



CONSTITUTIONAL COURT OF SOUTH AFRICA

Billiton Aluminium SA Ltd/a Hillside Aluminium v Khanyile and Others

**Case CCT 72/09
[2010] ZACC 3**

Date of Judgment: 18 February 2010

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court delivered judgment in an application for leave to appeal an order of the Labour Appeal Court. The order appealed against was one which restored an arbitration award granting reinstatement of the employee (the respondent in this matter) retrospective to the date of his dismissal in 2001.

The case arises out of the dismissal of the employee more than 9 years ago by the employer, the applicant in this matter, Billiton Aluminum. The employee successfully challenged the fairness of the dismissal in arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration in 2001. On review the Labour Court remitted the matter for fresh arbitration proceedings. The finding of the commissioner in the second arbitration proceedings was that the dismissal was substantively unfair and that the employee should be reinstated retrospectively. This finding was taken on review to the Labour Court. The Labour Court confirmed the unfairness of the dismissal, but ordered compensation rather than reinstatement. This order was then taken on appeal to the Labour Appeal Court by the employee. In that court the employer ultimately accepted that the employee's dismissal was substantively unfair. In upholding the appeal, the Labour Appeal Court restored the commissioner's award, based on the finding that the Labour Court had wrongly treated the matter as an appeal rather than a review, and accordingly ordered that the commissioner's arbitration award be restored.

The employer then applied for leave to appeal against the Labour Appeal Court's order to this Court. In this Court the employer argued that despite the dismissal being substantively unfair, the Labour Appeal Court should nevertheless have ordered compensation and not reinstatement. In the alternative, it argued that the Labour Appeal Court was under a constitutional duty to grant an order that was appropriate, just and equitable in terms of section 172(1)(b) of the Constitution. It argued that the Labour Appeal Court was under an obligation to investigate, on its own accord, facts which arose after the arbitration award was made or judgment in the Labour Court had been delivered. In particular it was argued that systemic delays within the

dispute resolution procedures under the Labour Relations Act 66 of 1995 should be taken into account when granting a remedy and that where an employee had earned an income subsequent to her or his dismissal, it should be taken into account when making a just and equitable remedy on appeal. The latter arguments were never raised in the Labour Appeal Court but were raised for the first time in this Court.

In dismissing the application for leave to appeal, Froneman J, writing for a unanimous Court, held that although the matter raised a constitutional issue, it was not in the interests of justice for leave to appeal to be granted. As a general principle this Court has required that constitutional issues should be raised in the courts from which the appeal arises before leave to appeal will be granted. This is especially so because this is a matter which fell manifestly within the jurisdiction of the Labour Courts and that this Court would have benefitted from their expertise in the matter. It was accordingly found that there were no exceptional circumstances in this case which warranted this Court sitting as a court of first and last instance.

The Court further held that leave to appeal should also be refused on an additional ground, namely that the constitutional point lacked prospects of success in the particular form and manner in which it was raised. It was found that there is no duty upon courts to investigate post-judgment facts in making a just and equitable order, especially where litigants had not made use of the relevant rules for adducing further evidence on appeal. Similarly, the applicant's argument that there was a legal duty upon employees to mitigate their losses was dismissed. People sought work after dismissal for economic survival, and it is unnecessary to turn this essential component of life into a legal duty.

The Court recognised that delays plague the dispute resolution procedures under the Labour Relations Act. It noted that such delays should be addressed by the users of the system within the different institutions that make up the dispute resolution procedures. It held that the delay in this particular case was primarily caused by the employer itself in its failure to implement the order of reinstatement, despite its eventual recognition that the dismissal was unfair.

In the result, leave to appeal was dismissed.