REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO D 458/2001

DATE HEARD: 19 11 2001

In the matter between:

CROWN FOOTWEAR (PTY) LTD **Applicant**

and

NATIONAL UNION OF LEATHER ALLIED WORKERS **First Respondent**

SECOND TO TWENTY-FIFTH RESPONDENTS **Further Respondents**

JUDGMENT DELIVERED BY THE HONOURABLE JUSTICE PILLAY ON 23rd NOVEMBER 2001

PILLAY, J

1. This is an application to declare that the further Respondents are not entitled to be reinstated into their former employment with the applicant pursuant to a judgment of the Labour Court and the Labour Appeal Court under case numbers D663/98 and DA 7/2000 respectively. A further declarator is sought for the amount of compensation payable to the further Respondents.

2. On 12th July 1998 the further Respondents were dismissed for participating in industrial action. The Applicant re-employed them (except for CJ Charles) on 4th August 1998 on fixed term contracts, pending the outcome of the litigation. Proceedings were instituted in the Labour Court and later in the Labour Appeal Court to determine the fairness of their dismissal.

3. The Labour Court granted reinstatement of the further Respondents with no loss of benefits.

The LAC dismissed the appeal. In the meantime the services of some Respondents had terminated.

4. The parties could not agree about the interpretation and application of the Labour Court judgment.

5. The Respondents contended that the Applicant was not entitled to deduct any payments made in respect of the temporary contracts from the compensation. Furthermore, the retrenched Respondents should be reinstated, it was submitted.

6. The Applicant conceded that it was obliged to reinstate and compensate the further Respondents but qualified the concession thus: the further Respondents who had left the services of the Applicant before the outcome of the Labour Court or Labour Appeal Court decisions, either because they were retrenched or had resigned should not be reinstated. The Applicant further submitted that compensation should be calculated by deducting payments made to the further respondents in terms of their interim contracts.

7. It was common cause that all the further Respondents had to be compensated, although as indicated above, the amount of such compensation was in dispute. There was also no dispute that certain employees were retrenched. There was a dispute as to whether respondents C J Charles and M Moodley had resigned.

8. This is an application to clarify the judgment of Lyster AJ in the Labour Court. Objection was raised to this court's jurisdiction to do so on the grounds that the judgment was not ambiguous. [*Plaaslike Oorgangsraad van Bronkhorstspruit v Senekal (2001) 22 ILJ 602 (SCA) @ 605 F-I; Adminstrator, Cape and Another v Mtshwagela and Others 1990 (1) SA 785 (A) @ 715 F-I*]

9. In Plaaslike Oorgangsraad van Bronkhorstspruit v Senekel 2001 22 ILJ 602 (SCA) quoting the honourable Justice Nicholas in Adminstrator, Cape & Another v Ntshwagela & others 1990(1) SA 705 (A) at 715F-I it was said that:-

"'[T]he Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole I order to

ascertain its intention. If on such reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it.' "

'n Deel van die 'usual well-known rules' van interpretasie is dat mens jou moet blind staar teen die swart-op-wit woorde nie, maar probeer vasstel wat die bedoeling en implikasies is van dit wat gese is. Dit is juis in hierdie proses waartydens die samehang en omringende onstandighede relevant is."

10. The "black and white" text of the judgment of Lyster AJ reads:

" Accordingly I find that the dismissal was unfair and reinstate the Applicants, with no loss of benefits."

11. In the absence of a full analysis of the evidence relating to the remedy in the judgment itself, the text is ambiguous. Does the word "reinstate" include those applicants who had been retrenched? Does the phrase "no loss of benefits" mean that any remuneration the Respondents received since their dismissal on 21st July 1998 should be factored into the computation?

12. It is evident from those portions of the record of the trial to which I was referred and the judgment itself that these questions were not the focus of particular concern at that stage, it not being anticipated that a dispute would arise later. In order to cure the ambiguity regard must be had to all the relevant material available to Lyster AJ.

13. At the trial Mr Ashworth, a director of the Applicant testified that the reason for offering to re-employ of the further respondents was "purely financial". The Applicant wanted to avoid being saddled with a huge amount of back pay if the judgment went against it. Re-employment was pending the outcome of the litigation. It was put to him under cross examination and he confirmed that the main reason for entering into the interim contracts was to mitigate the financial consequences to the Applicant if the further Respondents were reinstated with back

pay. It was not put to him that after advertising the vacant post, the Applicant realised that new recruits would have to be trained. Hence, the re-employment of the further Respondents on interim contracts was a plan the Applicant had devised to overcome this difficulty.

14. It was also not suggested to Mr Ashworth when he testified that the interim contracts would not relieve the Applicant of paying back pay. The submissions in these proceedings, namely that the interim contracts would have no bearing on the dismissal dispute and that they were completely detached from any previous service or benefits that the further respondents had enjoyed at dismissal, were not put to Mr Ashworth in cross-examination.

15. The final clarification provided by Mr Ashworth emerges from the following extract from his cross-examination:

"So for the [*sic*] purposes of determining the LIFO criteria you used the original date? ---Yes.
For the purposes of the benefits in terms of severance pay and otherwise, you used the 4th of August? ---Yes
And I take it that this agreement – the agreement between the parties are that should the applicants succeed in this matter those who have been retrenched will – what will their status be? ----I would imagine their legal status would be that they would be then entitled to the benefits they would have had if their service had not been broken.
At retrenchment? --- Yes."

16. From this the obvious inference is that the Applicant did not intend to deny the further Respondents their benefits merely because they had been retrenched. Nor was there intention to reinstate the Respondents who had been retrenched or had resigned. This inference is fortified by the fact that it had not been put to Mr Ashworth that the retrenched Respondents would be entitled to reinstatement in addition to the benefits.

17. Mr Govender for the Respondents brought to my attention the following extract from Mr Van Niekerk's address on behalf of the Applicant at the trial:

"Some of their services have been terminated, I understand, on the basis of retrenchment

but their rights are reserved in terms of the agreement that was concluded between the company and the union, and should the applicants succeed in this case they will be dealt with as if they had not been retrenched."

18. Mr Govender submitted that this extract confirmed that there had been an agreement which supported the Respondents' interpretation of the judgment.

19. Firstly, Mr Van Niekerk's address was not evidence at the trial. His use of the word "retrench" in the extract quoted was, he now concedes, inappropriate and that he should have used the word "terminated" instead.

20. This extract must be seen in the context of his entire address. He had also unequivocally informed Lyster AJ that the further Respondents had

"continued in their employment with respondent to date pending the outcome of this enquiry, … – the reason for that was to protect the respondent's interests in case it should not succeed in these proceedings, to avoid having to pay the horrific amounts of back-pay that companies are often ordered to pay in circumstances such as these."

Mr Van Niekerk submitted that there was no agreement other that the fixed term interim contracts with the further Respondents.

21. Mr Shunmugam, a Respondent, testified at the trial about the circumstances in which the fixed term contracts came about. The Respondents led no evidence to show that they were entitled effectively to double pay for the period served under the interim contracts. They also failed to establish that the retrenched Respondents were to be reinstated. There was no agreement express or implied, between the parties on these issues.

22. The Respondents' submission that the interim contracts were "designed to be completely detached from any previous service or benefits" was not supported by the evidence at the trial. The further Respondents' previous service was in fact used in the selection for retrenchment. The fairness of the retrenchment was not challenged.

23. In the absence of agreement between the parties the next inquiry is whether there is any basis in law which compels the Applicant to compensate the further Respondents by disregarding their remuneration in terms of the interim contracts and to reinstate those who were retrenched.

24. If employees find alternative employment out of their own initiative, the remuneration received from such employment cannot be a basis for absolving the employer of its obligation to compensate for unfair dismissal. This is premised on the elementary principle that no one should be allowed to profit from their wrong. That is not to say remuneration from alternative employment should never be considered in devising an appropriate remedy for unfair dismissal. If, for instance, the compensation is likely to bankrupt the enterprise it may be in the interests of the employees to temper the amount of the compensation by taking into account the fact that they had mitigated their losses.

25. However, there is a fundamental difference between an employer arranging interim employment and employees doing so for themselves. Preservation of the employment relationship is one of the primary objects of our labour law. There would be no incentive for an employer to provide interim employment for its dismissed employees if there is no cost benefit for it.

26. Another possible incentive for retaining dismissed employees is that their employer would avoid the inconvenience of retraining and the disruptions of engaging new staff. However, if that were a major consideration their employer would not have dismissed them in the first place. In any event such a consideration is hardly an incentive when the dismissed employees are unskilled and in abundant supply.

27. In the circumstances, no right to reinstatement of the retrenched Respondents and to compensation which disregards the remuneration paid by the Applicant during the interim employment of the further Respondents arose either *ex lege* or *ex contractu*.

28. I find, therefore, that upon an objective construction of the order by Lyster AJ, all the further Respondents must be reinstated with no loss of benefits subject to the following:

    a. the Respondents who were retrenched or who resigned before the decision of the

Labour Court or Labour Appeal Court must be compensated up to the date of the termination of their services by such retrenchment or resignation.

b. the amount of the compensation must be calculated by deducting the remuneration received in the interim from the total compensation.

29. With regard to Respondent Moodley, the evidence of Respondent Nazir Armoed was that she had resigned for maternity reasons whilst engaged on an interim basis. There is no indication as to when her maternity leave ended. Nor is there evidence that she tendered her services afresh when her maternity leave was over. It is also not suggested that the Applicant failed or refused to "re-employ her in terms of the interim agreements.

30. With regard to Respondent Charles, it is common cause that there is a dispute of fact as to whether she resigned. It is not in dispute that she refused to be employed on an interim basis. However, her claim cannot be finalised on the pleadings before me.

31. With regard to the computation of the compensation, the Respondents ought to have raised in their affidavits any disagreement they had with the figures on which the Applicant's calculations are based. They have not done so. The Applicant's calculations therefore stand.

I grant an order in the following terms:

1. The Respondents, whose names and particulars reflected on Annexure "A2" for to the Founding Affidavit attached hereto, excluding J C Charles, are not entitled to be reinstated into their former employment with the Applicant in consequence of the judgments delivered by the Labour Court and the Labour Appeal Court under case numbers D663/98 and DA7/2000 respectively.
2. The further Respondents are entitled to be compensated in the amounts reflected on the schedules attached as Annexure "F1" and "F4" to the founding affidavit.
3. The dispute relating to C J Charles is referred for oral evidence to determine whether she resigned.
4. The Respondents are to pay the costs jointly and severally, the one paying the others to be absolved.

JUDGE PILLAY

FOR THE APPLICANT:	ADV G.O. VAN NIEKERK SC
INSTRUCTED BY:	MILLAR & REARDON
FOR THE RESPONDENTS:	ADV S. M. GOVENDER
INSTRUCTED BY:	JAY REDDY ATTORNEYS