THE LABOUR COURT OF SOUTH AFRICA,

DURBAN

Of interest to other Judges

Case No: D 343/2021

In the matter between:

BERNARD MLONDO & 35 OTHERS Applicants

and

ELECTROWAVE (PTY) LTD Respondent

Heard: 24 – 26 April 2023

Delivered: 18 May 2023

JUDGMENT

VAN NIEKERK, J

Introduction

[1] The applicants have referred a dispute to this court in terms of Rule 6, in which they contend that their dismissal for participation in an unprotected strike was substantively and procedurally unfair. The applicants seek reinstatement into their employment, on the same terms and conditions, with retrospective effect. The respondent contends that the applicants' dismissal was both substantively and procedurally fair, and that the referral ought to be dismissed, with costs.

The facts

[2] The first applicant, Mr B Mlondo testified on behalf of the applicants; Mr R Govender, the respondent's managing director, testified on behalf of the respondent. It is not in dispute that the respondent is engaged in the electrical services industry, and that the applicants were employed by the respondent until their dismissal in February 2021. The respondent had recognised the National Union of Metalworkers of South Africa (NUMSA) as a collective bargaining agent, and its primary engagement with the union was through the agency of a union official, Mr Maduna. At the relevant time, Mlondo and the second applicant Mbewe, were union shop stewards.

[3] The events that culminated in the applicants' dismissal must necessarily be seen in their historical context. Govender testified that the relationship between the union and the respondent was fraught, to the point that during August 2019, the parties agreed to embark on a relationship by objective (RBO) exercise, facilitated by Tokiso. That exercise culminated in a report, in which a number of objectives and solutions were identified. Among the items agreed was that the union would 'take all necessary steps to ensure that unprotected industrial action is avoided'. It was also agreed that the parties would commence negotiations on the terms of a recognition agreement. Govender attended the RBO exercise, as did Mdondo and Mbewe.

[4] On 19 September 2020, the applicants engaged in a strike. An ultimatum was issued, and the striking employees returned to work. On 21 September 2020 the respondent and the shop stewards, including Mlondo and Mbewe, concluded an agreement. It is not in dispute that the agreement provided, among other things, for a job grading system plan to be completed by the end of January 2021, and a 5% wage increase with effect from 1 October 2021. Govender testified that the respondent was largely dependent on a single client, Nokia, and that the wage increase was paid over and above the earlier industry-wide increase in circumstances where the respondent felt held to ransom by the striking employees.

In regard to the agreement on the job grading system, employees had complained about disparities in salary and sought equal pay for equal work, regardless of factors such as length of service, experience, and the like. Govender's undisputed evidence was that the respondent had submitted a job grading plan to NUMSA in December 2020, and received no response. In October 2020, the respondent proceeded to issue final written warnings for participation in the strike on 21 September. That action prompted another unprotected strike. After further discussion, it was agreed to pend the matter of the final written warnings which after further discussion with the union, were eventually issued on 19 December 2020. During the course of the same month, the respondent gave notice of a possible retrenchment. Govender testified that there was little work coming in, and that the respondent was suffering significant losses. One of the contributing factors was the wave of unprotected strikes, some for strikes in the previous two years, all of which impacted on the respondent's reputation as a reliable supplier. In response to the section 189 (3) notice, the CCMA appointed a facilitator who met with members of the respondent's management, union officials and shop stewards on 17 December 2020. At that meeting, the union requested audited financial statements from the company. On 8 January, the union was advised of the respondent's intention to introduce short time, and to halt the job grading exercise, given the consultations on possible retrenchments. The union was invited to consult on the introduction of short-term on 11 January 2021. A meeting took place on 13 January 2021 when it was agreed that short time would be introduced with effect from 20 January to March 2021, in accordance with a schedule that had been the subject of discussion with Maduna. At the same meeting, Govender explained why the job grading plan had been put on hold.

[5] The plan agreed with Maduna was that if he (Maduna) would address employees on 18 January 2021 to explain the plan regarding the implementation on short time. On 18 January, Maduna was not available and requested Govender to have the shop stewards explain the short time plan to affected employees. Govender testified that he met with the shop stewards, including Mlondo, in his office at the respondent's premises on 18 January 2021.

[6] Govender stated that on 19 January 2021, he was working from home when he received a call from Russell Knight, who advised him that employees were on strike and demanded to speak to him (Govender). Govender advised that employees should put their grievances in writing and that he would discuss these with him when work resumed. Reference was made by both witnesses to a handwritten document dated 19 January 2021, signed by Mlondo and Mbewe, and recording a number of demands, including a concern that the time frame for the implementation of the job grading system 'have 12 days remaining as per agreement'.

[7] On the same morning, 19 January 2021, the respondent issued a first ultimatum requiring the striking employees to resume normal duties by 9:00. The ultimatum contained a clause to the following effect:

> Despite the contents of this ultimatum or any discontinuing of the strike for any reason whatsoever, the company expressly reserves its rights to take disciplinary action, which may include dismissal, against those employees who participated in the unprotected strike in the first place.

[8] A second ultimatum, in similar form and requiring employees to resume normal duties by 10:00 was issued at approximately 9:00. A third and final ultimatum was requiring employees to resume their normal duties by 11:00. The employees failed to respond to the ultimatum and between 13:00 and 13:30 the respondent issued letters of suspension pending the outcome of an investigation to be conducted by the respondent. Govender referred to a transcription of the discussion held at the time with the shop stewards, including Mlondo and Mbewe, in terms of which the shop stewards were advised that employees had been suspended on full pay but were required to be available and contactable during working hours. The shop stewards were advised that the notice to attend a disciplinary hearing which was handed to them was not applicable to shop stewards, since a separate disciplinary process was to be initiated after the respondent had engaged with the union. Employees were advised that they were entitled to be assisted at the

disciplinary hearing by a fellow employee, and that no outside representation would be permitted. The shop stewards were specifically advised that they were allowed to represent employees. The transcript was not challenged, nor was any of Govender's evidence in relation to the transcript.

[9] On 20 January 2021, the consultation was held with Maduna and the shop stewards. The union was advised that the disciplinary hearing would be chaired by an independent party. The arrangements for the format of the hearing were discussed, having regard to Covid-related constraints. Again, the union was advised that the disciplinary hearings for shop stewards would be conducted separately. The chair of the hearing had proposed that a group hearing be convened. After much discussion on the format of the hearing and rights to representation, Govender advised Maduna that the respondent's policies and procedure permitted representation by a fellow employee, but for shop stewards in which case representation by a union official was permitted. Govender reiterated that the disciplinary hearing for employees would proceed on that basis, and that a separate hearing would be conducted for the shop stewards on 25 January 2021, at which Maduna would be entitled to represent them. The discussion concluded with agreement between the respondent and Maduna on these terms.

[10] The disciplinary hearing of the employees, excluding the shop stewards, commenced on 22 January 2021. At the outset, it was proposed that since the boardroom could not accommodate all of the affected employees, limited numbers of employees (including the shop stewards) would be permitted to remain in the boardroom, with other employees located within the premises, in the warehouse, with access to a big-screen TV on which the proceedings would be streamed. This proposal was rejected by the shop stewards who with the employees, elected to leave the meeting. The hearing continued in their absence and Govender presented the respondent's case. Russell Knight gave evidence regarding events leading up to the strike and the strike itself. On 26 January 2021, the chairperson made a finding to the effect that the employees had committed an act of serious misconduct, and that the penalty of summary dismissal was warranted.

[11] In the interim, on 25 January 2021 and 2 February 2021, the disciplinary hearing in respect of Mlondo and Mbewe was conducted. Govender testified and a member of the human resources department sat in the hearing as an observer. Govender testified that he was cross-examined by Maduna, after which the hearing was postponed to 2 February 2021. On that date, Maduna did not arrive, and the shop stewards stated that they had heard rumours that he had retired. They nonetheless wished to represent themselves. The hearing continued on that basis and at the end of it, after considering aggravating and mitigating factors, on 4 February 2021, the chairperson dismissed both Mlondo and Mbewe for participation in an unprotected strike.

The issues

[12] In regard to substantive fairness, the applicants aver in the statement of claim that the respondent decided to implement short time without consultation, that this amounted to a unilateral change to the applicant's terms and conditions of employment, that the respondent, 'unilaterally decided to implement job grading in five years' time in breach of a collective agreement concluded on 19 September 2020 'that job grading shall be finalized by the end of January 2021' and that in so doing, the respondent 'provoked the applicants to engage in a work stoppage on 19 January 2021 which he labelled as a strike'. The applicants further averred that the three ultimatums issued by the respondent are unlawful in that even if there were to be a return to work within the period stipulated by the ultimatum, employees could nonetheless be disciplined. On this basis, the applicants appear to contend that the ultimatums were illegal and invalid. The applicants contend further that since the final written warnings issued to them on 21 September 2020 contained the same terms, those final written warnings were unfair.

[13] In regard to procedural unfairness, the applicants contend that the advice given to them that they could be represented only by a fellow employee with no outside representation was unfair. In particular, the applicants aver that the

respondent's refusal to allow them to be represented by their trade union in the form of Mlondo and Mbewe was unfair, given that they were accused of the same misconduct. Finally, the applicants averred that their own hearings were unfair since the NUMSA official Maduna advised them that he intended to be an observer in the disciplinary hearing in circumstances where he participated in the hearing, 'by making adverse confirmation of things to ensure that applicants were found guilty'.

[14] Counsel for the applicants attempted to make something of the wording of the ultimatum, and in particular the reservation of rights to discipline even in the event of a return to work. This was not raised in the statement of claim as an issue in dispute, but there is in any event no merit in the point. I fail to appreciate why an employer ought not to be permitted to reserve its rights to discipline even in the event of compliance with its terms. The situation may well be different where a dismissal follows compliance with an ultimatum, but in the present instance, there was no compliance.

[15] In summary, the issues in dispute are whether there was a strike on 19 January 2021; whether any strike that took place was unprotected; whether any strike that took place was provoked by the respondent's conduct; whether the ultimatums issued prior to the dismissal were fair; and whether the disciplinary hearings conducted in respect of those applicants excluding Mlondo and Mbewe were fair; and whether the later hearing in respect of Mlondo and Mbewe was fair.

Analysis

[16] I deal first with the issue of the existence or otherwise of a strike. Mr Sibisi, the applicants' representative, submitted that the applicants had recorded in their statement of case that they had a meeting '*during working hours'*. In its statement of response, this was denied by the respondent. Specifically, Mr Sibisi submitted that in law, the meeting thus took place outside working hours, and that '*this therefore*

means that the Applicants held a meeting outside working hours which could be during their lunch time.' The effect of the respondent's denial, so the submission went, is that the meeting was held outside of working hours, meaning that there could be no strike, since there was no obligation at the time to attend at work.

[17] There is no merit in this submission. The paragraph that is denied by the respondent is one that avers that the applicants had a meeting during working hours because some applicants were not going to report for duty on Wednesday, 20 January 2021, and because other applicants were stationed in different working sites and were to go to those sites immediately after the meeting. Appreciated in this context, the respondent's denial does not amount to an admission that any meeting that the applicants may have held was conducted outside of working hours. In any event, and to the extent that the pleadings may be ambiguous, a draft pre-trial minute sent to the respondent's representatives for signature, a proposed clause 8, to the effect that applicants held their meeting outside working hours, was deleted by the respondent's representative and reintroduced under the heading 'Facts that are in dispute'. The pre-trial minute as amended and initialled thus records that whether the applicants held a meeting inside or outside working hours is an issue in dispute. The applicants made no objection to this amendment.

[18] The submission made by Mr Sibisi that there was no strike is nothing short of disingenuous, particularly in the light of the applicants themselves having pleaded that in a space of seven months, they participated in no less than three unprotected strikes, the last being the subject of the present proceedings. Even more disingenuous is the submission made, for the first time in the heads of argument filed on behalf of the applicants, that there was no strike because the applicants did not meet to '*pursue any grievance or force the Respondent to accede to a particular demand*'. In their statement of claim, the applicants plead the following:

> 2.22 Russel knight (sic) requested Applicants to put their grievance in writing so that he will give them to Mr Rueben Govender to address them.

> 2.23 Applicants then put the grievances in writing dated 19 January 2021 and gave them to him when he left the meeting.
>
> 2.24 Applicants in the above-mentioned grievance raised only three items in their list of grievances which they requested Respondent toe-resolve with them. The first one was short time, the second was the repayment of TERS money deducted from salaries of team leaders to benefit the respondent without they (sic) consent and the third one was the timeframe for the completion of each operating system.

[19] There could not be a clearer articulation of the demands in support of the applicants' withdrawal of labour. Further, and in any event, the applicants' statement of case contains a clear concession that applicants had embarked on an unprotected strike. Clause 2.4 of the statement of claim reads as follows:

> In a time period of just seven (7) months, Respondent by his actions forced the Applicants to engage in three unprotected strikes. The first one was on 20 July 2020 and the second one was on 21 September in which the Respondent issued all employees who participated in it with final written warnings. The third and last one which led to the dismissal of the Applicants took place on 19 January 2021.

[20] For all of these reasons, the applicants' attempts at the late stage of trial to deny the existence of a strike stand to be rejected. On their own version, the applicants participated in an unprotected strike. The applicants' appeal to provocation as a justification for their conduct sits uneasily with a defence that amounts to a denial of a strike. Be that as it may, and to the extent that the applicants rely on provocation as a basis to claim that their dismissals were unfair, the existence and extent of any provocation stands to be determined, and the fairness of the dismissals assessed.

[21] The legal principles are clear. 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.

[22] The Labour Appeal Court 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).)

[23] In the face of a clear legislative policy to reward compliance with the statutory dispute resolution mechanisms, caution ought to be exercised to maintain the distinction between protected and unprotected strike action and avoid any blurring of the lines. An appeal to provocation is one of the not uncommon means whereby exculpation is sought against the consequences of flouting the carefully crafted procedures that seek to maintain industrial peace. While it is correct that a court ought properly to take into account conduct by an employer which may serve to excuse any failure by employees to refer their dispute to the statutory dispute

resolution mechanisms, the threshold is set high. For employees to escape the ordinary consequences of participation in an unprotected strike by way of provocation, the conduct by the employer must be egregious, and there must be some substantial justification proffered to excuse a failure to comply with the applicable procedures.

[24] To the extent that the court has been presented with two versions which, to a significant extent, discloses a material dispute of fact, I have no hesitation in accepting Govender's evidence above that of Mlondo. Govender's evidence was not seriously challenged in cross-examination, and the applicant's counsel's reliance on matters allegedly not put to Govender during his evidence in chief (not all of them true) does not in any manner detract from Govender's credibility. On the other hand, Mlondo was often evasive. He was a poor witness, who in many respects, contradicted the version deposed by the applicants in the statement of claim. For reasons that are not apparent, the statement of claim was filed in the form of a notice of motion with the statement signed by the applicant's attorneys as well as Mlondo. Mlondo is thus not in a position to plead ignorance of the applicants' pleaded case. However, in many fundamental aspects, including the existence or otherwise of a strike, as well as the grievances giving rise to the strike itself, Mlondo's evidence stood in stark contrast to what the applicants had pleaded as facts. I have no doubt that significant portions of Mlondo's evidence were contrived in his effort to legitimise what had previously been considered as an unprotected strike. For example, Mlondo's evidence that Govender summoned him and Mbewe to his office on 19 January 2021 to give them notice of the plan to implement short time, this evidence ignores a meeting held on 13 January 2021 when the decision to introduce a short time on account of the shortage of work and financial stability of the respondent was specifically discussed. This meeting was followed up by an email addressed to the union on 15 January 2021, of which Mlondo must have been aware. Mlondo was ultimately forced to concede that it was at the retrenchment facilitation meeting held as early as 17 December 2020 when Maduna had spoken about the prudence of implementing short time as a means to avoid retrenchment, and when he had requested audited financial statements to justify retrenchment. Mlondo was also

forced to concede that the job grading proposal prepared by the respondent was emailed to the union on 15 December 2020.

[25] The most startling inconsistency in the applicants' case relates to the issue that they say gave rise to a withdrawal of labour on 19 January 2021. This aspect of the applicants' claim is pivotal to their contention that the respondent's conduct provoked that withdrawal. The applicants plead as follows:

> 3.1.1 Respondent decided to implement short-term on a very short notice without consulting the applicants.
>
> 3.1.2 This amounted to unilateral change to the applicant's terms and conditions of employment.
>
> 3.1.3 Respondent unilaterally decided to implement job grading in 5 years' time.
>
> 3.1.5 This was in breach of a collective agreement entered into on 19 September 2020 that the job grading shall be finalized at the end of January 2021.
>
> 3.1.5 By so doing, Respondent provoked the Applicants to engage in a work stoppage on 19 January 2021 which he labelled as a strike.

[26] Mlondo's evidence was that the crucial issue for the shop stewards was the grading system and in particular, that the grading system discussed in September 2020 was 'not finished'. The collective agreement reached in September 2020 provided no more than that the job grading plan was to be completed by the end of January 2021. As I have indicated, Govender's undisputed evidence was that the proposal had been put to the union in December 2020, and that no response had

been received from the union. Further, in the light of the proposed retrenchment and the introduction of short time, the respondent had specifically proposed that discussions about the job grading system be pended on account of the prospect of retrenchment. I fail to appreciate how in the circumstances it can be said that the respondent provoked any unprotected strike on the issue of job grading. In the first place, the collective agreement provided only that the job grading plan was to be completed by the end of January 2021. The unprotected strike took place on 19 January 2021, in circumstances where the respondent had submitted a plan to the union for its consideration (with no response from the union) and where it had discussed on 13 January 2021 its proposal to put the job grading plan on hold on account of the retrenchment exercise. At the time the strike occurred, the deadline for the completion of the job grading plan had not yet expired. The ball was in the union's court, and had been for a month.

[27] The present case is not dissimilar to *Modibedi & others v Medupi Fabrication (Pty) Ltd* (2014) 35 *ILJ* 3171 (LC), where the court (per Thlothlalmaje AJ) said the following:

> [76] In my view, the respondent had reached a point where it had to draw a line in the street fight picked by the applicants. It had come to a point where it had to confront the bullies head on after all the efforts it had made to appease them had failed….
>
> [77] …In my view, they [the applicants] had in the light of the importance of that project, misjudged their own importance and the vulnerability of the respondent, hence they had embarked on their path of seeking confrontation. At no point during these proceedings had any of their witnesses showed any form of contrition or acknowledged their wrongdoing. Instead, the applicants sought to absolve themselves from any wrongdoing and pointed the finger at the respondent for every misfortune that has befallen them. …in the end, the bully that started the street fight cannot claim to be a victim when it comes second best in that fight.

[28] The applicants showed no regard for the statutory dispute resolution processes – indeed, they conducted themselves as if they did not exist. They were aware of the respondent's vulnerability by virtue of its exposure to a single client and sought to exploit that. All of the efforts made by the respondent to secure labour peace by way of the RBO exercise, the conclusion of a recognition agreement and engagement with the union in the form of Maduna were frustrated by the applicants, and in particular Mlondo and Mbewe, who preferred to resort to extra-statutory methods to secure the ends they sought.

[29] In regard to fair procedure, it is not in dispute that the respondent engaged the services of an independent party to conduct a hearing into the allegation of misconduct levelled against the employees, and separately in respect of Mlondo and Mbewe. It is not in dispute that Mlondo and Mbewe were present at the employees' hearing, and that they withdrew from the hearing when they refused to accept that not all employees could be accommodated in the boardroom where the hearing was conducted, with limited access to the boardroom and remote access by the remaining employees in the warehouse.

[30] As indicated above, the applicants' specific complaints regarding procedural fairness are first, that the advice given by the respondent that employees could be represented only by a fellow employee and that no outside representation would be permitted was unfair; and secondly, that Maduna's advice to the shop stewards that he intended to sit in their hearing as an observer only and his subsequent participation in the hearing was procedurally unfair.

[31] In regard to the first issue, I accept Govender's evidence that the format of the hearings was discussed extensively with Maduna, and that he had been advised (and accepted) that the shop stewards would represent the employees at their hearing convened on date. This version is consistent with the documentation and in

particular, the transcript of the discussion with Maduna, the content of which was not challenged. The respondent's position is also consistent with the terms of its disciplinary code and procedure. On the second issue, the applicants' complaint is one against the union, not the respondent. It is in any event false. I accept Govender's evidence that the hearing convened in respect of the shop stewards was conducted by an independent party, and that on the first day of the hearing, he gave evidence and was cross-examined by Maduna. I also accept that on the second day of the reconvened hearing, in Maduna's absence, the shop stewards elected to represent themselves, and that the hearing proceeded and was concluded on this agreed basis. There was in any event no evidence to support the averment that Maduna limited his role to that of an observer, or that his participation in the hearing extended to ensuring the shop stewards were found guilty. The documentary record of the hearing and Govender's evidence indicate the opposite.

[32] In summary: for the purposes of items 6 and 7 of the Code of Good Practice, the applicants' contravention of the LRA was serious, they made no attempt whatever to comply with the Act, their strike was not in response to any unjustified conduct by the employer, the applicants were aware that an unprotected strike was an act of misconduct for which they may be disciplined, they were aware that they had final written warnings for the same offence, and they were afforded a right to be heard prior to dismissal. I find therefore that the dismissal of the applicants was both substantively and procedurally fair. Their referral thus stands to be dismissed.

Costs

[33] The court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. Ordinarily, the court does not make orders for costs against aggrieved employees, who misguidedly but in good faith, pursue legitimately felt grievances against their employers. The present case does not fall into that category. The applicants pleaded a case that was not the case presented in court, and their representative persisted, to the point of

heads of argument, arguing a case that stood in stark contrast to what had been pleaded. In *SA Breweries (Pty) Ltd v Louw* (2018) 39 ILJ 189 (LAC) at para 4 the LAC had the following to say regarding the status of pleadings:

> [4] To state the obvious, litigation is complex. Among the duties of legal practitioners is to conduct cases in a manner that is coherent, free from ambiguity and free from prolixity. True enough, the holy grail of translating what is complex into simplicity is not always attainable, but the ground rules are irrefrangible: say what you mean, mean what you say and never hide a part of the case by a resort to linguistic obscurities. The norm of a fair trial means each side being given unambiguous warning of the case they are to meet. Moreover, these requirements are not mere civilities as between adversaries; the court too, is dependent upon the fruits of clarity and certainty to know what question is to be decided and to be presented only with admissible evidence that is relevant to that question. Making up one's case as you go along is an anathema to orderly litigation and cannot be tolerated by a court. Counsel's duty of diligence demands an approach to litigation which best assists a court to decide questions and no compromise is appropriate.

[34] Judge Seegobin of the KwaZulu-Natal High Court recently wrote an article (R Seegobin 'Restoring dignity to our courts: The duties of legal practitioners' *Ground Up*, 14 September 2022) in which he addressed role that legal practitioners are required to play in restoring dignity and decorum to our courtrooms. He quoted from the speech entitled 'The Duty owed to the Court – Sometimes Forgotten', in which an Australian judge, the Hon. Marilyn Warren AC, highlighted a practitioner's duty to the court:

> The lawyer's duty to the court is an incident of the lawyer's duty to the proper administration of justice. This duty arises as a result of the position of the legal practitioner as an officer of the court and an integral participant in the administration of justice. The practitioner's role is not merely to push his or her client's interests in the adversarial process, rather the practitioner has a duty to assist the court in the doing of justice according to law.

> The duty requires that lawyers act with honesty, candour and competence, exercise independent judgment in the conduct of the case, and not engage in conduct that is an abuse of process. Importantly, lawyers must not mislead the court and must be frank in their responses and disclosures to it. In short, lawyers "must do what they can to ensure that the law is applied correctly to the case".
>
> The lawyer's duty to the administration of justice goes to ensuring the integrity of the rule of law. It is incumbent upon lawyers to bear in mind their role in the legal process and how the role might further the ultimate public interest in the process, that is, the proper administration of justice. As Brennan J states,'[t]he purpose of court proceedings is to do justice according to the law. That is the foundation of a civilized society.'
>
> When lawyers fail to ensure their duty to the court is at the forefront of their minds, they do a disservice to the client, the profession and the public as a whole.

[35] There is little point making an order for costs against the applicants. Mlondo testified that he has been unemployed since the date of his dismissal. The applicants' representatives, on the other hand, ought properly to account for their conduct of the trial. In particular, I am concerned that the applicants had themselves pleaded that they participated in unprotected strike on 19 January 2021, denied the existence of a strike in the pre-trial minute and perpetuated that denial throughout the trial, to the point, as I have indicated, of a repetition of that denial in the heads of argument. Further, the case pleaded was that the applicants had received final written warnings for participation in an unprotected strike on 21 September 2020. In his evidence, Mlondo denied the existence of the final written warning, a denial that the applicants allowed to stand. Further, the applicant's representative sought to raise issues regarding the admissibility of the recognition and procedural agreement (a document recorded in their own schedule of documents), and raised irrelevant and unnecessary arguments concerning the pre-trial minute. All of this was a desperate attempt to backpedal on concessions already made and served to present a contrived version of the facts to the court. The case presented by the applicants was, in the words of Sutherland JA, 'made up as they went along' with scant regard for the pleadings, and with no regard to the obligation to present a case in a manner '*coherent, free from ambiguity and free from prolixity*'. The applicants'

representatives failed to conduct themselves in accordance with the standards described in *Louw* and by Judge Seegobin. They ought thus to be liable for at least a portion of the respondent's costs, payable on a punitive scale.

I make the following order:

1. The referral is dismissed.

2. The respondent is awarded fifty percent (50%) of its taxed costs, to be paid *de bonis propiis*, on the scale as between attorney and client.

André van Niekerk
Judge of the Labour Court of South Africa

Appearances:

For the applicants: Adv MG Sibisi

Instructed by: Ngwenya Attorneys

For the respondent: Mr B Mgaga, Garlicke and Bousfield Inc.