CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 50/13
[2013] ZACC 36

In the matter between:

FOOD AND ALLIED WORKERS UNION — Applicant

and

LUNGI ROSEMARY NGCOBO N.O. — First Respondent

MICHAEL MKHIZE — Second Respondent

Heard on : 29 August 2013

Decided on : 9 October 2013

JUDGMENT

CAMERON J (Moseneke DCJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ, Nkabinde J, Skweyiya J, Van der Westhuizen J and Zondo J concurring):

[1] The issue is whether a trade union can invoke its constitution, together with its constitutional right to determine its own administration,[1] to assert special protection

[1] Section 23(4)(a) of the Constitution provides:

> "Every trade union and every employers' organisation has the right to determine its own administration, programmes and activities".

against a claim arising from its failure properly to prosecute a claim for unfair dismissal on behalf of its members. Two employees dismissed by their employer, who entrusted their case to the applicant trade union (Union), claimed damages from it when it failed to lodge their claims in time. The KwaZulu-Natal High Court, Durban[2] (High Court) and the Supreme Court of Appeal[3] found in their favour. The Union now applies for leave to appeal against those decisions.

Factual background

[2] The reported judgments of the earlier courts set the facts out fully. In addition, the focus narrowed considerably in this Court, since the Union abandoned most of its previous defences to concentrate on a single argument: that it enjoys special constitutional protection from damages claims by members it undertakes to represent. So the facts can be stated briefly.

[3] In May 2002, Nestlé South Africa (Pty) Ltd dismissed two employees after 20 years of service. They were Mr Mandla Ndlela (who has died and who is represented by his life partner, the executor of his estate, the first respondent) and Mr Michael Mkhize, the second respondent (employees). Aggrieved, they sought help at the Union's Durban offices. The Union undertook to represent them in their unfair dismissal claims. And it did indeed refer the dispute for conciliation before the

[2] *Ngcobo and Another v Food & Allied Workers Union* [2012] ZAKZDHC 18; (2012) 33 ILJ 1337 (KZD) (High Court judgment).

[3] *Food & Allied Workers Union v Ngcobo N.O. and Another* [2013] ZASCA 45; 2013 (5) SA 378 (SCA) (Supreme Court of Appeal judgment) per Ponnan JA and Plasket AJA, with Malan JA and Tshiqi JA concurring; Southwood AJA dissenting.

Commission for Conciliation, Mediation and Arbitration (CCMA).[4] On 18 June 2002, one of its officials appeared before the CCMA on behalf of the employees. But that is about all it did. Its constructive involvement in their cause ended there.

[4] After conciliation failed at the June 2002 meeting, the CCMA certified formally that the dispute had not been resolved.[5] This meant that the employees' claims were ripe for referral to the Labour Court for adjudication. However, there was a deadline. The dispute had to be referred within 90 days.[6] The Union told the employees it would do this. But it never did. The 90-day window closed. And the employees' claims for unfair dismissal lapsed. To revive them would require climbing the stone-strewn hill of a condonation application.

[5] The Union never attempted that ascent. All its officials did, for nearly a year, was to assure the employees that their matter was being attended to. After months with no concrete news, the employees decided in May 2003 to seek help from the law clinic at the University of Durban-Westville. Only then did they discover the truth: the Union had done virtually nothing to prosecute their claims.

[6] They returned to the Union's offices. In response, the Union's officials assigned their case to a different official. He, too, never applied for condonation. After tarrying for nearly six months, what he did was to write to the employees. He

[4] In terms of section 191(1) of the Labour Relations Act 66 of 1995 (LRA).

[5] Id section 135(5).

[6] Id section 191(5)(b) and (11)(a).

told them that it was "imperative" to apply for condonation, and explained how he planned to do this. But instead of applying, as he had undertaken to do, he devised a different stratagem to remedy the debacle. In January 2004, he attempted to go back to the CCMA by re-initiating the proceedings there. Unsurprisingly, the CCMA rejected this attempt.

[7] Three more months passed. By now it was nearly two years after the employees had been dismissed – and 19 months after their right to refer their claims to the Labour Court had lapsed. The Union asked its attorney, Mr Surju, for an opinion. He furnished one. It stated that the employees' dismissal was not unfair, and that any attempt to pursue an unfair dismissal claim would result in an adverse costs order. Armed with this, the Union washed its hands of the employees and their case. It told them it would not proceed with their claims in the Labour Court.

[8] The employees approached a firm of attorneys in June 2004. Their new advisors immediately threatened a damages claim against the Union. They gave the Union two weeks in which to file a condonation application. This demand, they said, was "part of our clients' duty to mitigate the loss". When the Union did not respond, summons was issued. This was in August 2004, more than 27 months after the dismissal.

High Court

[9] Seven years later, the employees' claims were tried in the High Court. Trial proceedings took place over eight days in February, May and November 2011 and February 2012. At their conclusion, the High Court decided in favour of the employees. The Court rejected all the Union's arguments, including many it has now abandoned. The Court found that, although it was not necessary to categorise the relationship between the Union and the employees as a contract of mandate, the Union had agreed to assist them by providing legal assistance by timeously referring their dispute to the CCMA and, if necessary, to the Labour Court. The agreement tacitly entitled the Union to withdraw legal assistance if it was advised that the employees' claims had no prospects of success – but in doing so it had an obligation to prevent prejudice to the employees. This meant that the Union was obliged to apply for condonation itself when, without notifying the employees, it failed to refer the dispute to the Labour Court.

[10] The Union urged the High Court to find that it would be contrary to public policy to impose liability on a trade union for not prosecuting members' claims because there would be ruinous financial consequences. The High Court rejected this: the Union had provided no evidence that indemnity insurance would be prohibitively expensive.

[11] The High Court concluded that the employees' dismissal would have been found to be both procedurally and substantively unfair had it been referred to the

Labour Court and adjudicated there. It awarded each of the employees 12 months' salary and commissions, amounting to R107 232, calculated on the basis of a "just and equitable" consolation payment (*solatium*) to which they would have been entitled had their employer been the defendant.

Supreme Court of Appeal

[12] On appeal, the High Court having granted leave, the majority of the Supreme Court of Appeal held that the Union had undertaken to assist the employees under a contract of mandate. That contract obliged them to represent the employees, and so the question whether the Union's constitution obliged it to represent its members was a "red herring". The well-established natural incidents (*naturalia*) of a contract of mandate obliged the Union to perform its functions faithfully, honestly and with care and diligence. Even though the Union's officials were not trained lawyers, it was established law that a mandatary who professes a certain skill is held to that standard.

[13] The Union was therefore obliged, the Supreme Court of Appeal found, to take the steps necessary to have the employees' dispute with their employer determined in accordance with the LRA. This it failed to do: first, by failing to refer the dispute in time to the Labour Court, and, second, by failing to secure condonation for that failure. In both respects, the Union "failed to act honestly or diligently."

[14] That the employees themselves never applied for condonation made no difference. To succeed against the Union, they had to establish only that their dispute,

had it been properly referred to the Labour Court, would have been resolved in their favour. And the Union was not entitled simply to walk away from its undertaking. After discovering that the Union had failed to refer their dispute, the employees elected to uphold their agreement with it – and indeed at that point the Union once more undertook to perform it. Even after the Union had changed its mind, the employees (through their attorneys) gave it a further opportunity to perform. Only at that point did the employees finally cancel the agreement and sue for damages for breach of contract.

[15] The majority upheld the findings of the High Court on the unfairness of the employees' dismissal and the compensation to which they were entitled. The Court dismissed a cross-appeal by the employees against the amount awarded.

[16] The dissenting judgment would have upheld the appeal and reversed the High Court's findings. The employees had failed to prove that they suffered their loss as a result of the Union's breach of contract. It was their own failure to apply for condonation that factually caused their loss. Hence, it was self-inflicted. They therefore had to allege and prove that, had they applied for condonation, it would have been refused. But condonation would probably have been granted had they applied. So their cause of action was incomplete.

In this Court

[17] In this Court, the Union accepted the following propositions, most of which it had previously contested: the employees were its members; their employer dismissed them unfairly; the Union agreed to represent them in pursuing their claim; it acted remissly in doing so; had their claims been properly pursued, the Labour Court would have awarded compensation against their employer in the amount of damages the earlier courts granted against the Union; and under the common-law contract of mandate the Union would have been liable for breach of mandate both by failing to lodge the claim timeously and by failing to apply thereafter for condonation. Both parties accepted that the employees were themselves free to apply for condonation at any time.

[18] The Union's argument was that it enjoys special protection under the Constitution and the LRA. It centred on a provision in its constitution, clause 5.11, that provides that the aims and objectives of the Union include providing "legal assistance to members and/or Officials where it deems it in the interest of the Union to do so."[7] This provision, it contended, must be read together with its constitutional right to determine its own administration, programmes and activities, enshrined in the Constitution and the LRA.[8] Its right to determine its own administration had thus

[7] Clause 5.11 of the Union constitution provides:

> "The aims and objectives of the Union shall be:
>
> . . .
>
> To provide legal assistance to members and/or Officials where it deems it in the interest of the Union to do so."

[8] The provisions of section 23(4)(a) of the Constitution are set out in n 1 above. Section 8(a)(i) and (b) of the LRA provides:

been exercised, through clause 5.11, so as to limit the extent of its contractual liability to those it undertook to represent.

[19] Under the LRA, a trade union "may act in any one or more" of three different capacities in a dispute: in its own interest, on behalf of its members or in the interest of any of its members.[9] From this the Union sought to infer that, because it sometimes represents both its interests and those of its individual members, and those may sometimes diverge, the provision entitles it to withdraw from a mandate when it sees fit.

[20] A trade union, it argued, plays a unique role in representing its membership in litigation: it does so only where it deems it in the Union's interest to do so. What is more, it charges nothing for this service, and its officials generally have no legal qualifications. And it must always act in the interests of the union membership as a whole, rather than only those of individual members.

"Every trade union and every employers' organisation has the right—

(a) subject to the provisions of Chapter VI—

(i) to determine its own constitution and rules;

. . .

(b) to plan and organise its administration and lawful activities".

[9] Section 200 of the LRA provides:

"(1) A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party—

(a) in its own interest;

(b) on behalf of any of its members;

(c) in the interest of any of its members.

(2) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings."

[21] Accordingly, any contract of mandate that the Union concludes is subject to an implied term that it can withdraw from the contract at any time if it deems it in its interest to do so, especially if it has been advised that the claim has no prospects of success, and even if the withdrawal causes prejudice. This term was triggered in April 2004, when it obtained Mr Surju's opinion. It was entitled to withdraw without liability.

[22] Counsel for the Union further submitted that the mandate the Union undertook was simply to pursue the employees' claims in the Labour Court, whether before or after the 90-day time period. Since condonation could always be granted, it did not matter that the Union failed to refer their claims in time. The Union conceded that, under the common-law contract of mandate, the mandatary can withdraw from the mandate only if the mandator will not be prejudiced. If the mandatary withdraws after the mandatary's act or omission has prejudiced the business of the mandate, the withdrawal constitutes a repudiation that entitles the mandator to claim damages.[10] But, relying on the dissent in the Supreme Court of Appeal, the Union said that the employees would have obtained condonation had they applied for it. Hence, it did not matter that the Union failed to institute proceedings in the Labour Court timeously. The business of the mandate – which was to refer the matter to the Labour Court, before or after the deadline – could still be performed.

[10] See Joubert et al (eds) *LAWSA* (second edition) vol 17(1) at para 16(h).

[23] The employees contended that the Union's constitution did not entitle it, having decided it was in its interests and having concluded a contract of mandate, to withdraw from its agreement with the employees at any time with impunity. There was no constitutional issue – the Union was perfectly free to regulate its own affairs by making provision for a contractual indemnity. It had simply not done so.

Leave to appeal

[24] It is long established that for this Court to grant leave to appeal, the matter must involve a constitutional issue, and the litigant must show not only that it has reasonable prospects of success, but that it is in the interests of justice to grant it leave.[11] The Union's argument does raise a constitutional issue. It invokes section 23(4)(a) of the Bill of Rights. But, as will emerge now, its argument is barely tenable. It has no prospects of success. This means, for the reasons that follow, that the interests of justice do not favour granting leave to appeal.

Prospects of success on the merits

[25] The Union's argument proceeds from two premises. The first seeks to confine the ambit of the obligations it undertook to the employees when it took on their case by implying a term into their agreement that it could withdraw when it no longer served its own interest to continue representing them. The second attempts to evade the consequences of its admitted failure to lodge the employees' claims properly, or to

[11] See, for example, *Coetzee v National Commissioner of Police and Another* [2013] ZACC 29 at para 19 and *Ingledew v Financial Services Board* [2003] ZACC 8; 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) at para 13.

apply for condonation, by asserting that this was not a breach of its agreement with the employees. Neither premise survives inspection.

[26] That the Union has a constitutional right to determine its own administration is beyond doubt. What is at issue is whether that right, located in section 23 of the Constitution and embodied in the LRA, can serve to found an exemption from liability for responsibilities the Union agreed to undertake and then failed to honour.

[27] The Union's constitutional right "to determine its own administration, programmes and activities" confers on it essential organisational autonomy.[12] The inclusion in the Bill of Rights of the right to organisational autonomy sprang from two

[12] The full text of section 23 of the Constitution reads:

> "(1) Everyone has the right to fair labour practices.
>
> (2) Every worker has the right—
>
> (a) to form and join a trade union;
>
> (b) to participate in the activities and programmes of a trade union; and
>
> (c) to strike.
>
> (3) Every employer has the right—
>
> (a) to form and join an employers' organisation; and
>
> (b) to participate in the activities and programmes of an employers' organisation.
>
> (4) Every trade union and every employers' organisation has the right—
>
> (a) to determine its own administration, programmes and activities;
>
> (b) to organise; and
>
> (c) to form and join a federation.
>
> (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
>
> (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36(1)."

inter-connected Constitutional Principles that guided the constitution-makers.[13] They were Principles XII and XXVIII, contained in Schedule 4 of the interim Constitution.[14] Principle XII provided that: "Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected." Principle XXVIII provided in part that: "Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected."

[28] These principles arose in response to a half-century of legislated racial oppression during which, until 1979, discriminatory laws prohibited the majority of this country's people, under criminal penalty, from forming and joining trade unions.[15] The right not only to organise through unions, but for unions to have organisational autonomy in pursuing their members' rights, was thus an integral part of the constitutional vision that sought to replace that repressive history.

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[13] See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) and *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic Of South Africa, 1996* [1996] ZACC 24; 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC).

[14] Constitution of the Republic of South Africa Act 200 of 1993.

[15] The Industrial Conciliation Act 11 of 1924 was the first statute to provide for the registration of employers' organisations and trade unions. But it expressly excluded black African workers from the definition of "employee". They were thus barred from belonging to trade unions, from direct representation on industrial councils and from participating in conciliation boards. See Du Toit et al *Labour Relations Law – A Comprehensive Guide* 5 ed (LexisNexis Butterworths, Durban 2006) at 6-8. The exclusion enacted in 1924 did not apply to coloured and Indian workers. However, the racial bar was expanded in 1956. The Industrial Conciliation Act 28 of 1956 prohibited the registration of new non-racial unions and required existing non-racial unions to have racially separate branches and whites-only executives. Id at 8-10. The racial restrictions on forming and belonging to trade unions were abolished when the Industrial Conciliation Amendment Act 94 of 1979 was enacted.

[29] So understood, the right secures for trade unions and employer organisations a zone of structural and organisational self-regulation that is free from outside control. This means that unions and employer organisations have the liberty, subject to the Constitution, to decide how they administer themselves and how they promote the interests of their members through self-chosen programmatic activities. It also means that they have the freedom to control their own structure. These liberties, in turn, find statutory embodiment in the LRA.[16]

[30] The right does not, however, specify how the freedom it confers may be exercised. Nor, in itself, does it suggest immunity from damages claims. The Union's argument was that its exercise of the right to determine its own administration, as embodied in its own constitution, conferred that immunity. The effect of clause 5.11, read with section 23(4)(a) of the Constitution, was to imply a term, whenever it agreed to provide legal assistance to a member, that entitled it to withdraw assistance at any time if it was no longer in its interest to continue providing it. Here, the Union invoked section 200 of the LRA.[17] This, it said, conferred the power on a trade union to act in its own interests, and the interests of its members, even when doing so may prejudice individual members.

[31] But the provision cannot bear the weight the Union seeks to put on it. It is a capacity-conferring provision, not an exemption clause. What the provision does is to

[16] The relevant parts of section 8 of the LRA are set out in n 8 above.

[17] Section 200 of the LRA is set out in n 9 above.

confer legal standing on trade unions and employer organisations to act in distinct and differing capacities – and it stipulates that they are entitled to be party to any proceedings involving their members. Nothing in it suggests that a union may pursue its own interests with impunity when it has injured the interests of a member by failing to represent him or her properly.

[32] Nor does clause 5.11 of its constitution help the Union. The Union contended that because the clause permitted it to provide legal assistance to members "where it deems it in the interest of the Union to do so", it was entitled, without adverse consequence, to stop providing legal assistance when it deems it no longer to be in its interest.

[33] But this is not what clause 5.11 means. The clause merely expresses one of the Union's aims and objectives.[18] It does not purport to regulate the powers of the Union

[18] Clause 5 of the Union constitution reads:

> "The aims and objectives of the Union shall be:
>
> 5.1 To organise all workers engaged in the Food Industry in South Africa into one (1) National Union and to use every legitimate means to induce all workers who are eligible for membership to become members.
>
> 5.2 To promote a spirit of trade union unity and solidarity amongst members of the Union and amongst all workers irrespective of race or sex and to oppose any policy, practice or measure which will cause division or disunity amongst members or workers.
>
> 5.3 To promote the interest of the members in particular and workers in general.
>
> 5.4 To regulate relations between members and their employers and to protect and further the interest of members in relation to their employers.
>
> 5.5 To negotiate and enter into collective agreements between members and their employers in relation to their employment.
>
> 5.6 To promote worker leadership and build democratic structures at all levels within the Union.

and its office-bearers and officials. Those are fully set out elsewhere[19] – and nowhere do they feature the qualification the Union seeks to import. On the contrary, the Union's constitution shows that its drafters foresaw that those working for the Union might be negligent in performing their duties. In response, they gave only a limited indemnity from its consequences. The Union indemnifies its shop stewards, officials, office-bearers and committee members from proceedings, costs and expenses incurred through negligence in the performance of their duties on behalf of the Union, provided their acts do not constitute misconduct.[20] The provision does not say that the Union itself is exempt from those consequences. In fact, it specifies the contrary: when those acting on its behalf are negligent, the Union will take responsibility for them.

5.7 To consider and advise on legislation or policies affecting the interest of members, to provide support for or oppose any such legislation or policies and to make representations to public and other bodies.

5.8 To co-operate with and assist other progressive trade unions or worker organisations within South Africa and internationally in the general interest of the working class movement.

5.9 To assist members in obtaining employment and to endeavour to induce employers in the food industry to employ trade union labour.

5.10 To educate workers about their rights.

5.11 To provide legal assistance to members and/or Officials where it deems it in the interest of the Union to do so.

5.12 To endeavour to achieve decent standards of living and social justice.

5.13 To do such other things as appear to be in the interest of the union and its members and which are not inconsistent with the aims and objectives or any matter specifically provided for in this Constitution."

[19] Clause 8.6 (powers of factory general meetings); clause 9.8 (duties of shop stewards committee); clause 9.9 (duties of shop stewards committee office-bearers); clause 11.7 (powers of branch committees); clause 12.6 (powers of branch executive committees); clause 13.2 (duties and functions of branch office-bearers); clause 15.6 (powers of regional conferences); clause 16.6 (powers of regional executive committees); clause 19.6 (powers of national conference); clause 20.6 (powers of national executive council); clause 21.1 (duties and functions of national office-bearers); and clause 21.2 (duties and functions of national officials).

[20] Clause 32 is titled "Indemnification of Shop Stewards, Officials, Office-Bearers and Committee Members" and provides:

> "The shop stewards, officials, office-bearers and committee members of the Union, provided that they have not acted in a manner which would constitute misconduct, shall be indemnified by the Union against all proceedings, costs and expenses incurred by reason of any omission, negligence or other act done in performance of their duties on behalf of the Union and they shall not be personally liable for any of the liabilities of the Union."

[34] So clause 5.11 does not shield the Union. And even if we understand the provision as defining the Union's authority, at most it authorises the Union to give an undertaking to represent its members when it deems it in its interest to do so. It says nothing about the Union's entitlement to withdraw from that undertaking, once given. It does not imply a term into an agreement to provide legal assistance entitling the Union to withdraw with impunity. The clause gives the Union the freedom to contract to provide legal assistance, not the freedom not to perform its contracts.

[35] Even if the Union could withdraw, it nonetheless had a duty to take that decision in good faith and to notify the employees promptly. These qualifications underlie the law of mandate: a mandatary must act in good faith, and may withdraw only if there is still time for the mandator to fulfil the mandate.[21] The Union did not do this. Rather, it seems to have cut the employees loose to protect itself from the unpalatable consequences of its failure to represent them properly.

[36] So even if we construe the Constitution and clause 5.11 as best for the Union, it cannot escape the consequences of its remissness in representing the employees. This leads to an inescapable problem for the Union: when it decided to withdraw, it had already failed to lodge the employees' claim timeously. Faced with this difficulty, the Union sought to put a particular gloss on its agreement with the employees. It did not undertake, it contended, to refer their claims to the Labour Court before the 90-day

[21] *LAWSA* above n 10 at para 11.

statutory cut-off – all it agreed to do was to refer their claims at some point. The Union thus argued that, because the employees could still apply for condonation, it incurred no liability to them when it withdrew from representing them.

[37] This is not correct. The Union's argument seeks to find in the parties' agreement a tacit term that the Union's obligation was merely to get the matter to the Labour Court, whether before or after the cut-off. A tacit term is an unspoken provision of the contract. It is one to which the parties agree, though without saying so explicitly.[22] The test for inferring a tacit term is whether the parties, if asked whether their agreement contained the term, would immediately say, "Yes, of course that's what we agreed."[23] Before a court can infer a tacit term, it must be satisfied that there is a necessary implication that they intended to contract on that basis.[24]

[38] No reasonable understanding of the parties' dealings supports the inference that they tacitly agreed that the Union could lodge the employees' claim at any point, without regard to the cut-off. On the contrary: it is unlikely that any employee turning to a union for help in an unfair dismissal claim would agree to a term of this kind.

[22] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* [2011] ZASCA 100; 2011 (5) SA 19 (SCA) at paras 13-21 (reversed on other grounds in *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC)) and Christie and Bradfield *The Law of Contract in South Africa* 6 ed (LexisNexis, Durban 2011) at 174-81.

[23] See, for example, *Wilkins N.O. v Voges* [1994] ZASCA 53; 1994 (3) SA 130 (A) at 136H-137D and 141G-H, explaining the distinction between implied and tacit terms, and the judgment of Corbett JA in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532-3, citing the famous statement of Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 (CA) at 605.

[24] *Alfred McAlpine & Son (Pty) Ltd* above n 23 at 533A.

Much more probably the party, when asked, would say, "No, of course not, the claim must obviously be lodged in time, and failing to do so would violate our agreement."

[39] It follows that the Union's duty under its agreement with the employees was not to lodge their claim at any time, but to lodge it before the 90-day guillotine fell. That it failed to do. Its failure breached the contract of mandate it concluded with them. For this breach the employees are entitled to compensation. The Union has not provided any sound reason to depart from the Supreme Court of Appeal's analysis.[25]

[40] The Union's contention that the business of the mandate could still be performed also rests on a misappreciation of how its remissness impaired the employees' rights. It is true that the employees could themselves have applied for condonation. In fact, they could still do so now. Though it is by no means clear that condonation would be granted, I assume in favour of the Union, along the lines of the dissenting judgment in the Supreme Court of Appeal, that it would.[26] This does not rescue the Union from its predicament. The Union faces the same problem that precluded the tacit term. It did not undertake merely to get the employees' case before the Labour Court. Rather, the mandate it accepted obliged it to prosecute their claims in time. Once the 90-day period expired, that became impossible, to the palpable prejudice of the employees.

[25] Supreme Court of Appeal judgment above n 3, especially at paras 45-7.

[26] Id at paras 39-42.

[41] That this is so emerges from the consequences of not referring a dismissal dispute timeously. Proper lodging entitles an employee, without more, to a determination of the merits of a claim by the Labour Court. But once the 90-day period expires, an employee has a different, lesser and conditional entitlement: to apply for condonation and reinstatement of the claim.

[42] Thus, as a result of the Union's failure to refer their case in time, the employees' legal position was weaker and more precarious than it had been. They had lost their right to adjudication of their claim. In its place was a weaker right – the right to seek an uncertain indulgence. That they could still try to obtain the indulgence is no answer to their complaint about what they lost. And their agreement required precisely that the Union avoid this loss.

[43] So the Union's argument founders in every way. It has a constitutional colouring, but no constitutional substance. Its contractual premises are contorted and implausible. And it misreads the Union's own constitution. In summary, the argument fails because (i) clause 5.11, read with the Constitution and the LRA, does not import a term entitling the Union to withdraw with impunity; and (ii) it mischaracterises the obligation the Union undertook to the employees.

Constitution Seventeenth Amendment Act

[44] The case was argued on Thursday, 29 August 2013. Six days before, on Friday, 23 August 2013, the Constitution Seventeenth Amendment Act[27] took effect. This amended section 167(3) of the Constitution to confer on this Court jurisdiction to hear non-constitutional matters, "if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered" by it.[28]

[45] Counsel for the Union was invited to address the Court on whether, if the jurisdictional amplification applied, the Union's case involved an arguable point of law of general public importance which the Court ought to consider. He submitted that, even if there was no constitutional issue at stake, the Supreme Court of Appeal erred in failing to give sufficient weight to, and to apply, clause 5.11. He did not proffer any other argument.

[46] It is not necessary to decide if the constitutional amendment applies to these proceedings, since, even if it does, the outcome is no different. The Union's

[27] Constitution Seventeenth Amendment Act, 2012.

[28] Section 167(3) of the Constitution, as amended, reads:

> "The Constitutional Court—
>
> (a) is the highest court of the Republic; and
>
> (b) may decide—
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and
>
> (c) makes the final decision whether a matter is within its jurisdiction."

contentions are entirely without merit, whether arrayed in constitutional garb or dressed more plainly as points of law.

Order

[47] The following order is made:

1. The application for leave to appeal is dismissed with costs.

For the Applicant:	Advocate M Pillemer SC and Advocate R Pillemer instructed by Brett Purdon Attorneys.
For the First and Second Respondents:	Advocate C Nel instructed by McGregor Erasmus Attorneys.