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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 353/12

In the matter between:

FOOD & ALLIED WORKERS UNION **APPELLANT**

and

L NGCOBO N O (M NDLELA) **FIRST RESPONDENT**

M MKHIZE **SECOND**

RESPONDENT

Neutral citation: *Food & Allied Workers Union v Ngcobo* (353/12) [2013] ZASCA 45 (28 March 2013)

Coram: PONNAN, MALAN, TSHIQI JJA, SOUTHWOOD AND PLASKET AJJA

Heard: 7 March 2013

Delivered: 28 March 2013

Updated:

Summary: **A trade union is liable for damages if it fails to perform the mandate which it accepted to represent its members before the Commission for Conciliation, Mediation and Arbitration, and the Labour Court – the measure of damages is the amount of the award that would have been made if the claims for wrongful**

dismissal had succeeded.

ORDER

On appeal from: KwaZulu-Natal High Court (Durban) (Swain J sitting as court of first instance):

The appeal and cross-appeal are dismissed. The appellant is ordered to pay the costs of the appeal.

JUDGMENT

SOUTHWOOD AJA:

[1] The appellant is the Food and Allied Workers Union (FAWU), a trade union registered in terms of the Labour Relations Act 66 of 1995 (LRA). The respondents are L Ngcobo, the executrix in the estate of the late Mandla Ndlela (Ndlela), and Michael Mkhize (Mkhize). Ndlela and Mkhize instituted separate actions against FAWU in the KwaZulu- Natal High Court, Durban in which they claimed damages for breach of contract. After *litis contestatio*, Ndlela passed away and he was substituted as plaintiff by L Ngcobo, the executrix in his estate, but, for the sake of convenience, I shall continue to refer to Ndlela as the litigating party. The actions were consolidated and the claims were successful before the high court (Swain J) which awarded damages in the sum of R107 232 to each respondent together with interest thereon at the rate of 15.5 per cent per annum from 28 August 2004 to date of payment. With the leave of the court a quo, FAWU appeals and the respondents cross-appeal against the awards. FAWU contends that the respondents' claims should have been dismissed and the respondents contend that the awards should have been double what the court a quo awarded. At the hearing the respondents' counsel did not persist with the cross-appeal.

[2] Ndlela and Mkhize each claimed damages for the loss which they sustained because FAWU, which was acting on their behalf, failed to prosecute their claims in the Labour Court. The loss that they alleged that they suffered was the award that they would have obtained in terms of the LRA for their unfair dismissal by their employer, Nestlé South Africa (Pty) Ltd (Nestlé).

[3] The LRA governs the right of a worker who is unfairly dismissed, to claim and recover compensation for his or her dismissal and the relevant provisions, for purposes of this judgment, may be briefly summarised.[1]

[4] When a Labour Court finds that a dismissal was unfair it may, depending on the circumstances, (1) order the employer to reinstate the employee; (2) order the employer to re-employ the employee or (3) order the employer to pay compensation to the employee.[2]

[5] The compensation awarded to an employee whose dismissal is found to be unfair because the employer did not prove that the reason for dismissal was a fair reason relating to the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.[3] An order or award of compensation made in terms of Chapter VIII of the LRA is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.[4]

[6] The LRA clearly distinguishes between claims for compensation and claims for damages.[5] It seems to be accepted that 'compensation' is a form of recompense

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1For present purposes it is not necessary to consider the position of an employee in the case of an 'automatic unfair dismissal'.
2Section 193(1) of the LRA.
3Section 194(1) of the LRA.
4Section 195 of the LRA.
5Section 158(1) of the LRA empowers the Labour Court to award either and s 195 empowers the

(satisfaction for some misdeed or offense)[6] and comprises recompense for sentimental as well as patrimonial loss. It also seems to be accepted that an employee will be able to recover a *solatium* for the injury to his feelings that was caused by the manner in which he was dismissed.[7]

[7] In terms of the LRA every employee has the right not to be unfairly dismissed.[8] Dismissal occurs, inter alia, where an employer has terminated a contract with or without notice and it will be unfair, if the employer fails to prove[9] (1) that the reason for the dismissal is a fair reason based on the employer's operational requirements, and (2) that the dismissal was effected in accordance with fair procedure.[10]

[8] In terms of the LRA an employer may legally dismiss an employee on three grounds: the conduct of the employee, the capacity of the employee and the operational requirements of the employer's business.[11]

[9] The LRA contains detailed provisions dealing with the procedure to be followed where an employer contemplates dismissing an employee for reasons based on the employer's operational requirements. At the time of the respondents' dismissal these were set out in s 189 of the LRA.[12]

[10] If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute to a bargaining council having jurisdiction, and if there is no such council, to the Commission for Conciliation Mediation and Arbitration (Commission), which referral must be made within 30 days of the dismissal.[13] The

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Labour Court to award, in addition to 'compensation,' any other amount to which the employee may be entitled in terms of any law or contract of employment .
6Shorter Oxford English Dictionary.
7*Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC).
8Section 185(*a*) of the LRA.
9Section 188(1) read with s 192(2) of the LRA places the onus on the employer.
10Section 188(1) of the LRA.
11 Section 188(1) of the LRA.
12These were substituted by s 44 of the Labour Relations Amendment Act 12 of 2002.
13Section 191(1) of the LRA.

Commission must attempt to resolve the dispute through conciliation[14] and if the Commission certifies that the dispute remains unresolved[15] the employee may refer the dispute to the Labour Court for adjudication if the employee alleges that the reason for the dismissal is based on the employer's operational requirements.[16] Such a referral must be made within 90 days after the Commissioner has certified that the dispute remains unresolved but the Labour Court may condone non-observance with that time-frame on good cause shown.[17] 'Good cause' is not defined in the LRA but in deciding whether good cause has been shown, the court will take into account a number of interrelated factors which include the explanation for the failure to comply with the time limit and the applicant's prospects of success in the claim before the Labour Court.

[11] The facts relevant to Ndlela's and Mkhize's claims for unfair dismissal have not been disputed and may be briefly summarised. Ndlela and Mkhize were both employed by Nestlé as sales representatives, Ndlela from 1981 and Mkhize from 1982. Although they had previously been members in about 1986, in 2001 neither was a member of FAWU or any other trade union. FAWU was the recognised trade union at Nestlé. Late in 2001 Nestlé decided to 'rationalise and restructure the Grocery Sales Division' (in which Ndlela and Mkhize were employed) and on 19 November 2001 Berlin Nayager, Nestlé's National Employee Relations Manager, faxed the following letter to Mr Sam Mashilwane, FAWU's Chief Negotiator in Johannesburg:

'Re: Restructuring in Grocery Sales Division

The Grocery Sales Division is currently sub-divided into 6 geographical areas, with each area being managed by its own Area Business Manager. Each area is then staffed with its own complement of Account Managers, Sales Representatives, Admin Personnel and Secretaries.

The Company has now resolved to rationalise and restructure the Grocery Sales Division by changing reporting structures and thereby creating only 3 Business Areas of the 6 mentioned above. There will be an amended staffing level required in the new business areas. This

14Section 115(1)(a) and 135(1) of the LRA.
15Section135(5) of the LRA.
16Section 191(4) and (5) of the LRA.
17Section 191(11)(a) and (b) read with s 158(1)(f) of the LRA.

restructuring could affect the job security of some of your members who are employed as Sales Representatives and Admin Personnel.

We envisage the proposed set up being put in place by 01 March 2002. The company believes that there could be some real positive spin-offs for employees whose jobs could be affected by this restructuring exercise, by offering empowerment opportunities.

You are therefore invited to consult with us in terms of the provisions of the Procedural Agreement and Section 189 of the LRA.

We look forward to your urgent response.'

Pursuant to this letter, Nestlé and FAWU arranged to meet on 29 November 2001 to discuss the restructuring.

[12] What happened at the meeting on 29 November 2001 is recorded in a handwritten note discovered by FAWU and a letter dated 26 February 2002 from Mashilwane to Nestlé's Employee Relations Operations Manager. It appears that FAWU objected to Nestlé's failure to comply with s 189 of the LRA as this made meaningful consultation impossible and that Nestlé's representatives undertook to comply with s 189 and to disclose in writing all relevant information with reasons prior to the next meeting to be held on 10 January 2002. It further appears from FAWU's letter that Nestlé did not comply with this undertaking and FAWU accused Nestlé of ignoring the provisions of s 189. FAWU also asked how it was legally possible to finalise retrenchment when Nestlé had not consulted. There was no answer to these complaints.

[13] Ndlela and Mkhize did not hear about the restructuring before January 2002. In January 2002, Keith Green, Nestlé's Accounts Business Manager in Durban, told the respondents that they would be converted to 'trade specialists'. They would be trained and assessed and if they were not successful they would be considered for alternative employment. Mkhize was not told that if he did not pass the assessment he would be retrenched. He did not receive any training but was assessed on 25 February 2002. He was not told how he would be assessed and he was not told what the outcome of the assessment was. After hearing a rumour that he and Ndlela had decided to take a voluntary severance package, he and Ndlela decided to apply for

membership of FAWU. At about the end of February 2002 or early in March 2002 they went to FAWU's regional office where they completed and signed FAWU's membership application forms. These forms incorporated stop orders. The person they dealt with, Mike Masondo, told them that they were full members and that their FAWU contribution would be deducted from their salaries.

[14] Any concerns that he and Ndlela had about the process going on were allayed in April 2002 when they each received from Nestlé's Grocery Division Business Manager, Bruce Laubscher, a letter dated 12 April 2002. The letter to Mkhize read as follows:

'Dear Michael,

Many thanks for your efforts and contribution for last year. 2001 was yet another difficult year for the KZN region, however, I believe we now have the right structure in place to succeed and grow our business in 2002.

The increases for April 2002 are inflated as a result of our improved Performance Management System and the inclusion of a once-off adjustment as compensation for the change in increase period. From now on, the salary increase period will run from April to March the following year, as a normal process.

Performance driven salary increases will become the norm in the future as this directly relates to the achievements of our business and personal goals.

Effective 1 April 2002, your salary has been increased to R7436 per month.

Lastly, I am looking forward to working with you and ensuring that we, together, take our business in the new Central Region, to the next level!'

[15] However, on 6 May 2002 each respondent received from Bruce Laubscher, now Nestlé's ABM, Central Area, a letter dated 3 May 2002 in which the respondent was informed that in terms of s 189 of the LRA his services would be terminated on 15 May 2002 and what his severance package would be. It is noteworthy that this letter states that at a meeting between Nestlé and FAWU on 11 April 2002 Nestlé formally informed FAWU that Mkhize's services as per s 189 of the LRA will be terminated on 15 May 2002. That happened the day before Laubscher addressed his letters of 12 April 2002 to the respondents to thank them for their work during 2001, to inform them of their salary increases and to tell them he was looking forward to

working with them.

[16] On receipt of this letter on 6 May 2002, the respondents immediately went to FAWU's office and handed the letters to Siphiwe Dlomo, FAWU's branch organiser. Dlomo told them to come back after they had been retrenched which they did. Dlomo undertook to represent them at the Commission and completed the referral forms which they signed.

[17] The conciliation hearing before the Commission took place on 18 June 2002. Ndlela and Mkhize were represented by Dlomo and Nestlé by Nayager. At the hearing, Nayager raised, as a point *in limine*, the issue of whether Ndlela and Mkhize were members of FAWU and whether FAWU could represent them. In answer to this objection, Dlomo produced the membership application forms signed by Ndlela and Mkhize and assured the Commissioner that they were members. As a result, the point *in limine* was not upheld. Nevertheless, the conciliation hearing did not resolve the dispute and on 18 June 2002 the Commissioner issued a certificate of non-resolution in terms of s 135(5) of the LRA. The certificate clearly states that FAWU was acting on behalf of Ndlela and Mkhize.

[18] Dlomo then sent the certificates to Sam Mashilwane in Johannesburg as FAWU had decided to consolidate, in proceedings before the Johannesburg Labour Court, all the claims based on Nestlé's unfair dismissal of FAWU's members.

[19] FAWU did not refer the dispute between Nestlé and Ndlela and Mkhize to the Labour Court within 90 days of the issue of the certificate of non-resolution as required by s 191(11)(a) of the LRA or thereafter and FAWU did not advise Ndlela and Mkhize of this failure. Nor did it keep them apprised of the progress of their cases. Ndlela and Mkhize regularly visited the FAWU offices to ascertain what progress was being made. They were told, repeatedly, that the matter had been referred to the Labour Court. Eventually in about May 2003 Ndlela and Mkhize approached the University of Durban-Westville Law Clinic for assistance and the Law Clinic advised them on 29 May 2003 that no documents had been filed with the

Labour Court.

[20] On 20 November 2003 Lucky Makae, FAWU's Durban Legal Officer, addressed a letter to Ndlela and Mkhize setting out the history of the proceedings in the Labour Court, as far as FAWU was concerned, and informing them (as had already happened on several occasions) that it was 'imperative' to apply to the Labour Court for condonation of the late filing of the relevant papers. Makae also informed them in the letter that the evidence of Thami Tukani, the legal officer who had previously dealt with the matter, was essential for the application for condonation and that he, Makae, was waiting for information from Tukani to enable him to bring this application.

[21] This was the first time that FAWU had advised Ndlela and Mkhize that it had failed to file the papers. FAWU still did not launch an application for the condonation for the late filing of the relevant papers.

[22] On 12 January 2004 Makae, on behalf of FAWU, addressed a letter to Nestlé demanding an urgent meeting to resolve the unsatisfactory state of affairs with regard to Nestlé's employees who had been unfairly dismissed.

[23] On 20 January 2004 Makae prepared a referral to the Commission of the disputes relating to the unfair dismissal of Ndlela and Mkhize. The Commission refused to entertain this referral.

[24] During April 2004 FAWU approached attorney J Surju for an opinion on Ndlela and Mkhize's prospects of success in proceedings before the Labour Court. On 28 April 2004, after consulting with Ndlela and Mkhize, Surju furnished FAWU with a written opinion that the dismissal of the Nestlé employees was not unfair.

[25] Eventually, on 4 June 2004, FAWU informed Ndlela and Mkhize that FAWU would not proceed with their claim in the Labour Court and on the same day Ndlela and Mkhize consulted attorneys Deneys Reitz who addressed a letter of demand to

FAWU. In their letter, Deneys Reitz stated that FAWU had been negligent in the way it handled the claims and that Deneys Reitz had been instructed to institute an action for damages against FAWU in the high court. Deneys Reitz concluded their letter by saying:

'However, as part of our clients' duty to mitigate the loss, we are instructed to give yourselves two weeks within which to file the necessary statement of case and bring the requisite application for condonation, as quite clearly the reasons for the failure to file the statement of case would be in FAWU's knowledge.

In the event that you fail to file the statement of case and the requisite application for condonation within this two week period, or should the application for condonation fail arising out of FAWU's negligence, we will immediately issue summons.'

[26] FAWU did not bring an application for condonation and neither did Deneys Reitz on behalf of Ndlela and Mkhize.

[27] In August 2004 Ndlela and Mkhize instituted their actions for damages against FAWU.

[28] On 3 September 2004 FAWU's attorney, Surju, addressed a letter to Deneys Reitz suggesting that Ndlela and Mkhize withdraw their actions because neither of them was a member of FAWU at the relevant time. On 7 September 2004 Deneys Reitz rejected the suggestion and pointed out that the correspondence emanating from FAWU showed that Ndlela and Mkhize were at all relevant times members of FAWU.

[29] The court a quo identified 11 issues to be decided: (1) whether Ndlela and Mkhize were members of FAWU at all material times; (2) whether an agreement of mandate was entered into between Ndlela and Mkhize and FAWU in terms of which FAWU was to refer Ndlela and Mkhize's claims against Nestlé for unlawful dismissal to the Labour Court; (3) if such an agreement of mandate was entered into, what its express, alternatively, implied terms were; (4) whether FAWU breached the agreement of mandate; (5) whether, if FAWU breached the agreement of mandate,

such breach rendered FAWU liable to compensate Ndlela and Mkhize for any damages suffered by Ndlela and Mkhize having regard to the following issues; (6) whether FAWU was entitled to resile from and renounce the agreement of mandate and, if so, what effect such a right to resile from the agreement had upon any previous breach of the agreement by FAWU; (7) whether Ndlela and Mkhize's actions were premature, as a consequence of their failure to advance their claims themselves in the Labour Court; (8) whether Ndlela and Mkhize lacked locus standi to sue FAWU; (9) whether it is against public policy to hold FAWU liable for damages to Ndlela and Mkhize; (10) whether Ndlela and Mkhize would have succeeded in the Labour Court in their claims for unlawful dismissal against Nestlé and (11) whether Ndlela and Mkhize proved the quantum of their damages. The court a quo found against FAWU on all the issues which it found necessary to decide.

[30] On appeal, FAWU contends that the court a quo erred in respect of every finding except the issue of public policy. The heads of argument dealt with all the relevant issues.

[31] Ndlela's and Mkhize's claims before the court below were claims for damages for breach of contract and the measure of damages alleged was the compensation which Ndlela and Mkhize would have been awarded in the Labour Court if they had proceeded there. Ndlela and Mkhize did not allege that FAWU had breached the agreement by not applying for condonation for the late filing of their claims in the Labour Court. However, they did allege that they were unable to mitigate their damages by instituting proceedings in their own names and seeking condonation for the late referral of their disputes. According to their particulars of claim this was because of their dismissal and hence unemployment. These allegations were denied by FAWU which contended that, absent an unsuccessful application for condonation, Ndlela and Mkhize did not have a complete cause of action. It seems to me that Ndlela and Mkhize's failure to bring applications for condonation is relevant both in the context of pleading a cause of action and in determining whether the breach of contract relied upon by Ndlela and Mkhize caused the loss which they claimed as damages.

[32] It is not necessary to traverse all the issues and arguments raised at the hearing of the appeal since I am of the view that the respondents failed to prove that they suffered the loss as a result of FAWU's breach of contract[18] and that the respondents' own failure to apply for condonation for the late filing of their claims in the Labour Court was the *sine qua non* for their loss.[19] In short, I am of the view that the loss was self-

18*Vision Projects (Pty) Ltd v Cooper, Conroy, Bell & Richards Inc* 1998 (4) SA 1182 (SCA) at 1191H-J; R H Christie & G B Bradheld *The Law of Contract in South Africa* 6 ed (2011) at 565-6.
19*International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-701A.

inflicted and cannot be attributed to FAWU.[20]

[33] For purposes of this judgment I accept that the respondents established that–

(1) the respondents and FAWU entered into a valid agreement in terms of which FAWU undertook to represent the respondents before the Commission and, if unsuccessful there, to refer the claims to the Labour Court;

(2) the respondents and FAWU agreed that FAWU would bring an application for condonation for the failure to refer the respondents' claims timeously to the Labour Court;

(3) that these agreements constituted a mandate to FAWU to represent the respondents in prosecuting the respondents' claims before the Commission and the Labour Court and FAWU was obliged to perform its functions faithfully, honestly and with care and diligence and to account to its principals for its actions;[21]

(4) in breach of its mandate, FAWU failed to perform its functions with care and diligence in that it failed to file the respondents' claims timeously with the Labour Court; it failed to prepare the application for condonation and it failed to report these failures to the respondents at the earliest opportunity;

(5) if FAWU had prosecuted the claims before the Labour Court it would have established that Nestlé's dismissal of the respondents was unfair and that they would have each been awarded compensation in the sum of R107 232.

[34] The loss for which the respondents claimed damages was the compensation they would have been awarded by the Labour Court. They did not suffer this loss simply because FAWU did not lodge the claims timeously. They suffered this loss because of the failure of the parties to bring an application for condonation which failure, effectively terminated the prosecution of their claims and meant that it was inevitable that no compensation would be awarded.

20*Cooper v Syfrets Trust Ltd* 2001 (1) SA 122 (SCA) at 134F.

21*David Trust v Aegis Insurance Co Ltd* 2000 (3) SA 289 (SCA) paras 20-21; J C de Wet and A H van Wyk *Die Suid-Afrikaanse Kontrakte- en Handelsreg* 5 ed (1992) vol 1 at 386; Joubert (ed) *The Law of South Africa* vol 17 (first reissue) para 11.

[35] When FAWU finally advised the respondents that it, FAWU, terminated the mandates and would not act on their behalf they immediately consulted Deneys Reitz which obviously advised them ─ correctly in my view ─ that they had a good claim for compensation on the grounds of unfair dismissal. Deneys Reitz obviously knew that the respondents could not stand by and do nothing to safeguard themselves: Deneys Reitz correctly considered that the respondents had a duty to act to prevent a loss arising from FAWU's breach of contract. However it wrongly concluded that by calling on FAWU to bring an application for condonation, the respondents were mitigating their damages. The principle was stated in *Hazis v Transvaal & Delagoa Bay Investment Co Ltd* 1939 AD 372 at 388─

'This rule about mitigating damages relates not to what the claimant in fact did, but to what he should have done. It is in essence a claim based on negligence ─ neglect to do what a reasonable man would do if placed in the position of a person claiming damages. The defendant in such claim says "admitting that in fact you suffered these damages, you have only yourself to blame for having suffered so much, or at all, because you did not take reasonable steps to protect yourself and, therefore me."'

The onus of proving that the respondents did not mitigate their loss rested on the defendant, FAWU.[22]

[36] However, that is not the issue in the present case. The respondents claimed damages for breach of contract and they had to prove that the loss which they suffered was caused by FAWU's breach of contract: that the failure to recover compensation in the Labour Court was caused by FAWU's failure to seek condonation for the late filing of the respondents' claims in the Labour Court.

[37] This was not a simple case where the failure to deliver the statements of claim timeously, automatically resulted in the failure of the claims, and, if the claims were good, the pecuniary loss because no awards would be made.[23] It was possible to obtain condonation for the failure to lodge the statements of claim timeously[24] and if

22*Hazis v Transvaal & Delagoa Bay Investment Co Ltd* 1939 AD 372 at 388-389; *North & Son (Pty) Ltd v Albertyn* 1962 (2) SA 212 (A) at 216-217.

23See eg *Mazibuko v Singer* 1979 (3) SA 258 (W) at 261D-E and *Slomowitz v Kok* 1983 (1) SA 130 (A) at 132C-D where claims for damages in terms of the Motor Vehicle Insurance Act 59 of 1972 were negligently allowed to prescribe.

24In terms of s 191(11)(b) read with s 158(1)(f) of the LRA the Labour Court 'may condone non-

the applications were unsuccessful an appeal lay to the Labour Appeal Court.[25] It was therefore necessary for the respondents to allege and prove that even if they had brought an application for condonation it would have been refused because of FAWU's delays, firstly in failing to lodge the statements of claim timeously with the Labour Court, and, secondly, in failing to lodge an application for condonation with the Labour Court at the earliest opportunity.[26]

[38] The difficulty in this case is that the respondents failed to take this necessary step to enable them to proceed with their claims before the Labour Court. These were the respondents' claims and they were obliged to take this step to prosecute their claims, particularly after FAWU refused to act further on their behalf. That is obviously what a reasonable man would do. If they were not granted condonation they would not succeed in getting an award of compensation in the Labour Court. I therefore respectfully disagree with the court a quo that an unsuccessful application for condonation was not part of the respondents' cause of action.

[39] The court a quo also found that the respondents would not have been granted condonation because they would not have been able to show good cause. This finding was based on the inordinate delay of FAWU, the lack of a reasonable and acceptable explanation for the delay, that Nestlé would oppose the application on the basis that it would be prejudiced in having to defend a claim for dismissal which had occurred two years earlier. The court a quo also found, correctly in my view, that the respondents were not precluded from bringing a condonation application because of financial constraints, the case they alleged in their pleadings. The court a quo also seems to have based its conclusion on the fact that the respondents lacked information which was exclusively within FAWU's knowledge.

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observance of that timeframe (ie 90 days) on good cause shown'.

25Section 173(1) of the LRA.

26Without these facts there was no cause of action as it was described in *McKenzie v Farmer's Co-operative Meat Industries Ltd* 1922 AD 16 at 23 '. . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court' and in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 . . . 'the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim'. See *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838D-H.

[40] Once again I respectfully differ with the conclusion. There is no evidence that Nestlé would have opposed an application for condonation and argued that it was prejudiced by the delay. It is a subsidiary of an international group of companies and clearly had the resources to record what happened during the retrenchment of its employees. Nayager was unable to show that any consultation had taken place or that the respondents had been dismissed for operational reasons. Nor is there evidence that FAWU was asked to provide information for the purpose of an application for condonation and had refused to do so. Deneys Reitz obviously decided not to bring an application on behalf of the respondents and therefore did not investigate the facts. Obviously there had been a long delay (about 20 months) but there was an explanation which would have to be considered with all the other relevant factors.

[41] The approach of the court to the grant of condonation was summarised by this Court in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532:

'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would serve only to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'

[42] Unlike the court a quo, when assessing the probability of an application for condonation being successful, I consider that it is probable that such an application would have been successful. The respondents had been employed by Nestlé for more than 20 years before they were unfairly dismissed. The merits of their claims

could not be refuted and were obviously important to them. The respondents immediately sought compensation and appointed FAWU to represent them before the Commission and the Labour Court. From the outset the respondents intended to recover compensation for their unfair dismissal and there was no willful or grossly negligent default on their part. They were clearly let down by FAWU's legal officer who, on the information on record, appeared to have taken ill and was hospitalised for a long period during which the FAWU administrative personnel failed to ensure that attention was given to his files. There is no indication that Nestlé would have been prejudiced by the delay in producing any evidence. Obviously, if requested, FAWU could have provided more detail. Nevertheless the merits of the case and the bizarre circumstances of the failure would weigh heavily with the court. In my view the court a quo attached too much weight to the apparently unacceptable explanation for the delay and insufficient weight to the question of the merits and the importance of the case to the respondents.

[43] I would therefore uphold the appeal with costs and replace the order granted by the court a quo with the following order:
'The actions are dismissed with costs.'

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B R SOUTHWOOD
ACTING JUDGE OF APPEAL

PONNAN JA and PLASKET AJA (MALAN and TSHIQI JJA CONCURRING):

[44] We have had the benefit of reading the judgment of Southwood AJA but regret that we are unable to agree with his conclusion that the appeal should succeed. We avail ourselves of the facts as also the issues that have been set forth in such comprehensive detail by our learned colleague. As many of the issues raised by the appeal are interrelated we consider there to be little value in dealing with them individually.

[45] It is important to note at the outset that the claim of the respondents is based not on delict, but on a breach of contract. What they allege is that there was a contract between the parties which imposed an obligation on FAWU that it failed to perform in the manner contemplated by that contract. The first duty of the court is therefore to determine the nature of the obligation imposed upon FAWU by the contract. It may well be that in terms of its constitution FAWU may not have been obliged to assist the respondents. But that can hardly avail it now. For, the simple truth is that FAWU had in fact undertaken to represent the respondents in their dispute with Nestlé. Not just that, it thereafter did in fact do so before the Commission for Conciliation, Mediation and Arbitration (the CCMA). Thus whether the respondents did indeed qualify for such assistance in terms of FAWU's constitution is, on the view that we take of the matter, a red herring. That the contract in question is one of mandate appears to admit of no dispute. Once it accepted that mandate FAWU was obliged to perform its functions faithfully, honestly and with care and diligence (*David Trust v Aegis Insurance Co Ltd* 2000 (3) SA 289 (SCA) para 20). It mattered not that it was not to receive any remuneration for the discharge of that obligation. For, as Hoexter JA made plain in *Bloom's Woollens (Pty) Ltd v Taylor* 1962 (2) SA 532 (A) at 539G-H ' . . . I wish to emphasise that in our law a person who has undertaken an obligation is bound duly to perform it, whether or not he is to receive remuneration'.

[46] At the outset we should perhaps dispose of a contention sought to be advanced on behalf of FAWU that being a trade union and not an attorney a less exacting standard should be expected of it. There is a short answer to that contention. It is to be found in the following dictum of Graham JP in *Mead v Clarke* 1922 EDL 49 at 51:

'Voet (XVII.1.9.) points out that where a man has expressly or tacitly professed to have business capability he ought not to have undertaken an affair for which he was not qualified and in which he knew or ought to have known that his own lack of skill would be damaging to the interests of his principal. And Story, in his work on *Bailments*, sec. 175, states the same principle: "Nor will want of ability to perform the contract be any defence to the contracting party, for though the law exacts no impossible things, yet it may justly require that every man

should know his own strength before he undertakes to do an act. And if he deludes another by false pretensions to skill he shall be responsible for any injury that may be occasioned by such delusion.'"

[47] In our view the mandate given to FAWU was a relatively simple one – it was to take such steps as were necessary to have the respondents' labour dispute with their employer determined in accordance with the provisions of the LRA. That it could easily have done. FAWU committed breaches of its mandate. It did so in the first place by failing to timeously refer the respondents' dispute with Nestlé to the Labour Court (LC) and in the second place by failing to secure condonation for that failure. In both instances it failed to act honestly or diligently. When the dispute remained unresolved and a certificate to that effect issued by the CCMA on 18 June 2002, the respondents acquired an unconditional right to approach the LC to have that dispute resolved. FAWU well knew that the respondents' dispute had to be referred to the LC within 90 days of the issuance by the CCMA of its certificate. That much emerges from its own correspondence to the respondents and Nestlé. FAWU, moreover, failed to inform the respondents that the matter had not been referred within the requisite 90 days or to keep them apprised of the progress of their case (because, one suspects, there was none). It took a visit by the respondents to the University of Durban-Westville Law Clinic for them to learn that no papers had been filed with the LC. That was approximately one year after the CCMA certificate of non-resolution had issued. The consequence of FAWU's failure to diligently discharge its mandate by failing to timeously refer the respondents' dispute with Nestlé to the LC was that it altered the nature of the respondents' right to one that could now only be exercised with the leave of the LC upon good cause being shown. A successful application for condonation thus became a necessary preliminary to a referral of the dispute to the LC.

[48] According to Mkhize, once they learned from the Law Clinic that no steps had been taken by FAWU, both respondents immediately visited the offices of the union. They were told that the person who had been handling the matter on their behalf was sick and that FAWU's officials could not get access to his office, which was locked.

They were reassured that they had no cause to be concerned. On 20 November 2003 FAWU's legal officer wrote to the respondents that he was endeavouring to make contact with his predecessor, whose affidavit was asserted to be 'central and imperative to the . . . abovesaid condonation application'. By that stage some 17 months had elapsed since the certificate of non-resolution had issued by the CCMA. And despite the letter concluding 'the criticality of this matter is fully appreciated', FAWU seemed incapable of raising itself from its self-induced inertia.

[49] Instead after all of that time, during April 2004, FAWU, somewhat surprisingly, chose to secure an opinion from Attorney J Surju, who, after having consulted with the respondents, expressed the view on 28 April 2004 that their dismissals were not unfair. Some five weeks later on 4 June 2004 FAWU informed the respondents that they would not proceed with their claim in the LC. The respondents then consulted with Deneys Reitz Attorneys, who wrote to FAWU threatening to institute a civil claim in the high court for damages as a result of the Union's negligent handling of the matter, but affording it two weeks within which to file a statement of case and bring the necessary application for condonation in the LC. The response that that letter elicited from Mr Surju on behalf of FAWU on 3 September 2004 was: 'You are hereby informed that [the respondents were] not member[s] of our client at all material times.' And so having undertaken to carry out the respondents' instructions and in so doing having asserted before the CCMA that they were indeed members of FAWU when that was called into question by Nestlé, the union did a complete *volte-face* well in excess of two years after first accepting the mandate.

[50] It is now contended by FAWU that the respondents' failure to themselves apply for condonation somehow operates as a bar to the institution of the civil action against it. We cannot agree. In our view while the obtaining of condonation may have been a necessary preliminary to the referral by the respondents of their dispute with Nestlé to the LC, it is not for this action. For, it seems to us that all that the respondents had to establish to succeed in this action as against FAWU is that: had their dispute been referred to the LC by it in accordance with the terms of the mandate it would have been resolved in their favour. Moreover, as this court held in

Ashcor Secunda (Pty) Ltd v Sasol Synthetic Fuels (Pty) Ltd [2011] ZASCA 158 para 8:

'For, as Nienaber J stated in *Moodley & another v Moodley & another* 1990 (1) SA 427 (D) at 431C-H:

"In *Erasmus v Pienaar* (*supra* at 29 *et seq*) Ackermann J, while expressing reservations about the given reason (that an unaccepted repudiation operates as a waiver of sorts), fully endorsed the notion that the repudiation may release the aggrieved party all the same from taking measures which, in terms of the agreement, he would otherwise have been obliged to take. The Court (at 29A read with 22J) accepted the proposition (if I may be permitted to paraphrase) that the one party's repudiation, though not treated by the other as a cause for cancellation, may nevertheless (i) excuse the latter from formal acts preparatory to performance; and (ii) entitle him, in appropriate circumstances, to suspend his own performance until the guilty party has reaffirmed his willingness and ability to fulfil his side of the bargain, provided that the aggrieved party, to the knowledge of the repudiating one, remained ready, willing and able to perform his part. The appropriate circumstances would be that the aggrieved party cannot proceed without co-operation from the other or that the principle of mutuality of performance would entitle him, eventually, to withhold his own performance.

The rationale for the rule was said to be (if I may again paraphrase) that a party to a contract ought not to be allowed, by his own wrongful conduct, to advantage himself or to disadvantage his counterpart. To permit the repudiating party to take advantage of the other side's failure to do something, when that failure is attributable to his own repudiation, is to reward him for his repudiation; conversely, it would disadvantage the other party to be obliged to make the effort and incur the expense of tendering a guarantee or of performing some other act when such a step, because of the repudiation, has become nothing but an idle gesture."'

Elsewhere P M Nienaber 'The Effect of Anticipatory Repudiation: Principle and Policy' 1962 *Cambridge Law Journal* 213 at 225 said:

'It is a fundamental principle of our law that no man can take advantage of his own wrong. *Nullus commodum capere potest de injuria sua propria*. From this broad proposition it follows that a contracting party cannot liberate himself from a contract by reason of his own breach. A contract mutually made cannot be terminated unilaterally, unless the law authorises the one to do so by reason of the other's misconduct. Rescission cannot be

effected at the instance of the guilty party. Hence the innocent party to a breach of contract, entitled to rescind, is not obliged to do so.'

[51] Having accepted the mandate the principal duty of FAWU was to carry it out. In breach of that duty it failed to timeously refer the dispute to the LC. It is trite that in those circumstances the respondents had an election to either hold FAWU to its undertaking by claiming performance of it of what it had bound itself to do or to claim damages *(Haynes v Kings William's Town Municipality* 1951 (2) SA 371 (A) at 378D-E). Some eight decades ago the position was articulated thus by Watermeyer J in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 638-639:

'It is a rule in the law of contracts that where one party to a contract does an act which makes it impossible for him to perform his promise, or renounces, or refuses to perform, his obligation under the contract, the other party is put to his election. He can either treat such refusal as a breach of contract and sue for damages or he can hold the defaulting party to the contract and insist on performance. If he elects to treat the default as a breach the contract is at an end; if, on the other hand, he refuses to accept the default as a breach, then he keeps the contract alive, he can insist on performance and the other party then has a further opportunity to perform his obligation notwithstanding his previous repudiation'.

[52] Here when it was discovered by the respondents that almost one year after it had undertaken to do so, FAWU had not taken steps to refer the matter to the LC, the respondents elected to keep the contract alive in the expectation, it would appear, that FAWU still had every intention of discharging the obligation imposed upon it by the mandate. Indeed at that stage FAWU also chose to keep the agreement alive. It was only on 4 June 2004 that FAWU intimated a deliberate and unequivocal intention no longer to be bound by the agreement. Even then the respondents through their attorney appeared in the first instance to insist on performance. That letter signified an unmistakable election on the part of the respondents to treat the contract as at an end should FAWU not perform. It thus constituted, to the knowledge of FAWU, a clear and unequivocal manifestation by the respondents (through their attorney) of their attitude that were FAWU to continue to refuse to perform they would regard the contract as being at an end. (See *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) paras 28-29.)

The response that that letter elicited from FAWU (through its attorney) was that the respondents were not members of the union. That in turn gave rise to the action now instituted, which on the view we take of the matter − namely, that the respondents' loss cannot be regarded as self-inflicted − must succeed. That renders it necessary for us to consider whether the dismissals were unfair and if so, the damages, if any, to which the respondents are entitled.

[53] Swain J found that the retrenchments of the respondents were both substantively and procedurally unfair. Mkhize testified that when they had heard rumours about possible retrenchments they raised the issue with management and were reassured that there was no danger of that happening. Indeed on 12 April 2002 he received a letter from the business manager of Nestlé thanking him for his efforts and contribution during the previous year and informing him of his salary increase, which was stated to be 'inflated as a result of our improved Performance Management System'. The letter concluded: 'Lastly, I am looking forward to working with you and ensuring that we, together, take our business in the new Central Region, to the next level.' But that letter was written, it would seem, after the Nestlé board had already taken a decision to restructure its operations and negotiations had already commenced with FAWU. That much emerges from Nestlé's retrenchment letter to Mkhize dated 3 May 2002. It read: 'I refer to the consultation held between the Company and the Union since 29 November 2001. . . . Several meetings were held. In the last meeting held on . . . 11 April 2002, we formally informed the Union that your services as per Section 189 of the LRA will be terminated from 15 May 2002.' The letter proceeded to inform him that he would inter alia receive '[t]wo months notice pay' and '[t]hree weeks for each completed year of service'.

[54] The position of Ndlela is for all material purposes identical to that of Mkhize. One of the primary complaints of the respondents is that they had been kept in the dark about the unfolding restructuring process. Mr Berlin Nayager, who was intimately involved in the restructuring process at the company, conceded that: (a) he did not know whether non-union employees, such as the respondents, were consulted as part of the retrenchment exercise; (b) the selection criteria and profiling

exercise to identify the employees to be retrenched may not have been agreed with the union, it having insisted on LIFO, in which event the respondents ought not to have been retrenched; and (c) the respondents ought to have been − but were not − offered other positions as an alternative to dismissal, when such positions were vacant and shortly after their retrenchments advertised to be filled. Mr Nayager was FAWU's witness. In the light of that evidence Swain J's conclusion that the retrenchments were both procedurally and substantively unfair cannot be faulted. Nor, bearing in mind that the onus would have been on Nestlé to prove that the dismissals were fair (s 191(2)), can his conclusion that had the dispute been referred to the LC it would have been resolved in the respondents' favour.

[55] The learned Judge then proceeded to a consideration of damages. In *Steenkamp v Du Toit* 1910 TPD 171 at 175 Innes CJ stated:

'A man, therefore, who has failed to carry out his contractual obligation, is liable for such damages as he must reasonably have known would naturally and probably result from the breach; such damages, in other words, as given his knowledge of the circumstances, might naturally be expected to follow the breach.'

Relying on s 194 of the LRA (as it read at the time) the respondents claimed either 24 months' salary, being payment for the period from the termination of their employment until when the LC would probably have finalised the matter and ordered re-instatement, alternatively 12 months' salary in the nature of a *solatium*.

[56] Section 158 of the LRA sets out the powers of the LC. It authorises the LC to award compensation (subsection (1)*(a)*(v)) or damages (subsection (1)*(a)*(vi)) in any of the circumstances contemplated in the Act. Section 193(1) provides the remedies for unfair dismissals and unfair labour practices, namely, reinstatement, re-employment or compensation. According to s 193(2), reinstatement or re-employment must be ordered unless: (a) the employee does not want to be reinstated or re-employed; or (b) a continued employment relationship would be intolerable; or (c) it is not practical to order reinstatement or re-employment; or (d) the dismissal is unfair only because the employer did not follow a fair procedure.

[57] Section 194(1) provides that where compensation for an unfair dismissal (whether substantively or procedurally unfair, or both) is ordered, it 'must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the *employee's* rate of *remuneration* on the date of *dismissal*'. And, according to s 195, an award of compensation as envisaged by s 194 'is in addition to, and not a substitute for, any other amount to which the *employee* is entitled in terms of any law, *collective agreement* or contract of employment'. Sections 41(2) and 41(5) of the Basic Conditions of Employment Act 75 of 1997 also come into the reckoning. In terms of the former, on retrenchment, an employee is entitled to severance pay 'equal to at least one week's remuneration for each completed year of continuous service . . .' . Whilst the latter provides that the 'payment of severance pay in compliance with this section does not affect an employee's right to any other amount payable according to law'.

[58] The respondents were dismissed on 15 May 2002. Sections 193 and 194 of the LRA were amended by the Labour Relations Amendment Act 12 of 2002 which commenced on 1 August 2002. The amendment sought to address what Conradie JA described as: ‘the dismal state of affairs to which s 194(2) . . . has given rise’ (*Lorentzen v Sanachem (Pty) Ltd* (2000) 21 *ILJ* 1075 (LAC) para 9). It removed the need to exercise a discretion to award all or nothing, as regards procedural irregularities. And replaced in its stead a new general discretion to award compensation in an amount which is just and equitable in all the circumstances. The result is that the risk of an employer having to pay − and an employee having to receive – all or nothing as regards procedural unfairness has been ameliorated. In *Fouldien & others v House of Trucks (Pty) Ltd* (2002) 23 *ILJ* 2259 (LC) para 17 Landman J held that for various reasons, such as: considerations of fairness; the absence of a transitional measure; the unchanged limit on quantum; the contingent nature of the right; the element of discretion, fairness and equity; the redress of the mischief; and, the fact that the new s 194 does not remove existing rights, the provisions of the section, as amended, are rendered applicable to pending disputes.

[59] The compensation for the wrong in failing to give effect to an employee's right to a fair procedure, according to Froneman DJP, is not based on patrimonial or actual loss but is in the nature of a *solatium* for the loss of the right and is punitive to the extent that an employer who breached the right must pay a penalty for causing the loss (*Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 *ILJ* 89 (LAC) para 41). In *Highveld Steel & Vanadium Corporation Ltd v National Union of Metalworkers of SA & others* (2004) 25 *ILJ* 71 (LAC), the LAC considered the factors to be taken into account in determining whether to grant compensation for procedurally unfair retrenchments under the all or nothing regime. The following were, inter alia, considered relevant: (a) the extent of the employer's deviation; (b) the severance packages and lengths of service; (c) the ages of the retrenched employees; and (d) whether it would have been easy for the retrenched employees to find other employment.

[60] Both respondents had exemplary work records. Ndlela had 22 years' service and Mkhize, 20. By comparison the longest serving of any other similarly placed employee was ten years. At the date of their retrenchments, Ndlela was 52 years old and Mkhize 47. Given their ages and lack of formal education – standard 9 in the case of the first and matriculation in the case of the second - it would be fair to say that neither could entertain any serious prospects of other employment. Indeed neither had been able to secure employment after their dismissal. As we have shown, the deviation on the part of the employer from the requirements of the LRA was quite substantial. On the other hand the severance package, which was in excess of the statutory minimum and also that provided in the recognition agreement between Nestlé and FAWU, was fairly generous. In *Highveld Steel* the LAC took into account that the severance pay that had been paid was generous – every bit as generous as in this case. Despite this, it held that those employees were entitled to compensation and the severance pay was not deducted. That is consistent with the approach to compensation as set out in *Johnson & Johnson*.

[61] From what is set out above, it seems to us that: first, the distinction that was drawn by the court below between substantive and procedural unfairness falls away

when the amended s 194 is applied; second, the compensation envisaged by the section remains in the nature of a *solatium* for being subjected to unfair treatment; and third, while the quantum of the severance pay, the mitigation of loss and the other factors alluded to may be relevant considerations, they do not necessarily preclude the payment of compensation; rather they go into the scales in determining whether it is just and equitable to compensate, and if so, in what sum.

[62] Swain J believed that he was dealing with s 194 in its pre-amended form. The effect of that is that we have to reconsider the matter afresh and exercise the discretion ourselves. We are of the view that as it would not have been practical to have ordered re-instatement, the awarding of compensation is indeed warranted. And given all the circumstances here present that 12 months' salary as compensation would have been appropriate. We would therefore uphold Swain J's award of damages but on a somewhat different approach. We may add that if one were to approach the matter on the basis of the pre-amended s 194, the matter is rendered much the easier - the weight of the relevant factors would be in favour of compensation for the procedurally unfair dismissals and, once that is so, the amount is set at 12 months' salary. In the result Swain J's conclusion on this aspect of the case falls to be confirmed. That conclusion disposes of the respondents' cross-appeal. But as it did not contribute to any increase in the costs of the preparation of the record and occupied barely any time in argument, we would make no order as to costs in respect of the cross appeal.

[63] In the result we would dismiss both the appeal and the cross-appeal and order the appellant to pay the costs of the former.

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V M PONNAN
JUDGE OF APPEAL

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C M PLASKET
ACTING JUDGE OF APPEAL

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