IN THE LABOUR COURT OF SOUTH AFRICA

SITTING IN DURBAN

Reportable

CASE NO **D113/00**

DATE HEARD 5-8 September 2005

DATE DELIVERED 2005/09/13

In the matter between

CEPPWAWU [on behalf of Gumede] Applicant

and

REPUBLICAN PRESS (PTY) LTD Respondent

JUDGMENT DELIVERED BY

THE HONOURABLE MADAM JUSTICE PILLAY

ON 13 SEPTEMBER 2005

ON BEHALF OF APPLICANT: MR M PILLEMER &

MR T SEERY

(Instructed by Shanta Reddy Attorneys)

ON BEHALF OF RESPONDENT: MR HUTCHINSON

(Instructed by Fluxmans Inc)

JUDGMENT 13 SEPTEMBER 2005

PILLAY D, J

[1] This retrenchment has a long and acrimonious history. On 3 May 1999 Mr Eitler, the Production Director, announced to the three trade unions having a presence at the respondent that the latter had bought a new TR4 press. It was expected to be installed in September. Furthermore, employees engaged on the Cerutti machine could face retrenchment if they did not work continental shifts or a compressed working week, as referred to in the Basic Conditions of Employment Act No 75 of 1997.

[2] Notice of restructuring and possible retrenchment of workers was issued about 11 May 1999 (the section 189 letter). On 28 May 1999 the respondent met with the first applicant, CEPPWAWU. Several further meetings were held during which the respondent elaborated on the information provided in the section 189 letter and how the compressed working week would operate. It impressed upon CEPPWAWU that there was an urgent need to upgrade the respondent's technology and outsource certain services, such as cleaning and carpentry, in order to be viable and competitive.

[3] On 17 July 1999 the respondent informed CEPPWAWU that it needed to dispatch notices regarding voluntary retrenchment by 21 July 1999, in order to assess the position for compulsory retrenchment. It also stated that the compressed working week had to be implemented by 2 August and that if CEPPWAWU was not agreeable to this the retrenchment would be unavoidable. Severance pay would not be paid in those circumstances as a compressed working week was an alternative to retrenchment.

[4] On 21 July 1999 CEPPWAWU made several counter-proposals. They included delaying the retrenchment until April the following year, when the new machinery would be introduced, introducing the compressed working week and a night shift in other departments, negotiating with customers to absorb affected employees, offering early retirement and voluntary severance and arranging interviews for cleaners before their retrenchment.

[5] The respondent declined to stall the retrenchment, declaring that the additional machinery introduced in April 2000 would be a separate exercise, distinct from the current plan. At that stage the respondent was already overstaffed and pointed this out to CEPPWAWU. Dismissing CEPPWAWU's counter-proposals as not taking the process further, the

respondent repeatedly referred to the progress it had made and the agreements it had reached with the majority union, the South African Typographical Union (SATU).

[6] It then invited CEPPWAWU to consultations on 28 July 1999 to finalise matters. If CEPPWAWU failed to attend the meeting, it was warned that agreements reached with the other two unions would be implemented. The respondent persisted that it would implement the compressed working week by 2 August 1999 and if CEPPWAWU's members failed to accept this "proposal" unequivocally by that date they would be retrenched. CEPPWAWU attended the meeting of 28 July 1999. No minutes of that meeting are available as, for some reason, the recorder did not tape the discussions.

[7] The respondent issued a memorandum on 28 July 1999 to all three trade unions, inviting them to send one shop steward each to participate in discussions about the selection process to be held on 30 July 1999. On the same day the respondent issued another memorandum to all managers and employees, informing them, *inter alia*, that on the afternoon of Friday, 30 July 1999, employees whom the respondent proposed to retrench would be notified and, pending conclusion of the consultations on selection criteria, would be

released from their duties on full pay. Mr Soldatos, the attorney for the respondent, explained that this was a necessary measure as, from past experience, sabotage became rife after the retrenchees were identified.

[8] CEPPWAWU's members received letters informing them that they were identified preliminarily as persons who might be affected by the restructuring and that CEPPWAWU's representatives were requested to submit representations about the selection criteria that the respondent proposed. A list of employees who might be affected was purportedly also issued. That list could not be found subsequently and it did not form part of the documentary evidence at the trial.

[9] The individual applicants submitted their letters to CEPPWAWU and awaited its further guidance and reports. They remained suspended on full pay until they were retrenched on 6 August 1999, which was extended to 6 September 1999. CEPPWAWU did not respond to the invitation to make representations about selection criteria by 4 August 1999. Instead, it referred a dispute to conciliation on 3 August 1999.

[10] Mr *Pillemer*, for the applicant, submitted that CEPPWAWU ceased to engage the respondent after

it refused to stay the retrenchments because, until then, it had believed that the retrenchments were caused by the new machinery.

[11] CEPPWAWU's belief was not misplaced. Mr Soldatos conceded that initially it was mooted that the restructuring was as a result of new machinery. The section 189 letter discloses a two-fold strategy of restructuring occasioned, firstly, by the intention to introduce new technology and, secondly, to trim costs by outsourcing and using temporary employment services. New technology was to be introduced in Galvano forklift driving (assistant positions), impose/DTG, finishing, dispatch and mailing departments. The cleaning, mechanical engineering, carpentry, electric, electronic and quality control departments were to be outsourced. Other positions that were redundant were in stores and administration.

[12] Not only is memory a casualty of the delays in prosecuting this action. Key witnesses on both sides, namely CEPPWAWU's organizer and the respondent's human resources manager have passed away, as have five applicants. Best evidence of what triggered the referral of the dispute would have been forthcoming from the organizer. Applicants who testified were not aware of the niceties of CEPPWAWU's plan in taking up their case.

[13] Shop steward Mr Myandu, who attended a meeting as an observer on a without-prejudice basis on 4 and 5 August 1999 after the dispute was referred, was not called by the applicant. He was nevertheless made available to the respondent if it wished to call him. It did not do so.

[14] The Court is left to infer from all the circumstances precisely what led to the break-down in relations between the parties. It drew great assistance from the bundle of documents which have been handed in. Except for parts of Exhibit D1, the documents were admitted by agreement to be what they purported to be without proof thereof and the minutes were agreed to be an accurate record of what had transpired at the consultations. The material facts are largely common cause. My conclusions are based mainly on the facts as presented by the respondent.

[15] CEPPWAWU appreciated that some departments and services were to be outsourced. It made appropriate proposals, such as negotiating for employment by the service provider. However, a substantial part of the restructuring was as a result of the introduction of new technology in several departments.

[16] Starting with the announcement by Mr Eitler on 3 May 1999 and followed through in consultations with the respondent, including its attorney, Mr Soldatos, who attended the consultations, the impression was created that the introduction of the new machinery was imminent. For instance, at the meeting of 28 May 1999 Mr Soldatos proposed that if a second-hand press was purchased for the machine room, the Cerutti could cease producing in July 1999.[1] CEPPWAWU questioned the respondent about why it was not consulted prior to the respondent taking the decision to purchase new technology.[2] It raised no questions about when the new machines would be introduced because, based on the information it received from Messrs Eitler and Soldatos, it was not an issue. The first that CEPPWAWU learnt that certain new machines introduced in April 2000 was when it received the respondent's letter of 19 July 1999. The content of that letter was in other respects also not conducive to consultations in good faith.

[17] CEPPWAWU's counter-proposals of 21 July 1999 were constructive and predictable. It was agreeable to the implementation of the compressed working week. Contrary to Mr Soldatos' evidence, CEPPWAWU was not at all times opposed to the retrenchment in its entirety. With the respondent's reply to its counter proposals, CEPPWAWU was

1Exhibit B8

2See B18

already being put on terms to agree to the implementation of the compressed working week. Other than rejecting its proposal to suspend the retrenchment until April 2000, the respondent did not engage CEPPWAWU on any of its other counter-proposals.

[18] It seems to me, as it might have to CEPPWAWU at the time, that the respondent had reached agreement with SATU on certain aspects of a retrenchment and was putting it on terms to fall into line with that agreement. Furthermore, the compressed working week was no longer a proposal, despite the respondent's use of that word.[3] The alleged proposal had already calcified into a decision. Against this background, CEPPWAWU's referral of the dispute is not surprising.

[19] Multi-union representation in a workplace calls for the highest degree of diplomacy, tact and good faith by the employer. To force an agreement reached with one union on another union is akin to waving a red rag before a raging bull. It is not surprising that CEPPWAWU's organizer had retorted to Mr Soldatos that he could not legitimise an illegitimate process.

3Exhibit B68

[20] The respondent's lack of good faith and finesse also manifests in the way it dealt with the selection criteria for retrenchment, to which I now turn. In response to CEPPWAWU's letter advising of the referral and that it was in dispute, the respondent invited CEPPWAWU on 3 August 1999 to a meeting on 4 August 1999 to discuss the selection criteria with the other trade unions. It also indicated that the process would be completed by 5 August 1999. In a further letter to CEPPWAWU, the respondent recorded that it had discussed the selection criteria with it and invited any queries it might have to be submitted in writing by no later than close of business on 4 August 1999. CEPPWAWU did not respond. Its organizer did not attend the meeting of 4 August 1999.

[21] Some shop stewards were present at that meeting when it started. They were reluctant to participate in the absence of the organizer or Mr Mnyandu. The meeting proceeded to discuss the case of individual employees. Mr Mnyandu joined the discussions later. He clarified that CEPPWAWU's representatives were present as observers. The gist of his contribution was that the shop stewards were attending that discussion without prejudice to their rights to challenge the selection criteria. In response to the invitation to appeal against the proposed retrenchment, appeals had been made on behalf of two applicants, namely Mrs James and Mrs Pillay. Mrs Pillay denied any knowledge of the

appeal letter sent on her behalf. In any event, it is common cause that the cases of these two applicants were discussed at the meeting of 4 to 5 August 1999. The heads of department were called into that meeting to justify their selection.

[22] The only ground of procedural unfairness raised by the applicants is that the respondent failed to disclose that it changed the selection criteria. In the section 189 letter the respondent informed CEPPWAWU that the selection criteria that it intended to invoke would be last in, first out ("LIFO"), subject to skills retention and the inherent requirements of the job.

[23] Mr Soldatos reaffirmed this at the meeting of 28 May 1999, making reference once again to "last in, first out, subject of course, to the usual with regard to special skills" (my underlining). In so saying, he was also signalling that there was nothing unusual about the selection criteria. The respondent pleaded that the selection criteria was last in, first out, subject to special skills and the needs and exigencies of the respondent's operation.

[24] Mr *Hutchinson,* for the respondent, submitted that SATU had proposed early in the process that LIFO subject to skills should be applied per department and not across the board. He conceded that nowhere in any of the bundles of documents is

there evidence that the respondent had notified CEPPWAWU that LIFO would be applied departmentally, nor was it explained that for purposes of applying LIFO the date of entry into a department would be considered, not the date of employment by the respondent. The respondent's explanation for the non-disclosure was that agreement about what the selection criteria would be and how it should be applied was only reached on 30 July 1999.

[25] Mr Soldatos alleged that the Human Resources Manager had informed him that CEPPWAWU had been advised of what the selection criteria would be. It is not clear from this that CEPPWAWU was also advised how the selection criteria would be applied.

[26] The respondent failed to comply with the Judge President's directive in retrenchment matters, despite being invited by CEPPWAWU to do so. More specifically, it failed to state how the selection criteria were applied. Precisely what criteria were used and how they were applied only became fully apparent when the respondent's witnesses, starting with Mr Eitler, testified. Some indication that the criteria were applied departmentally emerges from the minutes of the meeting of 4 to 5 August 1999. However, as discussed below, the minutes were only given to CEPPWAWU after a court order was

obtained. It is therefore not notification of the selection criteria as required for the purposes of consultation in terms of section 189.

[27] Furthermore, the respondent knew early in the process that SATU wanted LIFO to be applied departmentally. Mr Soldatos himself conceded that bumping across departments was always cause for tension as management resisted it and trade unions wanted it. From this I inferred that the respondent was also disposed to applying LIFO departmentally. In that event, the respondent should have been forthright with CEPPWAWU from the outset and disclosed its views and those of SATU.

[28] The respondent had indicated at the outset that the process would be concluded within about two months, i.e. by about end-June 1999. It only tabled selection criteria for discussion for the first time at the meeting of 30 July 1999. By that stage CEPPWAWU had already declared a dispute and abandoned the process. The respondent wholly misled CEPPWAWU into accepting that the criteria would be LIFO, subject to skills, as stated in the section 189 letter. The misrepresentation persisted until the respondent's witnesses testified because the respondent should have, but did not, plead or otherwise disclose to the applicant precisely what criteria it used and how it applied them.

[29] The respondent knew the language of negotiation and conflict avoidance. However, Mr Soldatos' reference to CEPPWAWU's representatives as "comrades" did little to build trust as, in other respects, the respondent showed it could not be trusted.

[30] Mr *Pillemer's* submission on procedural unfairness, namely that the respondent failed to notify the applicant about the changes in the selection criteria, is well-founded.

[31] The main thrust of the applicant's case is that the dismissals were substantively unfair. Mr *Pillemer* conceded that the respondent had a need to restructure and to downsize. The need to retrench was therefore not challenged. He submitted, however, that the respondent had to select employees to be dismissed according to selection criteria which, if not agreed, were fair and objective. (Section 189(7)(b) of the LRA.) The requirement of fairness and objectivity applies both to the criteria and the way in which they are applied. The selection of all the individual applicants was neither fair nor objective. In support of this submission, the applicant relied exclusively on the evidence of the respondent's witnesses and

on the facts that were common cause. Mr *Pillemer* helpfully summarised this evidence in his heads of argument, from which I now proceed to draw.

[32] Mr Eitler testified that the reason why applicant Mr Mkhize, a driver, who had been employed since 1974, had been dismissed, while other drivers with shorter service were retained, was because the respondent did not look beyond the department when applying LIFO. He could offer no valid explanation why a driver with longer service could not be retained by being substituted for one with shorter service in another department.

[33] Various departmental managers and foremen testified that, as directed by the human resources department, they applied LIFO, subject to skills, within the department. The effective date from which service was calculated was the date on which the employee started in the department, not the date of employment by the respondent. Applying LIFO in that way is, as pointed out in *General Food Industries Ltd, trading as Blue Ribbon Bakeries v Food and Allied Workers Union* (2004) ILJ 1655, open to abuse. It is also manifestly unfair because an employee with years of service with the respondent can be selected for retrenchment from a department where she has worked only a few months if there are other employees who worked longer in the department but who have

considerably shorter service with the respondent. This is, in fact, what happened to Mrs James.

[34] In her letter of appeal Mrs James set out fully her long history with the respondent since her employment on 10 April 1987 and the many skills that she had acquired. She accepted the respondent's need to reduce the number of clerks but denied that her position was redundant. She was multi-skilled, she had seen other people doing her work. She was selected for retrenchment because she had only four years' service in the department, having transferred from the respondent's branch in Mobeni.

[35] When Mr Sanjiv Devraj, a production foreman, testified, it also became clear that he interpreted "skills" to mean efficiency. What was communicated throughout to the applicants was that LIFO would be applied subject to special skills. Mr Eitler conceded that workers in the category of assistants and aides were low-skilled workers. They could acquire the skills for a particular department within a few days. Mr Devraj contended that about three months was required. He seemed to base this on the fact that workers were usually employed on three months' probation. Having regard to Mr Eitler's description of the tasks carried out by assistants and aides, it seems to me that they were "look and learn" jobs in the main. As applicant

Mr Cele testified, it could take a few weeks to master the tasks. The “special” skills were, after all, not so special that they could not be imparted to the employees with longer service within a short time.

[36] The test for skills was based entirely on the subjective opinion of the foremen and managers. Employees were not aware that their skills were being assessed, nor were they given an opportunity to comment on any assessment made of them before their names were submitted to the human resources department for retrenchment.

[37] The subjectivity of the process undermined its integrity altogether. Skills cannot be a fair selection criterion for unskilled or low-skilled jobs. Unskilled and low-skilled workers are especially vulnerable to arbitrary subjective selection if criteria such as skills are used. Mr Devraj demonstrated the arbitrariness of the application of LIFO, subject to skills, when he testified that he transferred one employee to a new department because he, Devraj, felt it was unfair to dismiss him as he had long service and could do the job to which he was transferred. The ability to do the job should have been an inquiry that the respondent should have made in respect of every employee proposed for retrenchment. For instance, applicant Mrs Ngcobo was employed as a cleaner. However,

the respondent engaged her over week-ends as a knocker-packer. She was employed in 1981. An employee engaged in 1994 was retained instead of her. Applicant Mr Faye, who had acquired several skills over the years, was promoted to the position of deputy foreman. His post became redundant. He was retrenched without any inquiry as to whether he was willing to do the work of his subordinates whom he supervised. His ability to do the work could not have been in question as he had progressed up the ranks through those very tasks. As in the case of the driver Mr Mkhize, applicants Messrs Ngwabi and Ndlovu were jack operators, a position which was identical in every department. It involved driving a machine that moved pallets around the factory. Ngwabi was employed in 1989 and Ndlovu in 1976. Many other jack operators with considerably shorter service with the respondent were retained instead of them.

[38] The scope for manipulation is also heightened in a multi-union workplace. The arbitrariness of the application of the selection criteria emerges from the case presented by Mrs James. She alleged in her appeal that her foreman selected her to victimise her for having grieved against him previously for showing favouritism. Mr Mnyandu had submitted on her behalf that the foreman had selected a person with lesser service because it was rumoured that he was having an affair with her. The allegation of an affair between the person

retained and the foreman was fobbed off as a private matter when it was raised at the meeting of 4 to 5 August 1999.

[39] The selection criteria and the way they were applied prejudiced all the applicants. Managers and foremen were not instructed to apply bumping with LIFO even within the department. Thus multi-skilled employees with longer service whose positions became redundant were not considered for other jobs even within a department. In some cases bumping to achieve LIFO would have resulted in demotion. The respondent did not offer lower positions to employees with long service.

[40] Mr Hutchinson submitted that bumping is feasible in a small business but not in a business as large as the respondent. He also said that vertical bumping that results in demotion could not be implemented without the co-operation of CEPPWAWU. In *Porter Motor Group v Karachi* (2002) 23 ILJ 348 (LAC) at paragraph 4-5, NICHOLSON JA opined in passing that where small numbers are involved the implementation of horizontal or vertical bumping should present few problems. Large-scale or "domino bumping" necessitates vast dislocation, inconvenience and disruption. It should nevertheless be considered but be directed at achieving fairness to employees, while minimising the disruption to the employer. (*Porter Motor Group* at paragraph 5)

[41] Although the learned Judge intimated that the independence of departments as separate business entities may be relevant, he nevertheless urged employers to consider inter-departmental bumping unless it was injurious. (*Porter Motor Group* at para 8) In *General Food Industries Ltd* above ZONDO JP held that independent business units with their own cost centres was not a bar to bumping. Significantly, the Judge President and NICHOLSON JA presided in both these cases and the decisions were unanimous.

[42] There is a huge difference in effect between LIFO applied departmentally and across the board. Bumping is a measure applied to boost the application of the LIFO principle as fully as possible. In my opinion, the respondent wanted to avoid a debate about the principles to be applied in determining the selection criteria and how they should be applied. Instead, it tried to tether CEPPWAWU to a framework that it had substantially predetermined with SATU.

[43] The respondent's misrepresentations and subsequent failure to disclose fully and timeously precisely what the selection criteria were and how they were applied is also in bad faith and unfair. The selection criteria, even as determined by the respondent, were applied in a manner that lacked

integrity, objectivity and legitimacy. It failed then to secure the confidence of the applicants and now the Court. The respondent failed to discharge its *onus* of proving, firstly, that the selection criteria were fair and were applied fairly. and secondly, that the dismissals were substantively fair.

[44]Against this finding, applicant Mr Zuma, whose name inadvertently fell off the list of applicants, is reinstated as an applicant. Mr *Hutchinson* resisted this as he alleged that the respondent would be prejudiced because it did not have an opportunity to lead evidence in support of Zuma's retrenchment. Whatever the evidence might have been, it would not have enabled the respondent to regularise an inherently flawed framework for retrenchment.

[45] The failure to consult in good faith is a serious indictment. Bad labour practices is bad for business. This is especially so in a constitutional democracy where fair labour practices are elevated to a constitutional right[4] and are integral to the very dignity of workers. Consequently, when employees are mowed over to make way for better technology and bigger profits without a genuine attempt at avoiding their dismissal or minimising the hardships for them, the penalties to be imposed on employers must be proportionately higher. From all accounts, the respondent had done well since the restructuring. On the other hand, many individual

4Section 23 of the Constitution of RSA Act 108 of 1996

applicants have not found secure employment since. Some have casual partial employment through the labour broker to whom the respondent outsourced certain services. They perform the same services for which they had previously been employed with the respondent for considerably lower rates of pay. Other employees have not been successful in securing employment with the labour brokers. Casualisation of labour as a phenomenon of the technological age is hard to combat. The least that can be done is to ensure that workers who suffer its consequences are treated humanely and with dignity. In the circumstances, those employees who want to be reinstated must be reinstated and those who want to be compensated must be compensated maximally. In coming to this conclusion I also take into account the respondent's conduct throughout the dispute.

[46] The respondent's bad faith is manifest from several altercations that occurred between the parties. Firstly, the respondent did nothing to resolve the dispute as soon as it became clear that bumping was endorsed by the Labour Court as an acceptable measure to be applied with the LIFO principle. I accept in favour of the respondent that when the consultations were held in 1999 there were no published cases of the Labour Court on the issue. This position changed in 2000 in the Labour Court decision of *Karachi v Porter Motor Group* (2000) 21 ILJ 2043 (LC) issued on 19 July 2000. The LAC confirmed this decision in February 2002 and gave

comprehensive justification for its endorsement of the measure. On 30 June 2004 the LAC reaffirmed, with even greater conviction, that it endorsed bumping.

[47] At no stage did the respondent stop in its tracks and re-evaluate its defence. It was represented throughout by lawyers experienced in the practice of labour law. It must have known of the serious weaknesses in its case. Instead of settling the matter, it gambled on avoiding a trial by taking technical points, which are discussed below.

[48] Secondly, the respondent failed to supply CEPPWAWU with information that was foundational to determining the issues in dispute in this case. CEPPWAWU was driven to bring an application to compel the production of information. One such piece of information was Exhibit D. Exhibit D1 was a list of employees who were retrenched and retained in the departments affected by the restructuring. Their job titles and dates of engagement were also reflected. Such a list is indispensable to any meaningful engagement about restructuring. A list substantially in the form of Exhibit D1 should have been made available during the consultations. To say that the respondent was not aware that the selection criteria would be an issue in dispute until the Court ruled on this issue on the first day of the trial is no excuse. Irrespective of the trade union's conduct, the respondent had an obligation to

objectively establish the procedural and substantive fairness of any retrenchment. Exhibit D1 was indispensable to enable the respondent to discharge this onus. The more probable reason why it did not produce Exhibit D sooner is that if it did so it would have been manifest that LIFO was applied departmentally and that applicants with longer service were retrenched in favour of those who had shorter service.

[49] Thirdly, in my opinion, the respondent was keen to avoid or delay the trial as far as possible. It avoided the first trial date in January 2005 by persuading NGCAMU AJ to call on the applicants to explain the delay in prosecuting the action. When the trial eventually started the respondent applied for leave to appeal against my ruling on the explanation for the delay. From my reasons for dismissing the application for leave to appeal, it is manifest that the application was wholly unjustified. Then followed an application for a postponement to enable the respondent to petition the Judge President for leave to appeal. This was also refused. Undaunted, the respondent made another application for a postponement on the curious basis that the applicant needed to amend its pleadings. I found that the applicant did not need to amend its pleadings and refused the postponement.

Technically, the respondent had a right to call for an explanation for the delay, to apply for leave to appeal against my ruling and to object to the

applications for substitution. That it chose to exercise these rights is telling of its unwillingness to resolve the dispute fairly and finally.

[50] Fourthly, five of the individual applicants had since passed away. The respondent objected to any order being granted in their favour because, firstly, the representatives of the deceased estates had not made a formal application or give notice for their substitution. Mr *Hutchinson* contended that it was not sufficient for Mr *Pillemer* to apply from the Bar for their substitution. Secondly, the respondent alleged that the deceased were not properly represented. In the case of three of the deceased, letters of authority in terms of section 18 of the Administration of Estates Act No 66 of 1965 were issued. In the case of the remaining two deceased applicants there were no letters of authority or executorship. The respondent resisted suggestions by Mr *Pillemer* about ways to overcome these technical obstacles.

[51] The Court made it clear that it would grant the application for substitution made from the Bar unless the respondent had good cause to oppose it. Only then did the respondent withdraw its objection to the substitution.

[52] I accepted Mr *Pillemer's* submissions from the Bar

in respect of those employees who did not testify because the individual applicants were in court and could have been called to testify about their reinstatement if the respondent so wished. With regard to those who are deceased, the respondent had no means of challenging their reinstatement on grounds specific to each deceased. The appropriate order in their case is therefore to limit their remedy to 12 months' compensation as allowed by the statute.

[53] Mr *Pillemer* submitted that no deductions should be made from the back-pay of those who are to be reinstated as the respondent had an equal duty to ensure the speedy prosecution of the action. It knew that it carried the risk of a full back-pay order if the workers were reinstated. Therefore, it should have taken steps itself to prevent the matter being archived by the Court. Instead, it took the risk of a full reinstatement order by doing nothing and hoping to let sleeping dogs lie. Mr *Pillemer* therefore asked that the respondent be directed to reinstate the individual applicants fully without deducting the period of delay. I do not agree. If I did, I would, on the one hand, be rewarding the negligence of the applicants' attorneys and perhaps even absolving them of their liability to their clients. On the other hand, I would be condemning the respondent for its inaction or attempting to seize a tactical advantage in the normal course of litigation. I estimate the period of delay to be about 2½ years from 2002 to mid-2004. This period must be deducted from the back-payment.

[54] The parties submitted a list of applicants to whom compensation only is payable with the rates of remuneration agreed in respect of each employee.

[55] The order that I grant is as follows:

(1) The dismissal of the individual applicants is procedurally and substantively unfair.

(2) The following 28 applicants are reinstated in their employment with the respondent with effect from 7 September 1999 on the same terms and conditions as applied at the date of their dismissal on 6 September 1999.

Clock No	Name
8093	L B Mbatha
8213	W Myandu
9332	B L Ngwabi
9375	B B Ndlovu
4491	Mariamma Pillay
5908	R Munsamy
7417	P P Faye
7721	J P Khumalo
7724	M A Khuzwayo
8041	M P Myeza

9350	S S Ngwabi
4925	U James
7153	J G Cele
7729	M M Khanyile
7972	K E Maphumulo
8899	E M Ngwabi
8927	N C Ntwani
7037	S E Bhengu
8233	S M Magwaza
3242	C Coetzee
8667	P Ndlovu
8199	A S Mthiyane
7136	J A Cele
8884	T P M Ndlovu
7275	S B Dube
8955	Z E Ngcobo
7723	T A Khuzwayo
9893	V N Zuma

(3) The order in paragraph (2) is subject to the following deductions from the back-pay:

(a) the equivalent of 2½ years' remuneration in respect of the delay occasioned by the applicant;

(b) any notice pay and severance pay paid to these applicants.

(4) The following seven applicants are to be compensated in the amount equivalent to 12 months' pay at the agreed monthly rate:

Clock No	Name	Agreed monthly rate
7478	S G Gumede	R1 879,40
7962	S M Mkhize	R2 109,16
8980	A M Mkwanyana	R1 700,32
8185	I Majozi	R1 880,00
7740	M T Khalala	R1 287,84
9340	M R Ngcobo	R1 700,16
7585	C Hlongwe	R1 997,48

(5) The estates of the following three deceased applicants are to be paid compensation in the amount equivalent to 12 months' pay at the agreed monthly rate:

Clock No	Name	Agreed monthly rate
7976	C T Mfayele	R2 025,00
8100	E S Mngadi	R1 287,84
8922	P Ndlovu	R1 997,48

(6) The following two deceased applicants are to be paid compensation by depositing with the Master of the High Court the equivalent of 12 months' pay at the agreed monthly rate:

Clock No	Name	Agreed monthly rate
8980	A M Mkwanyana	R1 700,32
8073	B Z Makhanya	R1 880,20

(7) Interest at the prescribed rate of 15,5% per annum shall accrue on all payments from date of this order.

(8) The respondent is ordered to pay the applicants' costs of the action, such costs to include the costs of two counsel.

(9) The respondent is ordered to pay the applicants' costs reserved in the application to compel the production of documents.

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