



CONSTITUTIONAL COURT OF SOUTH AFRICA

Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration, W Ferreira NO and Nelson Mawelele

**Case CCT 88/07
[2008] ZACC 16**

Judgment Date: 25 September 2008

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 handed down judgment in a matter concerning the interpretation of provisions of the Labour Relations Act 66 of 1995 (LRA), in particular provisions concerning unfair dismissals and related remedies.

The applicant company (Equity) dismissed the third respondent, Mr Mawelele, in March 2001. Mr Mawelele referred his dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA). On 18 March 2001 the Commissioner ruled that the dismissal had been both substantively and procedurally fair. Mr Mawelele then referred the matter to the Labour Court. The court set aside the arbitration award and found Mr Mawelele's dismissal to have been inappropriate. The CCMA's award was substituted with an order that, should Mr Mawelele commit a similar transgression within the following two years, he could be dismissed immediately. Equity appealed this decision to the Labour Appeal Court. That Court found that the Labour Court's order implied that Mr Mawelele be reinstated, but noted that the Labour Court had not indicated whether the reinstatement should operate retrospectively. In this regard, the Labour Appeal Court found that an order of retrospectivity was not to be implied in the judgment of the Labour Court, and because Equity had not raised the issue of retrospectivity before it, it was not open to the Labour Appeal Court to consider the issue. Accordingly, the Labour Appeal Court ordered that Mr Mawelele's dismissal was substantively unfair, that he be reinstated, and that the reinstatement should operate from the date of the issuing of the CCMA's award.

In this Court, Equity appealed the decision of the Labour Appeal Court on two bases. First, Equity contended that it is not competent for a court to order reinstatement with retrospective effect backdated to a period of more than 12 or 24 months (depending on the nature of the dismissal). To do so would be in conflict with the right to fair labour practices. Second, Equity submitted that the Labour Appeal Court should not have ordered, in the light of the

discretion accorded to it in terms of the LRA, that the reinstatement was to operate from the date of its award.

Nkabinde J, writing for the majority, found that the LRA does not require a 'capping' of the extent to which the retrospective effect of a reinstatement order can be made, provided the date is not before the date of dismissal. She held that this construction of the LRA accords with constitutional principles of labour law, statutory interpretation and international law. On the second issue, she held that appeal procedures require that a court of appeal decide a matter based upon the evidence that was before the court of first instance. In the light of the fact that Equity had failed to note a cross-appeal in the matter, it was not open to the Labour Appeal Court to consider the issue of retrospectivity. Accordingly, the Labour Appeal Court did not misconstrue its discretion in this regard and Nkabinde J dismissed the appeal.

In a separate concurring judgment, Yacoob J held that the case raised a constitutional issue, but that the application for leave to appeal should be dismissed as it bore no prospects of success. He held that the reinstatement ordered in the courts below was never retrospective in the true sense, in that it was not made to have effect from a date prior to the date upon which the court of first instance made its award. For this reason he would hold that the question as to whether or not retrospective reinstatement should be capped at 12 months did not arise.

The appeal was accordingly dismissed.