thumb, even if applied on a *prima facie* basis, will tend to fetter the wide discretion of the industrial court (or the Labour Appeal Court). That result is one to be avoided. In my opinion the correct approach is to give due consideration to

[7] *Foodpiper cc t/a Kentucky Fried Chicken v Shezi* (1993) ILJ 126 (LAC) at 136 A-E, *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ (LAC) at 981C-G.

the relevant conduct of the parties and, in the light thereof, to decide upon the appropriate relief.'

[33] Counsel for the appellant submitted that retrospectivity was inappropriate in this case in view of the illegality of the strike and lack of functionality thereof. Counsel also submitted that compensation was inappropriate for the same reason. This submission loses sight of the fact that it was not the appellant's case that it did not re-employ the respondents because they embarked on an illegal strike. Its case was that its selective re-employment was based on its operational requirements. Furthermore this selective re-employment was not preceded by any consultation, hence the concession by appellant's counsel that it acted unfairly. In fact, uncontested evidence by the respondent's witnesses was that the appellant selected 'good tomatoes' for re-employment and chose not to re-employ 'bad tomatoes'.

[34] However, when the matter came before the court *a quo* there was, it appears, no evidence that would have justified a finding that the respondents were entitled to compensation over and above reinstatement. Equally, there was no evidence as to the

effect that reinstatement or compensation covering a period longer than six months would have had on the appellant's business.

[35] Counsel for the respondents submitted, both in the heads of argument and at the hearing before this Court, that there had been affidavits from the respondents, other than those who gave oral evidence, before the Industrial Court that dealt with the questions of re-employment, unemployment and mitigation of loss. Those affidavits had not formed part of the record before the court *a quo.* They are also not before this Court. In view of the fact that the respondents have not cross-appealed to this Court against the decision not to award compensation, it is not necessary to deal with the reason for the omission of the affidavits from the appeal record. It is significant, however, that the respondents had cross-appealed, conditionally, to the court *a quo* in the event that the order for retrospective reinstatement was not confirmed. No explanation was tendered to this Court for the respondents' failure to persist with the conditional cross-appeal in this Court.

[36] Because there was insufficient evidence as to the financial position of the appellant, and in particular the effect on it of the retrospective reinstatement order before the court of first instance, Nugent AJA, in his dissenting judgment in the court below, found that the four year and seven month retrospective reinstatement order made by the Industrial Court was unwarranted. He said

(para 56):
‘It is by no means clear that the respondents were not in employment for the period from dismissal until the order was made. In my view that was the least that ought to have been ascertained before ordering reinstatement with full retrospective effect. Even then, however, it does not follow that the respondents were entitled to be reimbursed for the full amount of any loss they might have sustained (*Camdon’s Realty (Pty) Ltd v Hart* (1993) 14 ILJ 1008 (LAC). The interests of the employer need also to be taken into account in determining what is reasonable. The evidence does not establish precisely what effect the present order will have on the financial viability of the appellant, but on the face of it, an order which effectively requires the appellant, which is a relatively small enterprise, to pay arrear wages to 18 employees for a period of four years and seven months is likely to be crippling. I do not think that such an order ought to have been made without first knowing that it would not have that effect.’

The learned judge concluded (para 60):

‘In argument, the appellant’s counsel submitted that an order which has the effect of reimbursing the respondents for a period of six months would have been reasonable in the circumstances. Bearing in mind the paucity of evidence relating to the impact of a compensatory or retrospective order upon the respondents and the appellant respectively, in my view that cannot be said to be unreasonable.’

[37] The question has been raised as to whether it would be possible to refer the matter to an appropriate tribunal (in terms of the transitional provisions of the Labour Relations Act No 66 of 1995) for the purpose of eliciting the evidence required to make a proper order in respect of compensation. But in my view this is not

a case where such a referral to evidence is possible or appropriate. First, quite apart from the time that has already been spent on this litigation (nine years), there is no reason for such a referral. I consider that an order for reinstatement, retrospective for a period of six months, as suggested in his dissenting judgment by Nugent AJA, is the proper order in the circumstances. It should be borne in mind that it was open to the first court, and indeed the court below, to order simple reinstatement without retrospective effect. Retrospectivity for six months – the maximum possible – ensures that the respondents will receive even further redress for the wrongful conduct of the appellant.

[38] Secondly, as I have already indicated, there is nothing before this Court that signifies even *prima facie* that compensation over and above six months' retrospective reinstatement is warranted. It was the responsibility of the respondents to place whatever evidence there was supporting such a conclusion before the court *a quo* in the event of the award by the Industrial Court having been changed, and before this Court once the appellant lodged its further appeal. If there was evidence available then the respondents, knowing that there was a prospect of success on appeal, should have cross-appealed, and asked for leave to place before this Court whatever relevant evidence there had been before the court of first instance.

[39] Thirdly, it is not open to this Court, having found that a party has not adduced sufficient evidence to establish a right to compensation, or to establish the extent of that compensation, to

order what is in effect a retrial. The respondents were represented throughout this litigation. They have not ever suggested that they were deprived of the opportunity to present their claims as best they could. There is no reason at all to give them the opportunity to start afresh, some nine years after the dismissal by the appellant which gave rise to their claims. A reference to evidence by this Court is of course possible (s 22 of the Supreme Court Act 59 of 1959), but only in exceptional circumstances. One of the requirements for a referral to evidence is that there should be a 'reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial' (*S v De Jager* 1965 (2) SA 612 (A) at 613C-D, *Loomcraft Fabrics CC v Nedbank Ltd* 1996 (1) SA 812 (A) at 824H-825B; see also *Staatspresident v Lefuo* 1990 (2) SA 679 (A) at 692B).

[40] In the fourth place, litigation must reach an end at some point. In this matter there have been two hearings before the Industrial Court, one before the Labour Appeal Court, an application for leave to appeal against the decision of the majority of the Labour Appeal Court, a hearing in this Court in respect of the right to appeal further, and now this appeal. A referral to evidence cannot possibly serve the interests of any of the parties.

If there were affidavits as to the losses suffered by the respondents before the Industrial Court, it appears that they no longer exist. Counsel for the respondents was not able to tell this Court what had become of those affidavits. Counsel for the appellant knew nothing of them. There is no reference to them in the award made by the Industrial Court. In the circumstances, in the event of a referral to another tribunal, evidence would have to be reconstructed. That is inherently undesirable. The balance of convenience dictates that the litigation should end in this Court (see *Simaan v South African Pharmacy Board* 1982 (4) SA 62 (A) at 81A-B.)

[41] Of course the respondents are entitled to redress for their wrongful dismissal and the selective reinstatement. In my view, that redress is to be found in an order that the respondents be reinstated with retrospective effect for a period of six months.

[42] Although the appellant succeeds on appeal, when deciding the question of costs a discretion must be exercised after taking into account the requirements of law and fairness. Section 17C(2) specifically enjoins this Court to decide the question of costs 'according to the requirements of law and fairness'. The guidelines as to fairness are set out in *NUM v East Rand Gold and Uranium Ltd* 1992 (1) SA 700 (A) at 738F-739G. (See also *Performing Arts Council of the Transvaal v Paper Printing Wood*

and Allied Workers Union 1994 (2) SA 204 (A) at 221A-C). The proper approach is to take account of the conduct of the parties during the dispute and in the conduct of the litigation. The general approach developed by courts acting in terms of this Act is that costs do not automatically follow the result, unless there are special or exceptional circumstances justifying a costs order. *Mala fides*, unreasonableness and frivolousness have been found to be factors justifying the imposition of a costs order. (See *SA Chemical workers Union v Sasol Industries (Pty) Ltd and another* (2) (1989) 10 ILJ 1031 (IC) at 1060A-H; *Director-General of the Cape Provincial Administration V National Education Health and Allied Workers Union and others* (1995) 16 ILJ 233 (IC) at 235 I-236D.) In the case before us it is clear that both parties were *bona fide* in their respective stances. There can also be no suggestion of unreasonableness or frivolousness by either party. The considerations that weigh particularly in favour of the respondents in this case are the length of time it has taken this matter to reach finality; the fact that the awards made in their favour are likely to be entirely, or at least largely, used up by a costs award against them; and that their conduct in embarking on the strike cannot be said to have been reprehensible. The respondents considered that they had a legitimate grievance

which was not accommodated by the appellant. In the circumstances I consider that no costs award should be made against the respondents despite the appellant's success, as well as in the court *a quo.*

[43] 1 The appeal is upheld.

2 The order of the Labour Appeal Court is set aside and replaced with the following:

'The appeal succeeds.

The reinstatement order of the Industrial Court is set aside and replaced with the following:

"The applicants are reinstated in the employment of the Respondent retrospective for a period of six months from the date of this order".'

D MLAMBO

Acting Judge of Appeal

Concur:

Mpati DP

Zulman JA

Farlam JA

Lewis JA