IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case no: J 886/97

In the matter between:

South African Scooter and Transport **Applicants**

and

Diane D Karras t/a Floraline **Respondent**

–

JUDGMENT

–

MLAMBO J

1. The individual applicants in this matter were all dismissed from their employment on 1 September 1997. They dispute the fairness of their dismissal and seek reinstatement as well as compensation. The pre-trial minute signed by the parties' representatives stipulates that the issue to be decided by the court is whether in terms of the Labour Relations act no. 66 of 1995 ("The Act") the individual applicants's dismissal was fair substantively and procedurally and if not whether they are entitled to compensation.

Background facts

2. On 6 August 1997 the individual applicants walked off the premises of the respondent alleging that a certain Wilson Nkuna ("Nkuna") had threatened them with death. It is not in dispute that Nkuna came to the premises of the respondent on 6 August 1997, that he was in possession of a firearm which was in full view of the public, that he was known to the respondent as the boyfriend to the respondent's domestic worker, Evelyn Moatshe, and that on that day (6 August 1997) the respondent had employed his younger brother Daniel.

3. The individual applicants allege that after being threatened by Nkuna they went to the offices of the union, the First Applicant, to seek help. They did not tender their services to the respondent on 7 August 1997 and indeed for the whole month of August 1997. On 7 August 1997 Mr Sibiya, the General Secretary of the union sent a letter to the Respondent. The letter, headed: "Death threats against our members by your evil forces on the 6 August 1997." stated:

"It has been brought to our attention that on 06 August 1997 at about 15h00 a men (sic) wielding or brandind (sic) a firearm entered your premises accompanied by your maid Evelyn and threatened to shoot all union members for having given you personal problems. This man did this in your presence and stated in your presence and that of the affected employees that he and the taxi owners and drivers from West Street branch will come at 17h00 (knocking off period) to do so.

As a result of these threats our members left your premises at about 16h00 before the arrival of the taxi people. The taxi they were using was identified by some of them and your maid left with the taxi. We are unable to send them back to your premises until such time that police and the relevant authorities including CCMA are notified and they have deliberated on the matter.

It has been your intention at all times to rid your company of these unioned employees. This is not the way to do it. We wait your urgent written guarantee and suggest an urgent meeting to be held at CCMA offices or alternative venue to discuss same and to find a speedy resolution which will guarantee the safety of our members, whom are all women. We wait to hear from you soon, by fax."

4. On 8 August 1997 respondent's legal representatives at the time responded, to the union's letter in the following terms:

"Concerning your letter dated 7 August 1997 addressed to my client and bearing the abovementioned heading. We wish to place on record that we have no knowledge of the allegations made by yourself in this letter. The real facts of the matter are that your union members as well as yourself (Mr M.K Sibiya) are threatening management members in many serious ways including threats to their lives. We therefore await your "urgent written guarantee" concerning the safety of non-union members, management staff including Miss D D Karras."

5. The respondent's legal representative sent a further letter to the union on 11 August 1997 stating :

" Your letter dated 7 August refers:

We have already dealt with your abovementioned letter in our letter dated 8 August 1997. However we wish to add the following as a further reply to your mentioned letter:

1.1_ Your version will be dealt with in an appropriate forum.

1.1_ 1.2_ Your **statement that "We are unable to send them back to your premises until such time that police and the relevant authorities**

including CCMA are notified and they have deliberated on the matte" is, in our opinion an attempt to create a wrong impression, distort the true facts and keep your members away from work. We have no objection that the police and/or a security company be present at my premises to ensure everybody's safety. It is our submission that management's as well as other employees' lives are at stake and the presence of the police will be welcomed. We wish to advice that your members' absence is illegal and serious and you are requested to instruct them to return to the premises under the protection of the police.

If they fail to return we intend to institute appropriate action. We await your reply by return of fax to my offices today, 11 August 1997."

6. Sibiya then referred a dispute to the Commission for Conciliation Mediation and Arbitration ("the Commission") for conciliation on 11 August 1997 describing the dispute as **"the intimidation and death threats with a use of a firearm against the individual applicants by the respondent's friends (Taxi operators) allegedly from West Street"**. Further correspondence ensued between the parties but no resolution was forthcoming.

7. On 29 August 1997 the respondent brought an application for an urgent interdict in this court seeking, inter alia, an order to compel the individual applicants to desist from what it termed an unprotected strike. A rule nisi was granted in the following terms:

"A rule nisi is hereby issued calling upon the 2**nd to 28th respondents to show cause on 15 September 1997 at 10h00, why an order should not be made:**

1.1_ Declaring the conduct of the 2nd to 28th respondents in refusing to tender their services to the applicant to constitute unprotected strike action for non-compliance with section 64 of the Labour Relations act 66 of 1995;

1.2 Directing the 2nd to 28th respondents cease forthwith the conduct referred to in 1.1 above;
1.3 That the orders in 1.1 and 1.2 above are to operate with immediate effect as an interim interdict, pending the return date;
1.4 The 1st to 28th respondents must pay applicant's costs, save relating to the 21 and 27 August 1997 which must be paid by the applicant;
1.5 The return date may be anticipated on 24 hours notice to the other party."

8. The individual applicants returned to the premises of the respondent on 1 September 1997 allegedly in compliance with the interim order granted on 29 August 1997. The Respondent alleges that they did not comply with the order because they failed to return to work on the afternoon of 29 August 1997 as the order was granted before 13h00. When the individual applicants arrived at the respondent's gates the situation was very volatile. The respondent alleges that the individual applicants arrived between 8h00 and 8h30 toyi-toying, singing, shouting, screaming and blowing whistles. According to the respondent, because of this conduct on their part, it denied them access into the premises and allegedly issued verbal warnings or ultimata that they would only be allowed entry if they behaved in an orderly and peaceful fashion. The Respondent's version of that morning's events is disputed by the applicants.

9. The Respondent's testimony suggests that the alleged verbal ultimata achieved nothing. As a result of this, so the Respondent's testimony suggests, a dismissal notice was issued. This notice is dated 31 August 1997 and reads:

"Your services are hereby terminated with immediate effect due to, amongst others, your participation in an illegal/unprotected strike.

See "Notice to Floraline Employees" attached."

The notice attached to the dismissal notice stated the following:

"1. **On Friday 29 August 1997, the Labour Court ruled that you are engaged in an unprotected, and therefore illegal strike.**

2. The Labour Court further awarded an order of costs against you (each of the respondents 3 to 28) and the union (SASTAWU) in respect of the application. The legal representatives of Floraline estimate that these aforesaid costs that will have to be paid by you and the union, to amount to approximately R 30 000-00.

3. The relationship between employer and employee is one of trust and confidence, and there is a duty on both to conduct themselves in a manner not damaging this relationship.

4. Your actions and replies in regard to the unprotected strike, and the replies by your union, were placed before the Labour Court.

5. Neither you, nor the union, denied these actions.

6. Your misconduct, poor work performance and unprotected and therefore illegal strike actions have therefore not been denied. The actions of your union representative have also not been denied.

7. The Appellate Division of the High Court/Supreme Court of South Africa ruled in the case CSIR v Fijen (1996) 17 ILJ 18(A) that if employees make themselves guilty of conduct that is in breach of the trust and confidence relationship which should exist between employer and employee, the innocent party is entitled to cancel the employment contracts.

8. In view of the above, your contracts of employment have been canceled with immediate effect.

9. Your dismissal notices will be handed to you outside the main gate of the premises of Floraline.
10.
11. Kindly note also that further action may be brought against your representative in the High Court/Supreme Court of South Africa.

WE REQUEST YOU TO RESPECT THE LAWS OF THIS COUNTRY AND TO LEAVE THE PREMISES OF FLORALINE AFTER YOU HAVE

RECEIVED YOUR DISMISSAL NOTICES IN A PEACEFUL AND ORDERLY FASHION."

10. On 23 September 1997 the return day of the rule nisi issued on 29 August 1997 the court discharged the rule nisi after reasoning that the conduct of the individual applicants on 6 August 1997 and thereafter did not constitute an unprotected strike.

Res judicata

11. At the commencement of the trial Mr Sibiya, the applicant's representative, argued interdict that all issues dealt with in the urgent interdict proceedings instituted by the Respondent on 29 August 1997 and 23 September 1997 were res judicata and as such could not be raised again for consideration by this court. The import of Sibiya's argument is that everything that happened before 29 August 1997 was finally decided on 23 September 1997 i.e. that the conduct of the individual applicants was not an unprotected strike. Mr Sibiya argued that the court should only be concerned with what happened on 29 August 1997 and thereafter. The court rejected Sibiya's submissions in this regard. The court ruled that, after all, the dispute before it involved the dismissal of the individual applicants on strike related issues. This is apparent from the correspondence exchanged between the parties. This also clearly appears in the notice of dismissal and the notice attached thereto.

12. It is common cause that the respondent did not appeal against the discharge of the rule nisi. It cannot further be said that the stance adopted by the respondent in the present proceedings is an attempt to undo the order of 23 September 1997. A reading of the response to the statement of claim reveals that the respondent mentions or refers to the incidents prior to the 29 August not to resuscitate its case as presented in the interdict proceedings and in pursuit of the relief it sought then. Whilst it is correct that the parties before this court are the same parties as in the interdict proceedings, the similarity ends here. The issue before this court is not the same and the relief sought by both parties is also not the same as that sought during the interdict proceedings. For these reasons the court rejected Mr Sibiya's argument. In any way the present proceedings are trial in nature where different considerations apply as opposed to application proceedings.

Reasons for the dismissal

13. The applicant's statement of claim alleges that the individual applicants were dismissed for alleged participation in an unprotected strike that started on 6 August 1997. Whilst the evidence presented by the respondent in this suggests that the individual applicants were not dismissed for participation in an unprotected strike, the response to the statement of claim states the following something different. It states:

"It is denied that the "individual applicants" reported for work on 31 August 1997. At no stage did the "individual applicant" tender their services to the employer after 6 August 1997. On the morning of Monday 1 September 1997 the "individual applicants" formed up outside the premises of Floraline in a rowdy and unruly manner. The assistance of BBR armed response and S.A Police Service had to be obtained to disperse them. The "individual applicants" (apart from Anna Mlombo who was in hospital) were dismissed as per the letters of dismissal together with a "NOTICE TO FLORALINE EMPLOYEES". The "individual applicants" were dismissed for **their participation in unprotected/illegal strike action, their misconduct, their poor work performance and because they made themselves guilty of conduct that is in breach of the trust and confidence relationship which is essential for the existence of an employer/employee relationship."**

14. Diane Karras, (the Respondent), testified that when the individual applicants arrived on the morning of 1 September 1997 they were rowdy, were toyi-toying, blowing whistles and were swearing and shouting. She testified that this conduct was the same she had endured from them over the past five months. She testified that she pleaded with them telling them about the interim interdict obtained on 29 August 1997. She testified that she could not allow them in her premises with that kind of behavior as they had previously issued death threats against her and her staff.

15. She testified that she made a call to her legal representative, Marike Bean, seeking advice. She states that she returned to the individual applicants and again appealed to them to behave properly but to no avail. She states that she informed them that they were engaged in an illegal strike. When her pleas did not work, she states that she telephoned BBR security for help and thereafter issued the dismissal notice with its attachment. The individual applicants then left and never

returned.

16. Under cross examination Karras stated that the individual applicants were dismissed for breaking the trust relationship with her as their employer, they did not tender their services, they were not dismissed only for their conduct from 6 August 1997. She stated that the dismissal was brought about by a culmination of a number of things over a period of time. She conceded that their participation in a strike was mentioned as part of the reasons for the dismissal. She refused to answer a question whether the individual applicants were also dismissed for anything they did prior to 6 August 1997. In reply to a direct question she stated that the individual applicants were not on strike on 1 September 1997.

17. The evidence on behalf of the individual applicants was given by Mr Mfamana, one of them. He testified that they arrived at work at about 8h00 in the morning. On their arrival the police, BBR Security officials and other unknown employees were there. He testified that at about 08h25 they moved towards the gates intending to work but the police and the BBR employees prevented them from going in. He testified that they were then given the dismissal notices and told never to return .

1.

18. In cross examination Mfamana denied that when they arrived at work on 1 September 1997 they were blowing whistles nor did he hear any being blown. He

admitted that Karras was there but stated that they did not speak to her. He conceded that Karras would have been justified not to open the gates if indeed the employees were rowdy, shouting, screaming, toyi-toying and blowing whistles.

19. The parties in their pleadings and in evidence tendered in this court went to extreme lengths to deal with the events of 6 August 997 and thereafter. The pre-trial minute also contains a number of clauses referring to the events of 6 August 1997 and thereafter. The issue to be decided by this court makes no reference to the events of 6 August 1997 and thereafter but refers only to 1 September 1997 and thereafter only to the extent that this court deems that to be relevant to the issues before it.

20. Mfamana testified that he is the one who was accosted by Nkuna on 6 August 1997. He stated that Nkuna told him to inform the other employees to stop demanding everything from the respondent. He testified that Nkuna told him to advise the other employees that he would come with others from the taxi rank to attack them. After Nkuna left, Mfamana testified that he informed other employees of this and they all became afraid and started screaming and ran out of the respondent's premisses to the union offices. Mfamana stated that they left the respondent's premises because they were afraid that Nkuna would carry out the threat to come with other taxi drivers to kill them. He also stated that Karras was aware of Nkuna's presence, and that she was told of the threat but did nothing

about it, hence they left the premises to seek assistance from the union.

21. Mfamana confirmed that a charge of pointing a firearm was laid with the police. He testified that they remained at the union's offices i.e. daily. He stated that because of the threat to their lives they would only go back to work under police protection and an order from the Commission. He confirmed under cross examination that he saw the letter sent to his union by the respondent's representative on 11 August 1997. He further conceded that from the day he saw that letter (11 August 1997) there was no further threat to their lives as the respondent had no problem with them coming to work with the police etc. He could provide no coherent explanation why they never returned to work thereafter save to state that Sibiya advised them not to go back to work.

22. As regards the alleged threat by Nkuna, it is correct that he went to the Respondent's premises on 6 August 1997 and that he wore a firearm visible to all and sundry. He was not called as a witness though he seems to have been available to depose to affidavits at the request of the Respondent. His girlfriend Evelyn testified that she was not present at the Respondent's premises on 6 August 1997. She was of no assistance as far as the threat was concerned. Her testimony is important in one respect and that is Mfamana confirmed that he did not see her at the Respondent's premises on 6 August 1997. The applicants allege in their statement of claim that Wilson was accompanied by Evelyn on 6 August

1997. Sibiya even put it to Karras, in cross examination that Johanna Mataboge, one of the individual applicants, would testify that Evelyn was present on 6 August 1997 when Wilson Nkuna issued his threats. This was also put to Evelyn when she testified Johanna Mataboge was not called to testify. The court is left with the uncontested evidence of Evelyn which is a way was confirmed by Mfamana stated that he did not see her there on 6 August 1997. Mfamana that he did not see her there on 6 August 1997. As a matter of fact Mfamana should have seen Evelyn because he is the one who saw Wilson arrive in his taxi and actually opened the gate for him.

23. It appears justified to find that Evelyn was not present at the Respondent's premises on 6 August 1997. Furthermore if indeed the individual applicants were threatened by Nkuna and were afraid to return to work it is strange that those in their midst who stayed at the Respondent's premises were not afraid to go back to the premises. This is the uncontested evidence of Karras. This leads the court to find that even though the individual applicants may have been threatened by Wilson Nkuna, it was not the kind of threat that justified their stay away from work particularly after 11 August 1997.

24. As far as the events of 1 September are concerned the evidence suggest that the individual applicants arrived en masse. Mfamana stated that they (individual applicants) arrived at 8h10 and at 08h25 they went to the gates intending to work.

Karras testified that they arrived in a group. Probabilities suggest that if they arrived as a group, given their rather acrimonious relationship, given the fact that the individual applicants had been away for about three weeks, it is possible that they did not arrive quietly. The court is therefore satisfied that they arrived singing and toyi-toying. Karras testified that she expected them to tender their services peacefully and therefore could not allow them inside her premises singing and toyi-toying . Given the state of their relationship this court accepts that Karras had indeed called the police and the BBR personnel to be at the premises that morning. The court therefore accepts Mfamana's evidence that when they arrived the police were there.

25. Karras states that she verbally communicated with the individual applicants to tender their services peacefully to no avail. Whilst it might be so that she did everything she says she did, at no stage did she contact Sibiya or anyone else from the union to intervene. After all she was well aware that they had a union representing them. In the court's view her failure to involve the union proves that she had reached the end of her tether with the individual applicants and their union. After all the applicants were responsible for taking the Respondent to the Attorney - General's office for underpayment of wages, they had taken her to the Commission in not less than four referrals, in her mind their stay away from work from 6 August 1997 was an unprotected strike, they failed to comply with the interim interdict by not coming to work on Friday 29 August 1997, therefore their

conduct on 1 September 1997 is what can be referred to as the straw that broke the camel's back.

26. Karras tried very hard in her testimony to shy away from the fact that she dismissed the individual applicants for taking part in an unprotected strike. When pressed about the reasons for dismissing the individual applicants she stated that she dismissed them for poor work performance in the past, for blowing whistles in her face, which she said was their conduct for the past five months, she testified that they had over the past five months degraded and humiliated her, she stated that she realized that the relationship had broken down completely and therefore she was not prepared to take them back, she then dismissed them.

27. There is no doubt in the court's mind that the true reasons for the dismissal of the individual applicants is that, in the Respondents mind, they had participated in an "illegal" strike from 6 August 1997. In the application for an urgent interdict the Respondent stated that:

1. **"It is submitted that the conduct of the union members, when <u>they walked off Floraline's premises on the afternoon of 6 August 1997 at approximately 16h00 and their failure to return to work constitutes an unprotected strike.</u> (My emphasis) The provisions of Chapter IV of the Labour Relations Act no. 66 of 1995 were never complied with and no attempts were made (according to my knowledge) to comply with Chapter IV of the Labour Relations Act..) In my opinion the actions of the union members from approximately 16h00 on 6 August 1997 amongst others were premeditated and were by no means in response to unjustified conduct by another party to the dispute. It is therefore my humble submission that they should not enjoy any protection since approximately 16h00 on 6 August 1997**

from the Honourable Court."

28. The dismissal notice dated 31 August 1997 mentions the fact that the reason for dismissal is, amongst others, participation in an illegal/ unprotected strike. The court is therefore satisfied that the Respondent dismissed the individual applicants for participating in an unprotected strike. Section 213 defines strike as:

"The partial or complete concerted refusal to work, or retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory."

29. The conduct of the individual applicants from 6 August 1997 fell short of qualifying as a strike in terms of the Act because it was not for the purpose of remedying a grievance or resolving a dispute regarding a matter of mutual interest between the parties. It is a moot point whether from 6 August 1997 they had a grievance (threat) which may bring their conduct within the definition of a strike in terms of the Act. However the situation changed after 11 August 1997 as their grievance was remedied. Du Toit & Others in **"The Labour Relations Act of 1995" 2nd edition at page 194** describing conduct which may be regarded as similar, states:

1. "The employees were simply exercising collectively their right to refuse to work and were not using the refusal as an economic lever to extract concessions from the employer"

This was the reason for the discharge of the rule nisi on 23 September 1997 and the finding by the court that the conduct of the individual applicants was not a strike.

Jurisdiction

30. The question that arises is whether this court has jurisdiction to adjudicate the matter. In this regard section 191(5)(b)(iii) provides that:

"(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is-
iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV."

Section 191 deals with disputes about unfair dismissals. In this case the dispute between the parties is about the fairness of the dismissal of the individual applicants and not about whether they were engaged in a strike.

31. The dispute that was referred to conciliation by the applicants was for an unfair dismissal for alleged participation in an unprotected strike. After all the certificate issued in terms of section 135 states clearly that the dispute related to the dismissal of the individual applicants for alleged participation in an unprotected strike. When conciliation failed the applicants did not refer the dispute to arbitration. They came to this court because of section 191(5)(b)(iii). The applicants' stance is rather ambivalent if not downright opportunistic.

Throughout their papers and in evidence they justify their stay away from work based on alleged fear. Nowhere do they deny that they were engaged in what the Respondent viewed as an unprotected strike. Their comment is simply to the effect that this court refused to declare their conduct to amount to a strike.

32. In the court's view the main issue, in this matter is, and for that matter in any dispute in terms of section 191, whether the dismissal was for a fair reason. It is correct that in determining this issue it must be established if the employees' conduct amounted to a strike. However the answer to this question is not always determinative of the question whether the dismissal was for a fair reason. Furthermore if it transpires during the court's deliberations that the alleged strike is in fact not one as defined in the Act it does not necessarily mean that the court should either refer the matter back to the Commission for arbitration or that the court should continue to determine the matter but as an arbitration.

33. In the court's view the division of section 191(5) into two parts is significant. Part (b) deals with disputes with a collective element and all disputes under this part must be referred to this court for adjudication. It cannot be that the purpose of this section is to accord jurisdiction to this court to deal only with those disputes where the conduct of the employees qualifies as a strike in terms of the Act and that other conduct, which also has an element of a collective withdrawal of labour, should be arbitrated by the Commission simply because that conduct

does not qualify as a strike in terms of the Act.

34. The conduct in both instances has one overriding element and that is the withdrawal of labour which has economic or financial consequences either way. It seems logical that the fairness of any dismissal arising from such conduct either way be determined by one forum. After all the considerations would be the same in determining the justifiability of the conduct in relation to the fairness of the dismissal irrespective of whether the conduct qualifies as a strike in terms of the Act.

The present case

35. In casu the fact of the matter is that the individual applicants engaged in conduct which prompted the Respondent to dismiss them. It therefore remains to be determined whether the Respondent was justified in dismissing the individual applicants. The court has already stated that there was no justification for the individual applicants to stay away from work on the basis of the alleged threat issued to Mfamana especially after 11 August 1997.

36. Despite the lack of justification for the withdrawal of labour from 6 August 1997 the Respondent elected to sit it out until it approached the court on 29 August 1997 for an urgent interdict. Having gone that route the Respondent could

only claim justification for dismissing the individual applicants if they did not comply with the interim interdict. Whilst it is correct that the individual applicants did not return to work in the afternoon of 29 August 1997 when the interim interdict was granted there is no evidence of any communication between the parties that afternoon.

37. The fact of the matter is that the individual applicants showed up at the Respondent's premises on 1 September 1997 after an absence of some three weeks. There is no dispute that the only reason they turned up was because of the interim interdict in particular clause 1.2 thereof ordering them to cease their conduct of refusing to tender their services. As already stated, the court accepts the testimony by Karras that they did not arrive quietly. According to Karras it is this rowdy and unruly behaviour of the individual applicants that eventually prompted her to dismiss them.

38. Karras testified that she did not allow the individual applicants to enter her premises whilst they were behaving in an unruly and rowdy fashion. The fact that employees sing, toyi -toyi, shout and blow whistles, in itself, does not lend justification to their dismissal. This conduct if accompanied by criminal conduct such as intimidation and violence could lend justification to a decision to dismiss. No evidence was led in this court that the so-called unruly and rowdy conduct of the employees was accompanied by criminal conduct.

39. Unruly and rowdy conduct could conceivably also justify a decision to dismiss if it takes place inside the premises of the employer. In this case it is common cause that the singing, toyi-toying and whistle blowing took place outside the premises of the Respondent. The court can therefore find no substantive justification for the dismissal of the individual applicants based on their collective absence and conduct on 1 September 1997. After all section 17 of the Bill of Rights in the Constitution of the Republic of South Africa Act no. 108 of 1996 guarantees the right to assemble and demonstrate.

40. The court also has a problem with the manner in which the Respondent went about implementing its decision to dismiss i.e. if the Respondent viewed their conduct as misconduct. The courts have stated in numerous decisions that when faced with a work stoppage, strike or collective misconduct an ultimatum couched in clear terms should be issued to the employees. The ultimatum should in clear terms warn the employees of the folly of their conduct and warn them that should they not desist from their conduct they face dismissal. They should be afforded sufficient opportunity to reflect on their conduct and the ultimatum. If there is a union that represents the employees it should be involved timeously and be given a sufficient opportunity to intervene. See Item 6 clause (2) of the Code of Good Practice: Dismissal. See also **National Union of Mineworkers & Others v Goldfields Security Limited (unreported Labour Court judgment) case no. J**

 None of these steps were implemented in this matter. Under the circumstances the court must therefore find that the dismissal of the individual applicants was also procedurally unfair.

41. In considering what relief is to be awarded to the individual applicants the court takes into account the fact that the relationship between the individual applicants and the Respondent has broken down completely. Their relationship is charecterised by acrimonious correspondence, aggression on both sides at any given point and general mistrust. The conduct of Sibiya and his union also did not help. Karras gave detailed evidence, which is uncontested of the extent of the breakdown of the relationship. In view of this state of affairs the court is of the view that it is not reasonably practicable for the Respondent to reinstate or re-employ the individual applicants.

42. The court must therefore consider what compensation should be awarded. In awarding compensation the court has taken into account the following factors.

42.1 The applicant did not delay in referring the dispute to the Commission and to this court.

42.2 The parties held a pre-trial conference on 5 December 1997 and the matter was enrolled for trial on 1 June 1998.

42.3 However on that date the court rejected the pre-trial minute as being defective and ordered another pre-trial conference.

42.4 The desired pre-trial minute was filed on 12 October 1998 and the matter was enrolled for trial on 24 February 1999.

42.5 However it could not be heard on 24 February 1999 and could only be accommodated on 16 March 1999.

42.6 In the court's view both parties are to blame for the period from 1 June 1998 to 2 October 1998 because they filed a defective pre-trial minute. This period will therefore be deducted from the compensation due to the individual applicants.

43. The period from the date of dismissal to the last date of the proceedings is 19 months and when 4 months are deducted (from 1 June 1998 to 2 October 1998) the balance is 15 months. As this is a dismissal that is both procedurally and substantively unfair the court deems it just and equitable to award each individual applicant twelve (12) months compensation save for Anna Mlombo who was not dismissed on 1 September 1997; and Thomas Moloi and Elizabeth Mndawe who, according to the uncontested evidence of the Respondent, were no longer employed by her on 1 September 1997. These individuals also failed to testify as to their status on 1 September 1997.

44. The order of the court is therefore:

1. The dismissal of the individual applicants was procedurally and substantively unfair.

2. The Respondent is ordered to pay compensation of twelve (12) months to each individual applicant save for Anna Mlombo, Thomas Moloi and Elizabeth Mndawe.

3. There is no order as to costs.

MLAMBO J

Date of judgment: 25 May 1999.

For the applicants: Mr M.K Sibiya of South African Scooter and Transport Allied workers Union.

For the Respondent: Mr B. Leech instructed by Fluxman Rabiwowitz- Raphealy Weiner.