

SOUTH AFRICA / JUDGMENT

Association of Mineworkers and Others v Opsicol Mining Services CC (JS 703/2018) [2023] ZALCJHB 177 (5 June 2023)

[2023] ZALCJHB 177**COURT**

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS 703/2018

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Source record**THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG****Not Reportable****Case No: JS****703/2018****In the matter between:**ASSOCIATION
OF MINEWORKERS AND
MABUZA,
JI & 1 OTHER
Applicants
And
OPSICOL
MINING SERVICES CC
Respondent**Heard:**

15 May 2023

Delivered:05 June 2023
(This judgment was
handed down electronically by circulation to the parties' legal
representatives, by email, publication
on the Labour Court's
website and released to SAFLI. The date on which the judgment is
delivered is deemed to be 05 June
2023.)

JUDGMENT

VAN NIEKERK, J

[1] AMCU (the union) has referred a dispute to this court in terms of Rule 6 on behalf of two of its members, Mr Jacob Mabuza and Mr Jabulani Mahlangu (the individual applicants). The individual applicants, both shop stewards, were dismissed on March 2018 after being found guilty on five charges of misconduct, all of which had their origins in a work stoppage that occurred at the respondent's premises on 9 February 2018. It is common cause that the cause of the stoppage related to a request by the respondent's employees for transport to attend the funeral of one of their colleagues in the Eastern Cape. The union contends that the dismissals of the

individual applicants were substantively and procedurally unfair.

[2] The respondent is a mining contractor, contracted at the time to undertake work for Canyon Coal (Pty) Ltd at the Hakhano colliery in Mpumalanga. The respondent recognised the union as a collective bargaining agent in July 2017 in terms of a recognition agreement, referred to by the parties as 'the wage agreement'. For present purposes, clause 9 of the agreement is significant. The clause provides:

Funeral Transport

The COMPANY agrees to provide a twelve (12) seater bus for transportation of EMPLOYEES to attend the funeral of a colleague within two hundred kilometres (200 km) from the mine on which the deceased EMPLOYEE worked.

- [3] On 8 February 2018, Mabuza telephoned the respondent's general manager, Mr Gurban Zeynalov, regarding a funeral of a colleague to take place on the weekend commencing 10 February 2018. Zeynalov testified that he told Mabuza that he was aware of the funeral, that a van could be arranged and that he should 'speak to HR.' What Mabuza did not disclose to Zeynalov was that the funeral was to take place some 900 km from the mine, significantly outside of the 200 km radius for which the wage agreement made provision. The respondent's human resources manager, Ms Danelle Naude, testified that on enquiry from Mabuza and after discussion with Zeynalov, she advised him that since the proposed trip exceeded the 200 km limit, the respondent would not provide transport.
- [4] On 9 February 2018, day shift employees attended at work, which commenced with what was referred to as a daily 'toolbox talk'. During the meeting, Mabuza asked the site foreman Mr SM Mahlangu whether transport arrangements for the funeral had been confirmed with management. Mabuza told the foreman that the employees were waiting for a response and would not report for work until there was a response to their request. The foreman approached the site manager Mr A Mathabatha, to advise him that the employees wanted a response to their request and they would not report for duty until they had received a response. Mathabatha spoke to the employees, when Mabuza advised him that the

employees were refusing to work and would return to work only once they had received a response to their request. Mathabatha advised Mabuza that he would contact Naude.

- [5] At about 8am, Naude arrived on site. She inquired as to the reason for the stoppage and was told by Mabuza that employees wanted transport to the funeral in the Eastern Cape. Naude testified that she issued an ultimatum to return to work and after some 10 minutes, the employees returned to the workplace and started to work. Naude estimated that the duration of the strike was some 2 ½ hours.
- [6] Between 4pm and 5pm the same afternoon, Mabuza asked Naude for a response on the transport issue. Naude told him that transport would not be provided, and in terms of a mandate secured from Zeynalov that morning, offered Mabuza a sum of R2000, being R500 each for 4 attendees, as a contribution toward travel costs. The offer was refused.
- [7] The night shift employees arrived on site at approximately 5pm. They were aggrieved by the respondent's decision on the request for transport, and refused to report for work. Naude discussed the matter with Mahlangu, the night shift shop steward. Zeynalov arrived at the site at the time of the shift change. Zeynalov testified that he went to the taxis that had brought the shift to work, opened the door of one of them and said that whoever wanted to go to the funeral should get in the taxi, and that the respondent would cover the costs of the first 200kilometres. The employees claimed it was too late. It is not in dispute that Naude issued an ultimatum to return to work, to which the night shift employees responded.
- [8] On 6 March 2018, Naude issued notices to attend a disciplinary hearing. The charges against the individual applicants read as follows:

CHARGES

1. Gross Misconduct: participating in an unpredictable work stoppage on 9 February 2018 in that you refused to commence with your duties when the company refused to grant the request for transport to a funeral in excess of the agreed terms contained in the wage agreement.

And/or Alternatively

2. Gross misconduct: Failure to act in the interest of the Company when you failed to advise your fellow employees that they were participating in an unprotected work stoppage and to resume the duties on 9 February 2018.
3. Gross misconduct: Insubordination and that you refused various legal instructions from management to return to duty during the unprotected industrial action on 9 February 2018.

And/ Or Alternatively

4. Gross misconduct: Your actions as detailed above resulted in a financial loss to the company due to the loss of production of approximately 2.5 hours on 9 February 2018.

5. Gross misconduct: Your actions as detailed above place the Name of the Company in disrepute with its client, Canyon Coal.
- [9] The enquiries were scheduled to proceed on 13 March 2018. Mahlangu's enquiry commenced at 11am, and continued for the remainder of the day. The enquiry as chaired by Mr de Leeuw, a member of an entity affiliated to the AHI. De Leeuw heard evidence and found Mabuza guilty of the five charges brought against him. Mabuza was summarily dismissed.
- [10] Mahlangu's disciplinary enquiry was to commence the same afternoon. Naude testified that she was on study leave for the next two days, being a Wednesday and Thursday, and that she rescheduled the hearing for Friday 16 March 2018. It is not in dispute that Mahlangu was not present when the hearing convened, and that the hearing continued in his absence. Mahlangu was found guilty of all five charges brought against him and summarily dismissed.
- [11] Those employees excluding the individual applicants who had participated in the stoppages on 9 February were charged with participation in the work stoppage and issued with final written warnings and a penalty of a reduction in wages. At their hearing, chaired by De Leeuw, a penalty of lost wages was imposed as an alternative to dismissal. It is not in dispute that a subsequent referral to the CCMA challenging the fairness of this penalty was withdrawn.
- [12] The first issue to be decided is the existence or otherwise of a strike on 9 January 2018. The applicants denied the work stoppage that occurred on that date constituted a strike, and stated that employees had simply gathered on site, waiting for a response on the request for transportation from the respondent. In section 213 of the LRA, a strike is defined to incorporate four elements – a partial or complete concerted refusal to work or retardation or obstruction of work; by persons who are or who have been employed by the same employer or different employers; for the purposes of remedying a grievance or resolving a dispute; in respect of a matter of mutual interest between employer and employee. The only element contested by the applicants is that relating the purpose of remedying a grievance or resolving a dispute. When cross-examined on his understanding of the concept of a strike, and despite his training as a shop steward, Mabuza had none. I accept the evidence of the respondent's witnesses that there was a work stoppage on the morning and evenings of 9 February 2018 and that the stoppage was initiated for the purpose of remedying a grievance or resolving a dispute concerning the provision of transport for the funeral to be held on 10 February
2018. Naude had made clear that the request fell outside the scope contemplated by the wage agreement and for that reason, it had been refused. The employees had demanded transport to the funeral in circumstances where the respondent was not obliged in terms of the wage agreement to afford them any, and where what amounted to an ex gratia offer by the respondent had been rejected. In these circumstances, the employees' refusal to work

amounted to a strike. It was not in dispute that none of the procedural requirements relating to the exercise of the right to strike were observed. The strike was thus unprotected.

- [13] In relation to the substantive and procedural fairness of the applicants' dismissals, the issues that the court is required to decide are whether the applicants were guilty of the charges against them, whether the respondent applied discipline consistently (an element of substantive fairness), and whether the sanction of dismissal was fair in all the circumstances. In so far as procedural fairness is concerned, the issues are whether the respondent consulted with the union as required by item 4 (2) of the Code of Good Practice: Dismissal, and whether Mahlangu's dismissal was procedurally unfair on account of the fact that the hearing took place in his absence.
- [14] The legal principles to be applied in a dispute such as the present are well-established. The LRA makes a clear distinction between protected and unprotected strike action. The consequences of each are equally clear – protected strike action carries an immunity against dismissal and civil liability; unprotected strike action does not. That is not to say that participation in unprotected strike action carries with it an automatic penalty of dismissal; any dismissal must meet the tests of substantive and procedural fairness. Item 6 of the Code of Good Practice states that participation in a strike that does not comply with the LRA is misconduct. The Code further confirms that as with any act of misconduct, participation in an unprotected strike does not always deserve dismissal. Any consideration of the circumstance of the substantive fairness of a dismissal in the circumstances must be determined in the light of all of the relevant facts, including the seriousness of the contravention of the LRA, attempts made to

comply with the Act, and whether or not the strike was in response to unjustified conduct by the employer. In regard to procedural

fairness, the code requires that the employer is to discuss the ultimatum in clear and unambiguous terms prior to dismissal, and that employees be permitted sufficient time to reflect on the ultimatum and respond to it. Further, prior to dismissal, the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action that it intends to adopt.

- [15] I deal first with the applicants' submissions regarding what it contends was the inconsistent application of discipline. The test to be applied to determine inconsistent conduct in the form of contemporaneous inconsistency on the part of an employer is objective, to the extent that the comparator must necessarily be a similarly circumstanced employee subjected to different treatment. Thus, in *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* [2009] 11 BLLR 1128 (LC), this court noted that an inconsistency challenge will fail if the employer is able to differentiate between employees who have committed similar transcriptions on the basis of amongst other things, differences in personal circumstances, the severity of the misconduct or any other material factors.

- [16] In so far as the applicants submit that the respondent failed to apply discipline consistently (given that other employees guilty of the same offence were issued with final written warnings and a forfeiture of wages), the individual applicants were not similarly circumstanced. The difference in the charges brought against the applicants related to their status as shop stewards. The additional charge brought against the applicants was that they had failed to act in the interests of the respondent when they failed to advise their fellow employees that they were participating in an unprotected work stoppage, and to resume their duties. This charge was fundamental to the disciplinary action brought against the individual applicants, and distinguished them from those who had been charged with misconduct that related only to their participation in the strike. Clearly, the respondent expected the individual applicants to act in the respondent's interests, at least by advising the employees on both shifts that they were participating in an unprotected strike and that they should return to work. In these circumstances, it cannot be said that the differentiation in penalty is in itself unfair, nor is it any indication of inconsistency.
- [17] Turning next to the fairness of the sanction of the individual applicants' dismissal, the LAC has held that a two-stage enquiry must be conducted. The first is an enquiry into the matters referred to in item 6 of the Code; the second requires a consideration of the guidelines established by item 7. (See NUMSA v CBI Electric African Cables [2014] 1 BLLR 31 (LC).)
- [18] Where, as in the present instance, the employer issues an ultimatum to return to work or face dismissal and employees heed the ultimatum and return to work, without more, an employer is not entitled to dismiss an employee for participation in the strike. In AMCU obo Rantho and 188 others & another v Samancor Western Chrome Mines the LAC said the following (footnotes omitted):
- [24] Item 6 of Schedule 8 of the Labour Relations Act ("the LRA") offers clear guidance regarding the purpose and implications of an employer issuing an ultimatum during an unprotected strike. While making it clear that participation in a strike that does not comply with the provisions of the LRA is misconduct, Item 6 recognises that such conduct does not always deserve dismissal. The substantive fairness of a dismissal for participation in an unprotected strike must be determined in light of the facts, including the seriousness of the contravention, attempts made to comply with the LRA, and whether or not the strike was in response to unjustified conduct by the employer. Item 6(2) aims at avoiding precipitate dismissals by means of cooling-off measures. It provides in relevant part:
- 'Prior to a dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it.'

- [25] The object of an ultimatum is to give striking employees the opportunity to reconsider their action. It must, therefore, be clear and unambiguous and give the employees sufficient time to reflect. The ultimatum issued by Samancor were not entirely clear but indicated that dismissal would only follow after non-compliance with a final ultimatum to be issued after unjustified non-compliance with the preliminary ultimatum. Samancor also reserved its right to take disciplinary action against the employees for participating in unprotected strike action and for their conduct during the strike.
- [26] It is well-established in our law that where illegally striking employees obey an ultimatum and return to work within the stipulated time, the employer will not be entitled to dismiss them. To hold otherwise would render the purpose of an ultimatum nugatory (own emphasis). Strikes are functional to the social good of collective bargaining. Thus, the right to strike is constitutionally enshrined as a legitimate means of advancing orderly collective bargaining. A precipitate strike subverts the process by undermining the opportunity for resolution of the collective dispute by negotiation. The misconduct present in participation in an un-procedural strike is the subversion of the process. The purpose of an ultimatum is to put the negotiation process back on track and to end the precipitous action. If it achieves that purpose, dismissal normally should not follow because that too would be precipitate action undermining legitimate and orderly collective bargaining.
- [27] For those reasons, our law regards an ultimatum by the employer as a waiver of the right to dismiss for the period of its duration. A party who has once approbated (waived a right arising under the contract, including the right to terminate it) cannot thereafter reprobate (seek to enforce that right).[1] If the employees refuse to return to work, the waiver implicit in the ultimatum will lapse.[2] But if they comply with the ultimatum, the employer is ordinarily precluded from dismissing the employees for the act of striking, but not necessarily for other misconduct committed during the strike. Where an employer after issuing an ultimatum wishes to reverse or amend the terms of the waiver prior to it expiring, it may do so in appropriate circumstances provided it has a good reason and gives the striking workers timeous notice of the change to prevent them from being unfairly prejudiced thereby.
- [19] It follows that the respondent was not entitled to take disciplinary action against or dismiss the individual applicants solely on account of their participation in an unprotected strike. However, the Rantho judgment does not preclude an employer from dismissing an employee for acts other than participation in the strike. The judgment

acknowledges as much – as the above quotation records, in paragraph 27, the court’s view that if employees comply with an ultimatum, the employer is ordinarily precluded from dismissing employees for the act of striking, but not necessarily for other misconduct committed during the strike.

- [20] To sustain the substantive fairness of the individual applicants' dismissals, the respondent relied on the charge that related to what was alleged to be a failure to act in the best interests of the company 'when you failed to advise your fellow employees that they were participating in an unprotected work stoppage and to resume work...'
- [21] The evidence discloses that on the morning of 9 February 2018, the employees on the shift asked Mabuza about the issue of transport to the funeral. He testified that he had spoken to Zeynalov but received no answer. Mabuza stated that the employees had refused to go to work until they had received an explanation on the transport issue. He then approached the site foreman and told him what the reasons for the stoppage were, and then approached Mathabatha, told him about the reasons for the stoppage and that employees needed an answer on the issue of transport. There is no evidence that Mabuza had instructed employees to embark on a work stoppage or that he had incited the stoppage. Mabuza's evidence was, in effect, that he was stuck between the proverbial rock and a hard place. The employees wanted answers from him regarding the transport to the funeral, but he had no answers to give them. As Mabuza put it, while he did not instruct employees to discontinue their strike and return to work, he was concerned that the employees did not 'point fingers' at him afterward were there to be any negative consequences.
- [22] The respondent makes much of the individual applicants' duty to comply with the obligation of good faith to their employer, and their obligation to serve the respondent honestly and faithfully. Shop stewards occupy an ambiguous position. On the one hand, they are employees and subject to the discipline and prerogative of their employer. On the other hand, shop stewards play an important role within union structures; they represent members and negotiate on their behalf. This dual role may serve to create a tension between the conflicting interests of two masters.[3] In the present instance, the individual applicants sought to manage the tension between the demands of their employer and the demands of their members. As I have indicated, there is no evidence that either Mabuza or Mahlangu incited the strikes, or that they obstructed any return to work after ultimatums had been issued. On the contrary, their evidence is that by approaching and seeking the intervention of higher levels of management, thus indicating that they preferred to see a resolution of the dispute. To the extent that the respondent submits that the probabilities favour the version that the individual applicants initiated the strike since Mabuza intended to attend the funeral (and was the only employee from the morning and night shift who intended to do so). Put another way, as I understood the submission, the other employees had no real interest in embarking on a strike, since they were not intending to attend the funeral. This submission is not supported by the evidence, which discloses no intimidation or incitement by either of the applicants. Had they wished to bring out the workforce on strike against their will in support of a demand in which they had a personal interest, there would have been some evidence of an attempt to incite a strike against the will of those participating in it, at least at the stage that disciplinary action was taken against them. There is no such evidence, and it is more probable than not that those employees participating in the strike were expressing their solidarity with the demand that had been made. Further, the

submission ignores the collective component to the dispute. The funeral was of a colleague of all of the employees engaged at the mine. Those who had intended to attend the funeral were representatives of the entire workforce. In these circumstances, it cannot be seen, as the respondent submits, that those who participated in the strike ‘really had no interest’ in the issue that gave rise to it.

- [23] In summary: a consideration of the evidence reveals that no acts of misconduct were committed during the strike, the strike was peaceful and of limited duration, there was no intimidation of employees or other parties during the course of the strike, and that employees returned to work once an ultimatum was issued. The respondent was unable to quantify any financial loss that it suffered consequent to the strike. Both of the individual applicants had relatively long service and clean disciplinary records. As I have indicated, the respondent makes much of the contention that the individual applicants failed to comply with their duty of good faith towards it, and their obligation to serve the respondent honestly and faithfully. What this contention ignores is the dual role of the shop steward, and the tensions that arise in circumstances where members act unlawfully. What matters in the present instance is how the individual applicants responded to the situation. Mabuza’s evidence indicates that he was acutely

aware of the dilemma he faced – on the one hand, the respondent’s opprobrium and on the other hand, the demands of

his members. What is particularly significant is that the individual applicants sought to defuse the situation by actively seeking the intervention of supervisory management. Neither of the individual applicants adopted a confrontational attitude or sought to escalate the tension that already existed. In these circumstances, having regard to all of the relevant circumstances, the sanction of dismissal was inappropriately harsh.

- [24] Turning then to procedural fairness, the applicants raised two issues. The first is what the applicant’s alleged to be a failure by the respondent to consult the union as required by item 4(2) of the Code. That provision requires an employer, prior to disciplining an employee who is an office-bearer or official of a trade union, to first inform and consult with the union. The second issue relates to Mahlangu’s disciplinary hearing, which was conducted in his absence.

- [25] In regard to the consultation requirement, the applicants’ pleaded case is that the respondent did not consult the union prior to initiating disciplinary action against Mabuza and Mahlangu. The respondent denies this, and avers that a meeting took place with the union on 5 and 6 March 2018, after which notices to attend a disciplinary hearing were issued. In her evidence, Naude made reference to the meeting held on 5 March 2018, where the attendance register reflects that both Mabuza and Mahlangu were present, as was a union official, Mr David Masike the minutes of the meeting reflect a desire by the respondent to deal with issues relating to the proposed disciplinary action against the shop stewards in the face of a denial by Masike, for reasons that are not apparent, that the

meeting constituted a consultation. It is assumed that the union denies the existence of the consultation simply on account of Masike's refusal to recognize it as such. If there was any uncertainty regarding the purpose of the meeting, this was clarified the next day. At the meeting held on 6 March 2018, again attended by the individual applicants and this time by a Mr Thabo Tsotsetsi on behalf of the union, more progress was made in relation to arrangements for a disciplinary hearing. The minutes record that the union caucused for some 20 minutes after Naude proposed that the disciplinary hearings proceed on 13 March 2018. Naude testified further that the respondent was advised to continue with the disciplinary process. I have no hesitation in accepting Naude's evidence. The applicants' contention that the respondent failed and/or refused to notify and consult with the union stands in stark contrast with the documentary evidence to which the witnesses were referred. Mabuza's version that the meeting was the continuation of a wage negotiation was never put to Naude and is not reflected in the minutes, the veracity of which was never challenged. The union's version regarding the meetings held on 5 and 6 March 2018 is simply false. I find that the respondent complied with its obligation in terms of the Code to inform and consult with the union regarding the proposed disciplinary action against the shop stewards.

- [26] As far as Mahlangu's disciplinary hearing is concerned, it is common cause that the hearing was initially scheduled to take place at 12h00 on 13 March 2018, and that Mabuza's hearing continued from 11h00 throughout the rest of the afternoon. Naude testified that she was anxious that Mahlangu's enquiry be rescheduled to take place as soon as possible, and that she was on study leave on 14 and 15 March 2018. She also testified that the hearing was rescheduled for 16 March 2018, and that notice was given to Mahlangu (who refused to sign acknowledgement of receipt). Naude testified that she sent an email to this effect to Tsotsetsi on the morning of 14 March 2018. Mahlangu testified that he had remained in attendance at the venue where his disciplinary hearing was originally scheduled on 13 March 2018, until Mabuza's inquiry concluded at about 19h00 that evening. Masike, who had represented Mabuza and was to represent Mahlangu informed him (Mahlangu) that his inquiry would not proceed on the next day on account of Naude's study leave and that it would proceed the following week, once Naude had informed them of the date.

Naude accepted in cross-examination that Masike had not been copied on her email dated 14 March 2018, and also that Masike had indicated his surprise in email correspondence on 16 March 2016 as according to him (Masike) she had informed him of the Mabuza's hearing that Mahlangu's hearing would be scheduled for the following week. Mahlangu testified that he had always wanted to participate in his disciplinary inquiry. It is also not in dispute that on 16 March 2018, within two minutes of Naude having emailed Masike regarding the continuation of the hearing in Mahlangu's absence, that the hearing commenced on that basis. Masike responded to Naude on the afternoon of 18 March 2018, expressing surprise since 'you said you will reschedule this one next week Monday or Tuesday...'. Naude denied having said this. The chairperson of the hearing, again a representative of the AHI, found Mahlangu guilty of all five charges and dismissed him.

[27] I accept Naude's evidence without hesitation. She was a good witness who gave evidence in clear and consistent terms there was no agreement that Mahlangu's disciplinary hearing would take place only during the course of the next week. Naude rescheduled the inquiry to take place on 16 March

2018. She gave notice of the rescheduled hearing to Mahlangu, who refused to sign an acknowledgment of receipt of the notice on grounds that are best known to him. Naude advised Tsotsetsi, the union official with whom she had been engaged on the issue and who (unlike Masike) was present in the consultation meeting held with the union

on 6 March 2018, of the date of the rescheduled hearing. No evidence was called to contradict Naude's version, and I accept that Mahlangu and the union were aware that the disciplinary hearing was to commence on 16 March. The respondent cannot be held to be responsible in circumstances where less than clear communication within the union and Mahlangu's refusal to accept and acknowledge receipt of the notice are the best explanations for the failure by Mahlangu to attend the scheduled hearing. In these circumstances, the respondent was entitled to proceed with the inquiry in Mahlangu's absence.

Remedy

[28] The applicants seek reinstatement, alternatively, an award of compensation. The primary remedy for a substantively unfair dismissal is reinstatement. Section 193(2) of the LRA provides that the court must require the employer to reinstate or re-employ the employee unless the employee does not wish to be reinstated or re-employed, the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, it is not reasonably practicable to reinstate or re-employ the employee, or because the dismissal is unfair only because the employer did not follow a fair procedure.

[29] In the present instance, the respondent's representative asked Zeynalov whether the contract in terms of which the respondent conducted operations on behalf of Canyon Coal remained in existence. Zeynalov replied that the mine had reached the end of its life and that it had become depleted in 2019. Zeynalov testified further that all of the respondent's employees at the mine had been retrenched in 2019. This evidence was not challenged, and I must necessarily accept that the operation in which the individual applicants were engaged has ceased to exist.

[30] Another relevant factor is the union's failure to prosecute these proceedings with due diligence. The individual applicants were dismissed in March

2018. The dispute was referred to the CCMA timeously, and the matter referred to this court within the prescribed time limit, the statement of case having been filed on 10 September 2018. A week later, the respondent's attorneys gave notice of their intention to oppose and filed a statement in response to the statement of claim. In terms of the rules, a pre-trial minute was to have been filed within 14 days of the close of pleadings. The pre-trial minute was signed only on 21 July 2020, almost 2 years later. The applicant is dominus litis and was

responsible for ensuring that the litigation that it had initiated was conducted in accordance with the time periods set out in the rules. The union dismally failed to do so. The inordinate delays in the conduct of this litigation militate against the primacy of the remedy of reinstatement. Having regard to all of these circumstances, reinstatement is not a reasonably practicable remedy, and an award of compensation is appropriate. An award of six months' compensation to each of the individual respondents for what amounts to a substantively unfair dismissal is equitable. I take into account particularly the fact that when Mabuza initially telephoned Zeynalov to request transport to the funeral, he deliberately omitted to advise Zeynalov that the funeral was to take place way outside of the radius within which the respondent had agreed to provide transport at its expense. Had he done so, matters would no doubt have unfolded differently. The individual respondents must bear some of the blame for what ultimately transpired.

I make the following order:

1. The dismissals of Mr Mabuza and Mr Mahlangu were substantively unfair.
2. Mr Mabuza and Mr Mahlangu are awarded compensation in a sum equivalent to six months' remuneration, calculated at the rate of earnings of each as at the date of dismissal.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv Z Navsa

Instructed by: LDA Incorporated Attorneys

For the respondent: AP Brandmuller, Brandmuller Attorneys

[1] Administrator, Orange Free State & others v Mokopanele & others

[1990] ZASCA 69; 1990 (3) SA 780 (A); MM & G Engineering (Pty) Ltd v NUMSA & others (2005) 26 ILJ 1326 (LAC); and J Grogan Workplace Law (10 ed) 405-406.

[2] SA Workers Union (in liquidation) v De Klerk NO

(1992) 13 ILJ 1123 (A).

[3] Le Roux & Van Niekerk The South African Law of Unfair Dismissal (Juta 1994) at p196.

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