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Background

Mr Nesu Maroveke ("**applicant**") was employed by Fermel (Pty) Limited ("**third respondent**") as an artisan and mine technician. On 25 June 2009, the applicant was driving a company vehicle underground through a tunnel, when he received a distress signal to attend to a breakdown in a mine. The vehicle's engine failed as it sank in an area covered with water. The applicant was subsequently held responsible for the damage to the vehicle and was subjected to a disciplinary hearing where the expert report on the vehicle's damages was not presented. The applicant was dismissed on 16 July 2009. Two months after the applicant was dismissed by the third respondent, the applicant became employed by Gold Fields Limited ("**Gold Fields**").

The applicant lodged an unfair dismissal dispute with the Commission for Conciliation, Mediation and Arbitration ("**CCMA**"). The dismissal was found to be procedurally and substantively unfair – the failure by the third respondent to make the specialist report on the damage to the vehicle available to the applicant was procedurally unfair and rendered the dismissal substantively unfair. The applicant was ordered to be reinstated. The third respondent approached the Labour court to review the CCMA's arbitration award where the CCMA's award was set aside.

The applicant appealed the Labour Court's decision to the Labour Appeal Court. Due to contradictions and insufficiency in the witnesses' evidence, the Labour Appeal Court remitted the matter back to the CCMA to be heard in front of a different commissioner where an award of reinstatement retrospective to 1 November 2013 with back pay equivalent to 12 months' remuneration was issued ("**the Award**"). Again, the third respondent applied to the Labour Court for review of the Award, where the Award was also set aside. The applicant applied for leave to appeal from the Labour Appeal Court against this order of the Labour Court, but its application was dismissed. The applicant then applied to the Constitutional Court for leave to appeal against the Labour Court's order that the CCMA's award of 12 months' back pay was unreasonable.

Court Held

The Constitutional Court was presented with an application for leave to appeal where it dealt with the issue of determining what the appropriate back pay was due to the applicant. The court considered the principle, from *Mediterranean Textile Mills (Pty) Ltd v SA Clothing & Textile Workers Union*^[1], that reinstatement ought to neither impoverish nor enrich the employee beyond the extent to which he would have been but for the dismissal. A punitive element must not be involved. With regards to the applicant finding employment at Gold Fields, the Court considered that 'the applicant's diligence and good fortune in finding employment should not prejudice him from receiving what is due to him'.^[2]

It was found that the Labour Court's decision for two months' back pay was based on a material error. It did not consider the difference in earnings where the applicant earned much less at Gold Fields than when the applicant was employed by the third respondent. The applicant should be compensated for the difference in the remaining 10 months for which back pay is allowed. This would place the applicant in the position he would have been in if it was not for the dismissal. Therefore, the court decided that the applicant is entitled to payment of R49 461.20, which is two months' back pay, and R97 306.00, being the total difference between what he earned when he was employed by the third respondent and his earnings at Gold Fields for the period of 10 months.

Value The Court ensured that the constitutional right to fair labour practices was protected to an extent of precision. In addition, an employee's diligence and good fortune in finding employment after an unfair dismissal ought not to prejudice him insofar as back pay was concerned.

[1] [2011] ZALAC 23; (2012) 33 ILJ 160 (LAC) at paras 26-7.

[2] *Maroveke v Talane N.O. and Others* [2021] ZACC 20 para 32.

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