

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 13501/04
CASE NO. 13502/04

In the matter between:

L. NGCOBO N.O. (M. NDLELA)
M. MKHIZE

FIRST PLAINTIFF
SECOND PLAINTIFF

and

FOOD AND ALLIED WORKERS UNION

DEFENDANT

JUDGMENT Delivered on 03 April 2012

SWAIN J

[1] The case before me, reduced to its essentials, is a claim for the payment of damages by the defendant, allegedly suffered by the plaintiffs, as a consequence of an alleged failure by the defendant to refer a claim by the plaintiffs, against their erstwhile employer Nestle South (Pty) Limited (Nestle) for their alleged unlawful dismissal, to the Labour Court for determination. Separate actions were instituted by both plaintiffs against the defendant based upon the same cause of action. The actions however served before me, as a consolidated action with the plaintiffs being reflected as first and second plaintiffs respectively.

[2] It should be noted that as a consequence of the death of the first plaintiff (the deceased) before the matter came to trial one Lungi Ngcobo, the duly appointed *executrix* in the estate of the deceased, was substituted for the deceased, as the first plaintiff, in terms of Rule 15 (3). I will however for the sake of convenience in this Judgment, refer to the plaintiffs, and the first plaintiff in particular, as if the deceased was still a party to the present litigation.

[3] A determination of the claim of the plaintiffs, requires a resolution of the following issues:

[3.1] Were the plaintiffs members of the defendant Trade Union at all material times?

[3.2] Was an agreement of mandate concluded between the plaintiffs and the defendant, for the defendant, *inter alia*, to refer the plaintiff's claim against Nestle for unlawful dismissal, to the Labour Court?

[3.3] If such an agreement of mandate was concluded, what were its express, alternatively, implied terms?

[3.4] Did the defendant breach the agreement of mandate?

[3.5] If the defendant did breach the agreement of mandate, does such breach render the defendant liable to compensate the

plaintiffs for any damages suffered by the plaintiffs, regard being had to the following further issues.

[3.5.1] Was the defendant entitled to resile from and renounce the agreement of mandate? If so, what effect does such a right, have upon any previous breach of the agreement of mandate by the defendant?

[3.5.2] Is the action by the plaintiffs premature, as a consequence of the plaintiffs' failure to advance their claim themselves, in the Labour Court?

[3.5.3] Do the plaintiffs lack *locus standi* to sue the defendant?

[3.5.4] Is it against public policy to hold the defendant liable in damages to the plaintiffs?

[3.5.5] Would the plaintiffs have succeeded in the Labour Court in their claim for unlawful dismissal against Nestle?

[3.6] Whether the plaintiffs have proved the quantum of their damages?

[4] Were the plaintiffs members of the defendant trade union at all material times?

[4.1] The second plaintiff gave evidence that after he and the

first plaintiff formed the view that Nestle may want to dismiss them in February/March 2002, they decided to approach the defendant, with a view to re-instating their membership. They both went to the offices of the defendant in the Nedbank Building in Albert Street, Durban and met one Mike Masondo who gave them documents to complete which were membership forms, similar to the form appearing at page 172 of Bundle “D”. They completed the forms together using the same table at the offices of the defendant and gave the forms to Mike Masondo. Mike Masondo then told them that they were full union members and that monies would be deducted from their salaries. When asked whether the forms that they had completed, contained a similar provision to that appearing in the Bundle, authorising Nestle to deduct the monthly subscription from their salaries, he said he could not remember the precise terms but would say yes to the question, because they both had in their possession their payslips with their employee numbers. When deductions were not made from their salaries at the end of the month they went back to the defendant’s office, where they were assured that since they had completed the forms, the Constitution of the defendant guaranteed them membership.

[4.2] When cross-examined Mr. Pillemer, who appeared for the defendant, put it to the second plaintiff that the defendant accepted that the second plaintiff had come to the union office, but contended that the deceased and the second plaintiff had been chased away. He also put to the second plaintiff that he was chased away for two reasons:

- (a) the correct procedure of approaching a shop-steward to

apply for membership had not been followed and

(b) at that stage he had already been dismissed.

[4.3] What was put by Mr. Pillemer, namely that this occurred after the plaintiff's dismissal, resulted in an objection by M/s Nel, who appeared for the plaintiffs. The objection was that this was inconsistent with an admission the defendant had made in response to a request for further particulars at a Rule 37 Conference. The plaintiffs had asked the defendant, whether it was the defendant's contention, that each plaintiff was never a member of the defendant. The answer given was "yes" and it was alleged that "the plaintiffs were not members and definitely not paid up members. In amplification the plaintiffs applied for union membership shortly before being dismissed". A further question asked was "why does the defendant deny that each plaintiff was a member of good standing" to which the reply was "plaintiffs never paid Union subscription fees".

[4.4] Mr. Pillemer's response was initially to ask for leave to withdraw the admission that the application for membership was made by the plaintiffs "shortly before being dismissed". When I pointed out to him that such an application would have to be motivated properly, he agreed to give the matter further consideration. He then put to the second plaintiff, that there would be evidence that the said Mike Masondo's name had changed to Mike Nala and that he had chased the plaintiffs away, because they were not following the correct procedure to apply for membership and it was disputed that he had accepted their application forms for membership. This then elicited a further objection from M/s Nel, that the basis upon

which the defendant denied that the plaintiffs were members in good standing, was solely on the basis that they had not paid subscription fees. After a great deal of debate between Mr. Pillemer and myself as to the meaning of these admissions, Mr. Pillemer indicated he would not be bringing an application to withdraw the admissions. At a later stage he then put to the second plaintiff, that because the defendant was bound by the admission, he put to the second plaintiff that he was chased away by Mike Nala before he was dismissed. He then put to the second plaintiff that he had thereafter managed to get the relevant application forms, which were delivered to the defendant's offices at a later date.

[4.5] Under cross examination the second plaintiff agreed that he had never paid any subscription fees and that there should have been three deductions of monthly subscriptions after he said they had become members. When he received his payslip he noticed that the deduction had not been made and went to the defendant's office, to find out why. He did not make any attempt to pay the subscription, because he was told by the defendant not to worry and once the paperwork was in order, the deductions would be made. Mr. Dlomo was the representative of the Union, who had assured them that they were members and they should not worry that the deductions had not been made. He agreed that he did not do anything further, when the deductions were not made for the second and third months, because of the assurance he had received. He believed that when the deductions were made, they would include the arrear deductions and said it was always his intention to pay the subscription fees. He agreed that he realised once he had been

dismissed by Nestle, that no subscription fees could be deducted from his salary, but said he had gone to the defendant's office after he had been dismissed, but he was never told he had to pay the arrear subscription fees. If he had been told, he would have paid them.

[4.6] It was put to the second plaintiff that the defendant's version was that after he had been sent away from the offices of the defendant, because he had not followed the correct procedure, the second plaintiff must have obtained the application forms from somewhere else, because they were placed in Mr. Dlomo's pigeon hole. The second plaintiff disputed this and said "Dlomo never said that he suddenly discovered the forms".

[4.7] Mr. Pillemer then put the following to the second plaintiff "there will be evidence that these were not going to be accepted, as you were not employed - let me re-phrase that; there will be evidence that these were not going to be accepted, partly because it was at that time the wrong procedure to have brought it to the Union's office". The second plaintiff disputed this.

[4.8] Mr. Pillemer then put it to the second plaintiff, that there would be evidence that Mr. Sam Mashiloane, the national negotiator at the time, put pressure on the regional representatives to argue that the plaintiffs were members, even though the regional representatives were of the view that they were not. The second plaintiff's response was that the regional office should have advised them of what Mashiloane had said, because they were dealing with the regional office throughout.

[4.9] Mr. Pillemer also put it to the second plaintiff that under pressure from Sam Mashiloane, Mr. Dlomo argued before the CCMA that the plaintiff's were members of the Union. There would be evidence that Mr. Dlomo under pressure from Sam Mashiloane had also been told to back-date the application forms, to support the application in the CCMA, that the plaintiffs were members of the Union at that date. The second plaintiff replied that the plaintiffs did not know anything about that.

[4.10] When Mr. Dlomo gave evidence he agreed when M/s Nel put it to him, that he had been sitting in Court throughout the previous proceedings and heard it being put to the second plaintiff, that the plaintiffs had been chased away because they came at a point in time after their dismissal. M/s Nel then asked him to comment on what was put to the second plaintiff and what his version was now. His reply was that he had first seen the application forms, possibly a week before the plaintiffs' final date of employment.

[4.11] Because the answer given did not explain the inconsistency in the two versions, I explained to Mr. Dlomo what he he was being asked to comment upon. His answer was that it was wrong to say they were chased away because they were already dismissed. It was however correct to say that Mike Nala had refused to give the application forms to the plaintiffs, because it was clear that a retrenchment was under way "which was very much near". He consequently offered no explanation for the inconsistency.

[4.12] Mr. Dlomo agreed that he had also heard it being put to the second plaintiff, that he had been instructed to backdate the forms. He said he had been told to do this when they were to attend the hearing at the CCMA. He said he had been told by Sam Mashiloane that they had to assist the plaintiffs, because he was fighting with Mashiloane and refusing to assist the plaintiffs. He said he was told by Sam Mashiloane "Comrade Dlomo, I told them not to put a date, please put a date on it".

He said he could not remember what date he had put on the forms, but that no date had been filled in by the plaintiffs.

[4.13] However when the second plaintiff had given evidence, he said that they had dated the application forms, which evidence was never disputed.

[5] In my view, the following conclusions may be drawn from this evidence.

[5.1] Mr. Pillemer was instructed by Mr. Dlomo that he had been told by Mr. Masondo/Nala (who Dlomo said was since deceased) that one of the reasons, that Masondo had refused to accept the application for membership by the plaintiffs, was because at that stage, the plaintiffs had already been dismissed. There would have been no reason for Mr. Pillemer to clearly put such a version if that was not his clear instruction, which could only have emanated from Dlomo.

[5.2] While sitting in Court Dlomo heard the exchange between Counsel and myself regarding the admission that had previously been made by the defendant, that the plaintiffs had applied for membership, shortly before being dismissed and the statement by Mr. Pillemer that he would not seek a withdrawal of the admission. When giving evidence Dlomo therefore changed his version, in order to make it consistent with what the admission was.

[5.3] I find the inference irresistible that this occurred, when regard is had to Dlomo's evidence that he had been told by Sam Mashiloane to back-date the application forms. A need to back-date the application forms, could only be consistent with the original version advanced, namely that the plaintiffs had applied for membership after their dismissal and to give credence to such a version. That no back-dating of the forms took place is supported by the evidence of the second plaintiff that when the application forms were signed by the plaintiffs they dated them, which was never disputed. The evidence by Mr. Dlomo that Sam Mashiloane told the plaintiffs not to date the application forms, was clearly a fabrication to deal with the impossibility of back-dating application forms, which had already been dated by the plaintiffs.

[5.4] The significance of the date placed upon the application forms, becomes apparent when regard is had to Dlomo's evidence that "it is the date of joining when, you sign your signature and you put a date".

[6] I therefore have no hesitation in rejecting Dlomo's evidence that he was told by Mike Masondo that the plaintiffs' applications for

membership had been rejected and in accepting the evidence of the second plaintiff, that Mike Masondo accepted the application forms and told the plaintiffs that they were full members.

[7] In coming to this conclusion, I do not overlook that during argument, Mr. Pillemer drew my attention to a further Rule 37 Minute dated 13 May 2009 in which the following is recorded:

“The defendant declined to admit that both of the plaintiffs completed and signed defendant’s membership application form during February 2002 to the defendant’s satisfaction”.

As I understood his argument it was that by virtue of the fact that it was common cause, that the date of the plaintiffs’ dismissal was 15 May 2002, the defendant’s refusal to make such an admission, indicated that it made no admission that the forms were received before dismissal. This of course does not explain why on 23 November 2008 the defendant made the positive assertion that the plaintiffs applied for membership shortly before being dismissed and why Mr. Pillemer put it to the second plaintiff, that the plaintiffs applied for membership after they had been dismissed. I am therefore satisfied that this additional statement, has no bearing upon the conclusions I have reached.

[8] I now turn to consider whether the statement by Mike Masondo, that the plaintiffs were full members of the defendant, was justified

in terms of the defendant's constitution, and whether the non-payment of subscriptions by the plaintiffs, had any bearing upon this issue.

[8.1] Clause 6.2.2 of the Constitution of the defendant (Exhibit "F") provides as follows:

"An applicant shall be deemed to be a member of the Union on completion of the application form accompanied by a signed stop order form unless the REC (Regional Executive Council) resolves to refuse membership to such applicant. The REC shall consider such application within a reasonable time".

[8.2] Clause 6.5.1 of the Constitution provides *inter alia* that

"Active members shall pay weekly, fortnightly or monthly subscriptions fees".

[8.3] Mr. Vusumuzi Landu, who was employed by the defendant as the head of its legal department, conceded under cross-examination that in terms of Clause 6.2.2 of the Constitution of the defendant, when an individual complies with the provisions of this clause he/she is deemed to be a member of the defendant. He also conceded that if the defendant wished to refuse membership to an applicant, it would have to advise such an applicant in writing of the refusal, together with reasons for such refusal, in accordance with the provisions of Clause 6.2.3 of the Constitution, which provides as follows:

"An applicant to whom admission to membership is refused shall be notified in writing together with reasons for such refusal and shall be entitled to a refund of

the membership fee paid by him/her upon application”.

The need for such notification is to enable the applicant to exercise a right of appeal to the National Executive Council of the defendant from the decision of the Regional Executive Council, as provided for in Clause 6.2.4 of the Constitution. No evidence was led by the defendant that membership by the plaintiffs was refused in such a manner.

[8.3] Landu agreed under cross-examination that once the plaintiffs had been dismissed by Nestle, they would not have to pay any subscriptions to the defendant. He also agreed that in terms of Clause 6.3.2.1 of the Constitution of the defendant, if the member concerned was more than thirteen weeks in arrears with his/her subscriptions as result of “any other reason which is beyond the member’s control” the member would nevertheless be deemed to be a member in good standing.

[8.4] It is therefore necessary to examine the evidence concerning the non-payment of subscriptions by the plaintiffs, which I have touched upon in paragraph [4.5] above. The second plaintiff gave evidence that the plaintiffs had applied for membership around February/March 2002. When cross-examined he said he would say it was between February and March, but that he was not sure. Dlomo’s version however was that he was told by Mike Masondo that Mike Masondo had previously chased the plaintiffs away (as dealt with above) when Dlomo found the application forms in his pigeon hole, in the offices of the defendant. Dlomo said he put the forms aside and a week later the plaintiffs arrived at the defendant’s

office with a letter of termination, detailing the benefits they would enjoy after the retrenchment. According to Dlomo this was a week before the effective date, which it is common cause was 15 May 2002. Dlomo said that at this meeting the plaintiffs told him that Sam Mashiloane, the national negotiator for the defendant, had told them to approach Dlomo. Dlomo said he disputed that the plaintiffs were members and tried to contact Mashiloane to confirm what the plaintiffs had said, without success. The plaintiffs then left the offices without “a common understanding on their message from Sam”. A few days later he got hold of Sam who confirmed he did speak to the plaintiffs. Dlomo said he had a big fight with Mashiloane because Dlomo was of the view that the plaintiffs were only joining because they were “running away from the retrenchment”. Dlomo said the plaintiffs returned to his office after they had been retrenched, because Mashiloane had advised them to do so, to obtain his assistance in referring the matter to the CCMA. The second plaintiff denied however having any contact with Mashiloane. The second plaintiff agreed that on 06 May 2002, when the plaintiffs were issued with the letters of retrenchment, they went to the offices of the Union where they met with Dlomo, who read the letters of retrenchment and told them to come back after they had been retrenched, which they did. They spoke to Dlomo and he started completing the referral forms to the CCMA.

[8.5] According to the second plaintiff after the plaintiffs had been told by Mike Masondo that they were members they had gone back to the offices of the defendant, because the subscriptions had not been deducted from their salaries at the end of the month. He

said he could not remember who they spoke to, but they were assured that since they had completed the forms the Constitution of the defendant guaranteed their membership. When they met with Dlomo during May 2002 at no stage did he say the defendant would not act for the plaintiffs because they had not paid their subscriptions. When cross-examined the second plaintiff said that there would have been three deductions from his salary and because they were paid on the twenty-fifth of the month, when he received his payslip he noticed that it had not been deducted. He therefore went into the offices of the defendant to find out why the deductions were not made. He did not make an attempt to pay that amount to the defendant, because he was told by the defendant not to worry and once the paperwork was in order the deductions would be made. When asked who at the defendant who had told him that, he replied that it was difficult to remember all the defendant's officials, but the person he was constantly in touch with was Dlomo, who assured the plaintiffs they were Union members. Second plaintiff was then asked whether it was Dlomo who had told him not to worry about his subscriptions not being deducted, to which he replied in the affirmative. He stated that after the second deduction was not made on the twenty-fifth of the following month he did not do anything, because he expected that once the deductions were made they would include all of the arrear deductions. He said he expected this because they said that he should not worry. After the third month when no deductions were made he did nothing for the same reason. In cross-examination he was then asked whether once he was dismissed, he realised that no subscription fees would be deducted from his salary, to which he replied in the affirmative.

[8.6] In considering where the truth lies in these competing versions, I have of course already rejected Dlomo's version that the applications for membership by the plaintiffs, were rejected by Mike Masondo. This conclusion necessarily gives the lie to Dlomo's evidence that the application forms were unexpectedly discovered by him in his pigeon hole, linked as this discovery was, to the contemporaneous explanation by Mike Masondo, that he had previously chased the plaintiffs away. Where the versions are consistent however, is in the fact that the plaintiffs met with Dlomo after they had been given their retrenchment notices and met with him again after they had been retrenched. Of significance however is that on the defendant's version, the non-payment of subscriptions by the plaintiffs could have had no bearing upon their status as members, because it was only after the plaintiffs' dismissal that the defendant was prepared to assist them, which gave rise to the alleged need to back-date the application forms. It is therefore inexplicable why the defendant averred, as set out in paragraph 4.3 above, that the defendant denied the plaintiffs were members of good standing because they "never paid Union subscription fees". What this does illustrate is the same lack of consistency in the defendant's version of events. I accordingly reject the defendant's version of these events.

[8.7] The fact remains however, that on the plaintiffs' version, three monthly subscriptions, each due on the twenty-fifth day of each month, were payable in February, March and April 2002. As at the date of dismissal, being the 15 May 2002, none of these

subscriptions were more than thirteen weeks in arrears, and the plaintiffs were accordingly as at the date of dismissal, members of the defendant in good standing. By virtue of the fact that after their dismissal, they were not obliged to pay any subscriptions, their status as members could not be affected by any subsequent non-payment of subscriptions.

[8.8] In any event, Landu conceded that if what the second plaintiff had said was true, namely that he had been assured that he should not worry about the non-deduction of subscriptions, as they were being processed, then the plaintiffs could not be faulted. Consequently, the non-payment of the subscriptions was beyond the control of the plaintiffs within the meaning of that clause, as contained in Clause 6.3.2.1 of the Constitution.

[9] I accordingly find that the plaintiffs have discharged the *onus* of proving on a balance of probabilities, that they were members of the defendant in good standing, at all material times.

[10] **Was an agreement of mandate concluded between the plaintiffs and the defendant, for the defendant, *inter alia*, to refer the plaintiffs' claim against Nestle for unlawful dismissal, to the Labour Court.**

[10.1] The second plaintiff gave evidence that after the plaintiffs had been retrenched, they spoke to Dlomo, who

completed the forms for the referral of their matter to the CCMA. After the matter remained unresolved at the CCMA, Dlomo said that the matter would be referred to the Labour Court, because the certificate that was given to them at the CCMA, entitled them to go to the Labour Court. Second plaintiff said that after the CCMA hearing, they went to the defendant's office where the legal advisor was. Whilst at the office the legal advisor saw the letter that had been written to the second plaintiff dated 12 April 2002 by Nestle, thanking him for his efforts and advising him of an increase in his salary. The legal advisor then offered to take over the case, saying that it was a very easy case. The deceased had been provided with a similar letter by Nestle. The legal advisor offered to take over the case and continue with it in Durban, but Dlomo said he had been advised by Head Office that these cases concerning Nestle had to be consolidated, because there were some cases in Johannesburg, that had not been referred to the CCMA. Once the cases had been consolidated they would be referred to the Labour Court. During 2003 second plaintiff saw the document at pages 15 – 17 in Exhibit "B", which was a consolidated statement of case to the Labour Court under Case No. JS 1128/02.

[10.2] As pointed out above, Dlomo's version was that after the plaintiffs had been retrenched they returned to the defendant's office as Sam Mashiloane had advised them to return for assistance in having their matter referred to the CCMA. If the matter was not resolved at the CCMA, Dlomo would have to forward to him a certificate of non-resolution, for him to consolidate all the matters from the different provinces. Dlomo said this was told to him by the

plaintiffs. Dlomo then telephoned Sam Mashiloane who confirmed what the plaintiffs were telling him. After the matter was not resolved at the CCMA and a certificate of non-resolution was issued by the Commissioner, he said to the plaintiffs that he would fax the certificate to Sam Mashiloane according to his instructions. Dlomo then returned to his office, the plaintiffs did not accompany him and he faxed a copy of the certificate of non-resolution to Mashiloane. Dlomo said that there was no legal officer employed by the defendant in Durban at the time. After that he was no longer dealing with the matter, but the plaintiffs would come into his office to check on the progress of the matter. He would tell them that all that he knew was that Sam Mashiloane was to consolidate the matters, assisted by the legal officer stationed at the Gauteng provincial office, by the name of Tami Thukani.

[10.3] Despite the contradictions in these versions, it is common cause that the defendant agreed to assist the plaintiffs by providing legal assistance to them by timeously referring the plaintiffs' dispute with Nestle concerning their dismissal, to the CCMA and if unresolved, thereafter timeously to the Labour Court for determination.

[10.4] No challenge was raised by the defendant as to the authority of either Dlomo or Mashiloane, to agree to assist the plaintiffs in this way. Landu said that in this case Dlomo was the organiser and Tami Thukani according to Dlomo, was the legal officer at the Gauteng provincial office, who would assist Sam Mashiloane to consolidated the matters and refer them to the

Labour Court.

[10.5] In this regard a defence raised by the defendant was that the matter was referred to the CCMA in error, due to a misapprehension that the plaintiffs were members of the defendant. In the light of my finding that the plaintiffs were members of the defendant at the relevant time, there is no basis to the assertion that the referral was made in error.

[10.6] Mr. Pillemer however submitted that it was the defendant's case that it is superficial to treat the relationship between the plaintiffs and the defendant, where the defendant provides legal assistance to members on matters related to their employment as "a mere contract of mandate and import the essentialia of such a contract as being implied terms of the contract between member and Union". In addition, he submitted that any actions done by the defendant in this matter, derived from membership and did not amount to a contract of mandate but one governed by the defendant's Constitution. The ordinary rules of mandate or agency do not apply to the Union/member situation, where the Union has to take a view on the membership as a whole, with the result that individual members may be prejudiced or benefited in the process, and by decisions made by the Union from time to time. According to Mr. Pillemer the Union has to do what is best for the Union and its membership generally. The Union official acting in such a situation has as his first interest the Union and its general membership, and not the interests of the individual members, on whose behalf it may be acting.

[10.7] The cause of action as pleaded by the plaintiffs

was that the plaintiffs were members of the defendant and/or the defendant agreed to act on behalf of and in the interests of the plaintiffs, in accordance with Section 200 of the Labour Relations Act 66 of 1995 (LRA). It was further alleged that “express, implied and tacit terms of the plaintiffs’ membership with the defendant alternatively the agreement of mandate pleaded in paragraph [4.2], were”; and a number of terms governing the relationship are then alleged. The cause of action advanced by the plaintiffs, consequently contemplates the situation where the defendant acts on behalf of the plaintiffs as members, where the terms governing this relationship are determined by the status of the plaintiffs as members.

[10.8] The legal consequence of the registration of a trade Union in terms of Section 97 (1) of the LRA, as in the case of the defendant, is that it is a Body Corporate and acquires legal personality. It is an independent legal subject distinct in law from its members and officials

Lawsa Vol 13 Second Edition para 343

The defendant cannot perform anything legally which is not provided for in its Constitution and the terms of the Constitution, determines the nature of the relationship between the defendant and its members.

Lawsa supra at 344

The function of the Constitution of a Trade Union is to determine the rights and obligations of members of the Trade Union towards each

other and as regards outsiders.

Lawsa *supra* at 347

[10.9] Clause 5.11 of the Constitution of the defendant, provides as one of the aims and objectives of the defendant “to provide legal assistance to members and/or officials where it deems it in the interests of the Union to do so”.

Clause 9.8.9 of the defendant’s Constitution, in the context of detailing the duties of the Shop Stewards Committee provides as follows:

“To at the request of an employee in the workplace, assist and represent an employee in grievance and disciplinary proceedings as well as at bargaining councils and CCMA”.

Clause 20.6.12 of the defendant’s Constitution, in the context of detailing the powers of the National Executive Council, provides as follows:

“To provide legal assistance to members on matters related to their employment”.

[10.10] Section 200 (1) of the LRA provides as follows:

“A registered Trade Union or registered employers organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party

- a) In its own interest.
- b) On behalf of any of its members.

- c) In the interest of any of its members”.

[10.11] The defendant consequently has the power in terms of its Constitution to provide legal assistance to its members, on matters related to their employment. In providing such assistance it may act in any of the ways specified in Section 200 (1) of the LRA. However the capacity in which it acts in any particular case, has to be determined by reference to the particular facts of that case.

[10.12] The facts that are relevant to a consideration of this issue are as follows. According to Landu, the officials at regional level would have the power to entertain such an application by a member for assistance, and if they were of the view that there was merit in the matter, to refer the matter to the CCMA. The approval of a legal officer of the defendant would then be necessary to refer the matter to the Labour Court. If the legal officer was of the view that he/she was competent enough to deal with the matter, he/she would do the referral. If however the legal officer did not feel confident enough to deal with it, the legal officer would consult with the witness, to seek permission for the matter to be referred to “outside lawyers”. If the witness was satisfied that they had a strong case and that he was not competent to deal with the case, outside attorneys would be instructed to deal with the matter. The importance of determining the prospects of success in any matter was dictated by the fact that the defendant’s financial resources were derived solely from subscriptions by members. As regards litigation for members, he agreed that it was primarily in the interests of the member, but with the Union having a more general interest. The interests of the defendant in pursuing litigation on

behalf of a member lay not only in determining whether the member had a good case, but also a broader public interest where a large number of members were involved in a dispute with their employer. In the latter case, as long as the opinion that the defendant received from its lawyers was a 50/50 chance of success, they would proceed with the case. The inference to be drawn is that a decision by the defendant whether to commit financial resources to litigation on behalf of members, involves a consideration of the prospects of success, as well as the number of members involved. He agreed that the referral to the CCMA was done as “FAWU obo Michael Mkhize and Mandla Ndlela” and that in doing so the defendant acted in its own interests and the plaintiffs’ interests. When referred to the provisions of Section 200 (1) of the LRA he was of the view that the defendant was acting in the interests of the defendant and also on behalf of the members.

[10.13] I find it unnecessary for the just decision of this case to categorise the relationship between the plaintiffs and the defendant as one of mandate and as a result of such categorisation, imply terms governing their relationship, consistent with the legal concept of mandate. It is sufficient for present purposes, as I have already found, that the defendant agreed to assist the plaintiffs, by providing legal assistance to them by timeously referring their dispute with Nestle to the CCMA and thereafter timeously to the Labour Court.

[11] What were the obligations of the defendant in agreeing to assist the plaintiffs by providing legal assistance?

[11.1] Landu gave evidence that once the defendant had decided to offer legal assistance to a member in a dispute with an employer, there could be no expectation on the part of a member, that the defendant would offer such assistance to its conclusion. This was because the defendant had to assess the case from time to time, and if the defendant was advised that they did not have a case, it would be entitled to withdraw its assistance.

[11.2] Landu agreed that the Regional Office and the National Office knew that a referral to the Labour Court, would have to take place within ninety days of the certificate of non-resolution of the dispute, being issued by the Commissioner in the CCMA, in terms of Section 191 (11) (a) of the LRA. He agreed that it would be a “fair expectation” of a member that where the defendant decided no longer to give such assistance to a member, during this period, it would do so at a time when the member would be able to obtain an alternative source of assistance, to comply with this time period. He agreed that it appeared to be the case that nobody had told the plaintiffs during this ninety day period that the defendant was no longer proceeding with their case. He also agreed that if a member did not hear anything from the defendant, it was fair for the member to expect, that his case would be referred to the Labour Court within the period of ninety days and that the defendant was proceeding with the matter, until they informed them otherwise. Landu agreed it would never be fair if the defendant agreed to give legal assistance to a member, and when asked about progress, the member was told not to worry as the Labour Court takes a long time, and after

two years, advised the member that he had no case and the matter had never been referred to the Labour Court. He also agreed that the plaintiffs were entitled to assume during the two year period, that the Union was referring their matter to the Labour Court, if they were told that their matter was being handled at the Labour Court. In this regard second plaintiff gave evidence that the plaintiffs visited Dlomo at the defendant's offices for the whole of 2002 and 2003, at least twice a week to find out the progress of their case. They were told by Dlomo that the Labour Court was full, but they must not panic as their case would be dealt with. Dlomo agreed that the plaintiffs would come to the defendant's offices to check progress. At times they would make appointments, at other times they would simply arrive. The only answer he said he gave them, was that all that he knew was that Sam Mashiloane was to consolidate the matters assisted by Tami Thukani, the legal officer. He denied however telling them that the matter was being attended to, that the Labour Court takes a long time and that they must not worry.

[11.3] As stated by Brand J A in

City of Cape Town (CMC Administration) v Bourbon-Leftley
2006 (3) SA 488 (SCA) at para 19

“A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such a term if it had been suggested to them at the time”

Christie – The Law of Contract in South Africa 6th Ed page 177

[11.4] In a well known and oft quoted *dictum* Corbett AJA (as he then was) set out the approach to the implication of a term in a contract in the case of

Alfred McAlpine & Son (Pty) Ltd.

v

Transvaal Provincial Administration

1974 (3) SA 506 (A) 531 – 532

in the following terms:

“.....an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties”.

[11.5] When regard is had to the duty of the defendant when acting on behalf of and in the interests of the plaintiffs, to also have regard to its own interests and by extension the interests of other members of the defendant, I am satisfied that if it had been suggested to the parties at the time the defendant agreed to afford legal assistance to the plaintiffs, that the defendant would be entitled to withdraw such assistance, if advised that the plaintiffs did not have prospects of success, the parties would necessarily have agreed upon such a term. It is quite clear on the evidence that the defendant has to consider the interests of all of its members, when allocating time and funds in support of legal assistance, being offered to certain members. It must accordingly be entitled to resile

from an undertaking to provide legal assistance, where it is advised that there are no prospects of success.

[11.6] I am equally satisfied that the time at which the defendant is entitled to resile must be opportune, regard being had to the ability of the member to prosecute his/her claim at that time, without being prejudiced. Such an obligation would include the obligation to rectify any omission by the defendant in the interim in providing legal assistance, which prejudiced the prosecution by the plaintiffs of their claim. When regard is had to the evidence that the plaintiffs are lay persons seeking to advance a claim for unfair dismissal against Nestle, a large corporation with huge resources to marshal strong legal representation, and without legal assistance their prospects of success would be extremely remote, I am satisfied that the parties would necessarily have agreed upon such a term. Equally, if at the stage the defendant seeks to withdraw its assistance, it has failed to perform its obligation to timeously refer the plaintiffs' matter to the Labour Court, it must take whatever steps are necessary to discharge that obligation. Of significance in this regard is that by letter dated 20 November 2003 (Exhibit "B20") a legal officer of the defendant, Lucky Makae, accepted that the defendant was obliged to apply for condonation, on behalf of the plaintiffs, as a consequence of the defendant's failure to refer the plaintiffs' matter to the Labour Court.

[11.7] I have already found that the plaintiffs have proved on a balance of probabilities that the parties agreed that the defendant would refer the plaintiffs' alleged unfair dispute timeously to the

CCMA for resolution and if the dispute remained unresolved, timeously refer the plaintiffs' alleged unfair dismissal dispute to the Labour Court for determination.

[11.8] I am also satisfied that the implied term I have found established is consistent with the defendant's allegation in paragraphs 17.3 – 17.7 of its plea, that a term of the agreement was that the defendant would provide legal assistance to members, where it deems it in the interest of the defendant to do so and having been furnished with a legal opinion that the plaintiffs did not enjoy prospects of success in the Labour Court, would be entitled to resile from the agreement, if it was not in the interests of the defendant to proceed with the prosecution of the plaintiffs' claim, in the Labour Court.

[11.9] I am also satisfied that the further implied term I have found established is consistent with the plaintiffs' allegations in paragraphs 4.1 and 4.2 of the plaintiff's replication. Recognising that I have explicitly not sought to imply terms in the agreement between the parties, which are consistent with those found in an agreement of mandate, I am nevertheless fortified in my finding that the implied terms in question form part of the agreement, by the following common law principles in the Law of Agency. It is clear that the mandatory is entitled to renounce the mandate and following renunciation

“the mandator has no claim for damages if he has suffered no loss, or if any loss which he has suffered is attributable to his own neglect to take reasonable steps to protect himself”.

Kerr – The Law of Agency 3rd Ed page 251

The learned author quoting Pothier adds the following:

“This is the position when the mandatory renounces *res integra* i.e. ‘at a time when the mandant still has the opportunity to carry out the business forming the subject of the mandate himself, or easily to find another person who will agree to take it on’ “.

The business forming the subject of “the mandate” by the defendant was a timeous referral of the plaintiffs’ case to the Labour Court. At the time of renunciation by the defendant the plaintiffs no longer had the opportunity to do that. Their ability to carry out such business was therefore dependant upon the consent of a third party, being the Labour Court, as well as the assistance of the defendant, for reasons which I will set out below.

[11.10] I find it unnecessary to consider whether the plaintiffs have established any of the remaining terms alleged in plaintiffs’ particulars of claim, except that I will in due course deal with the allegation that it was a term of the agreement, that the defendant would provide proper legal advice regarding any settlement proposals by Nestle. The issue of whether Nestle made a settlement proposal at the CCMA hearing, is pleaded as a distinct cause of action and I will deal with it as such.

[12] Did the defendant breach the agreement to provide legal assistance to the plaintiffs, to pursue their claim for unfair dismissal against Nestle?

[12.1] It is common cause that the defendant never referred the plaintiffs' case to the Labour Court. In fact the evidence is that between 18 June 2002, being the date when the certificate of non-resolution of the dispute before the CCMA was issued until April 2004, when the defendant advised the plaintiffs that the defendant was no longer prepared to assist the plaintiffs, the only step taken by the defendant to advance the case of the plaintiffs was the drafting of a statement of case in the Labour Court dated 22 October 2002 (Exhibit "B" pgs 15 – 17). Landu agreed that this was in excess of the ninety day period and was consequently already out of time.

[12.2] The second plaintiff stated by reference to a letter dated 20 November 2003 (Exhibit "B" pg 20) that the plaintiffs had met with Lucky Makae, a legal officer at the defendant on 19 November 2003, who advised them that the matter had been assigned to him on 02 June 2003, at which stage it was clearly out of time. Makae advised them that it was imperative that an application for condonation for the late filing of the application for review in the Labour Court, be brought. He also advised them that an affidavit by Tami Thukani, the former legal officer who was dealing with the matter, was "central and imperative" to the application for condonation. He said he had travelled to Bloemfontein to trace him, but the said Thukani did not have any medical reports to include in the condonation application. He added that he was waiting for contact from Thukani, before he would proceed with the application for condonation.

[12.3] Dlomo gave evidence that Thami Thukani was sick and had been hospitalised for many months and during this time no-one had access to his office. The files that were in his office were left unattended for a long time, until attorney Jay Surju was asked to check the files, and as a consequence Surju produced an opinion (Exhibit “B” pgs 28 – 40) in April 2004, in which he concluded that the retrenchment of the plaintiffs was not unfair. He also concluded that the defendant was not obliged to “pursue each and every matter to the last court of recourse in South Africa”.

[12.4] As a consequence of this view, the defendant advised the plaintiffs that it was not prepared to continue with their case. The plaintiffs consequently consulted attorneys who wrote to the defendant on 04 June 2004, advising that they intended instituting an action for damages, as the defendant had been negligent in dealing with the plaintiffs’ matter. In addition, the defendant was afforded a period of two weeks within which to file the necessary statement of case and bring an application for condonation “as quite clearly the reasons for the failure to file the statement of case would be in FAWU’s knowledge”. No response was received to this demand and by letter dated 07 June 2004, the plaintiffs’ attorneys again wrote to the defendant, requesting a response as to whether the defendant was going to file an application for condonation. No response was received to this letter, summons was issued on 23 August 2004 and in response, attorney Surju alleged that the plaintiffs were never members of the defendant and the plaintiffs were invited to withdraw the action.

[12.5] It is therefore clear that the defendant breached the obligation to refer the plaintiffs' case timeously to the Labour Court. In addition, it breached the obligation to take whatever steps were necessary to rectify its failure to carry out this obligation, by bringing an application for condonation, at the time when it became entitled to resile from the agreement, by virtue of the opinion it had received.

[13] Before dealing with the issue of whether the plaintiffs are entitled to claim damages from the defendant, as a consequence of the defendant's breach of the agreement, it is necessary to deal with the plaintiff's claim that in breach of the defendant's obligations, the defendant advised the plaintiffs not to accept an offer of compensation, equivalent to twelve months remuneration from Nestle in settlement of the plaintiffs' dispute. It is alleged that the defendant acted negligently in doing so, because a reasonable Trade Union official, exercising the requisite degree of care and skill, would have advised the plaintiffs to accept the offer.

[14] There is a direct dispute of fact between the evidence of the second plaintiff and Dlomo, as to whether such an offer was made by the representative of Nestle at the CCMA hearing, one Berlin Nayager. However, Berlin Nayager was called by the defendant and denied that he had made any such offer on behalf of Nestle. He said the making of such an offer would be tantamount to his admitting that the entire consultation process had been flawed internally within Nestle, that they admitted that they were wrong,

that they did not consult properly and sought to make amends by offering the maximum compensation of twelve months. He stated that he would have been dismissed from Nestle if he had made such an offer, because he did not have the authority to make such an offer.

[15] As regards his lack of authority he explained that Nestle was part of a multi-national company and when it came to job losses and employment practices, because three hundred job losses were involved in the exercise, the Head Office in Switzerland would have to be satisfied that a proper procedure was in place. His superior was in Australia and that person's superior was in Switzerland and there was consequently a chain of authority that had to be followed. He was consequently not permitted to make any such offer.

[16] I find Nayager's reasons why he did not make any such offer plausible and I accordingly find that the plaintiffs have failed to discharge the *onus* of proving that such an offer was made. It consequently becomes unnecessary to consider the plea of prescription, that was raised by the defendant in this regard.

[17] Is the plaintiffs' claim against the defendant premature on the ground that the plaintiffs have at all material times been able to the necessary steps to pursue their claim against Nestle?

[17.1] The defendant alleges that at all material times, it was open to the plaintiffs to bring an application for condonation in the Labour Court and unless they do so and the application is refused, the plaintiffs do not have a complete cause of action against the defendant.

[17.2] The short answer to this issue is that I have found that it was part of the defendant's obligation, to rectify any default in the performance of its obligations, which prejudiced the plaintiffs in the referral of their case to the Labour Court, existing at the time when it became entitled to resile from the agreement, by bringing the necessary application for condonation. The need to bring an unsuccessful application for condonation in the Labour Court, consequently forms no part of the plaintiffs' cause of action against the defendant.

[17.3] In any event, it is clear that in order to obtain condonation in the Labour Court, the plaintiffs would have to show "good cause".

Premier Gauteng v Ramabulana
2008 ILJ 1099 (LAC) 1111 para 15

In order to show "good cause" the following factors would be considered:

[17.3.1] The degree of lateness or non-compliance in relation to the prescribed time frame.

- [17.3.2] The explanation for the lateness or the failure to comply with the time frame.
- [17.3.3] Prospects of success or *bona fide* defence in the main case.
- [17.3.4] The importance of the case.
- [17.3.5] The respondent's interest in the finality of the Judgment.
- [17.3.6] The convenience of the Court.
- [17.3.7] Avoidance of unnecessary delay in the administration of Justice.

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v

Pretorious

2008 ILJ 318 (LC) 322 paragraphs 17 - 22

[17.4] These factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Strong prospects of success may compensate for the inadequate explanation and long delay. The Court could decline the granting of

condonation, if it appears the default was wilful, or was due to gross negligence on the part of the applicant. The prospects of success or *bone fide* defence on the other hand, mean that all that needs to be determined is the likelihood or chance of success when the main case is heard. Without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.

Lawsa Vol 13 Part 1 2nd Edition para 973 note 3

[17.5] What is striking about the present case is the inordinate delay on the part of the defendant in dealing with the plaintiffs' case. The certificate of non-resolution was issued in the CCMA on 18 June 2002 and consequently the defendant was obliged to refer the plaintiffs' case to the Labour Court, within ninety days of this date. Nothing however was done to advance the plaintiffs' case and the only explanation advanced by Dlomo, was that the legal officer assigned to deal with the matter, Thami Thukani, was ill in hospital and the files he was dealing with, including the plaintiffs', were locked in Thukani's office, to which nobody had access. It is clear that Lucky Makae, a legal officer of the defendant, appreciated the need in November 2003 for an application for condonation to be brought and that medical evidence to explain the failure of Thukani to deal with plaintiffs' matter was necessary. He regarded an explanation by Thukani for the delay as "central and imperative", to the application. Despite this however no application was brought and the plaintiffs were advised in April 2004, that the defendant was no

longer prepared to proceed with their case.

[17.6] It is clear that the Labour Court would require a reasonable and acceptable explanation for the delay, particularly where the delay is two years, as in the present case. Mr. Pillemer submitted that the plaintiffs were in possession of all the facts as to why their case was not referred within the requisite time period, on the basis that they were justifiably under the belief that the defendant was dealing with their case and it was only in 2004, that they were advised to the contrary. I disagree. The inordinate delay could not be satisfactorily explained by the plaintiffs simply saying the defendant did nothing. As pointed out above, the defendant's own legal officer Makae was of the view that the evidence of Thukani to explain the delay was "central and imperative". It is clear that any application for condonation would be opposed by Nestle, who could justifiably argue that in the absence of any explanation for the inaction of the defendant over a period of two years, Nestle would be prejudiced in having to defend a claim for dismissal, which occurred two years earlier.

[17.7] The plaintiffs' ability to demonstrate prospects of success in any action against Nestle, would accordingly, in the absence of any reasonable explanation for the inordinate delay, be of crucial importance. Mr. Pillemer submits that much of the evidence in this regard was within the knowledge of the plaintiffs, as was demonstrated by the evidence of the second plaintiff. In my view however, the evidence as a whole, which I will demonstrate in due course, shows that the plaintiffs were ignorant of the dealings

between the defendant and Nestle concerning the retrenchment process. Nestle again would have disputed that the plaintiffs had prospects of success and would have utilised such evidence which the plaintiffs in the absence of co-operation from the defendant, would not have had access to.

[17.8] I am accordingly satisfied that on a balance of probabilities, the plaintiffs would not have been successful in an application for condonation to the Labour Court, in the absence of information from the defendant, which lay exclusively within the defendant's knowledge.

[17.9] Although the defendant did not plead a failure on the part of the plaintiffs to mitigate their damages, and the defence was couched on the basis I have dealt with, i.e. that the plaintiffs' claim is premature, the plaintiffs in their particulars of claim, somewhat surprisingly allege the following:

"As a consequence of the plaintiffs' dismissal and hence unemployment, the plaintiff was unable to mitigate his damages by instituting proceedings in his own name, and applying for condonation for the late referral of the dispute, when it came to his attention, during 2004".

I should add in fairness to M/s Nel, that she was not the pleader of the plaintiffs' particulars of claim and ignorance of the rule that a failure to mitigate is a defence to be raised and proved by the defendant, should not be laid at her feet. Be that as it may, the plea to this averment was a denial, together with an allegation that the plaintiff was in a position to bring an application for condonation

himself. It was also alleged that failing an application for condonation having been instituted and refused, the plaintiff did not have a complete cause of action against the defendant. This defence was reiterated in a further pleading by the defendant styled "Additional Special Pleas".

[17.10] However, in so far as the plaintiffs' alleged that they were unable to mitigate their damages by applying for condonation because of financial reasons, this is an issue on the pleadings requiring determination. Mr. Pillemer when cross-examining the second plaintiff asked him where he had obtained the finance to pursue the present action. The second plaintiff said they had taken loans to do so, they were in debt and still owed money. Second plaintiff said that he, together with the deceased, had borrowed money from loan sharks. Second plaintiff also said he did not know that they "needed to pay any money for this word 'condonation' and nobody had told them they 'needed to pay for the condonation application' ".

[17.11] The demand by the plaintiffs' attorneys that the defendant bring an application for condonation was made on 04 June 2004. When regard is had to the fact that summons was issued on 23 August 2004, which the plaintiffs were able to finance with loans from loan sharks, it is reasonable to infer that they would have been able to raise the finance to pay their attorneys to bring a condonation application, if advised by the attorneys to do so. I accordingly find that the plaintiffs have failed to prove that they were precluded from bringing a condonation application because of financial constraints. Such a conclusion can of course have no bearing upon the conclusion I have reached in regard to the

plaintiffs not being obliged to bring such an application, and their lack of prospects of success if they attempted to do so, without the co-operation of the defendant. Although these conclusions were reached in the context of the defendant's plea that the plaintiffs' action was premature, my finding that the plaintiffs lacked prospects of success, in any such application, would equally apply to the issue of a failure on the part of the plaintiffs to mitigate their damages.

[18] Do the plaintiffs lack *locus standi* to sue the defendant?

[18.1] The special plea raised by the defendant is as follows:

[18.1.1] As members of the defendant, the plaintiffs and the defendant have an identity of interest, with the result that the plaintiffs cannot in law sue the defendant unless this is expressly provided in the Constitution governing their relationship.

[18.1.2] The Constitution of the defendant makes no provision for a member to sue the defendant in the circumstances giving rise to the plaintiffs' claims.

[18.1.3] In the circumstances the plaintiffs do not have the necessary *locus standi* to pursue their claims against the defendant.

[18.2] In amplification of the defendant's special plea, Mr.

Pillemer made the following submissions:

- [18.2.1] Section 213 of the LRA defines a Trade Union as
- “an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers’ organisations”.
- [18.2.2] Although on registration in terms of Section 97 (1) of the LRA, a Trade Union acquires legal personality and becomes a body corporate, it is also an association of employees who make up the membership of the association and therefore *viz-a-viz* the membership, it has to be treated as their association. As members of the same association, all the members have an identity of interest with their Trade Union, their association, and since nobody can sue himself, none of the members may sue their Union.
- [18.2.3] As a consequence of such “identity of interest”, the plaintiffs cannot sue the defendant, unless this is provided for in the Constitution governing their relationship. The Constitution would have to embody the agreement of all the other members, to be liable in certain circumstances to compensate the wronged member, by rendering their association liable to such wronged member. Without their agreement it is not legally possible to achieve this

result.

[18.2.4] The Constitution of the defendant (as set out above) provides that one of the aims and objectives of the defendant is

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

The Constitution of the defendant makes no provision for a member to sue the defendant in the circumstances giving rise to the plaintiffs’ claims.

[18.2.5] The provisions of Section 200 (1) of the LRA (as set out in para [10.10] above) supports the notion that there is an “identity of interest” as it permits a registered Trade Union to act on behalf of and in the interest of any of its members.

[18.3] Central to the special plea is the concept of an “identity of interest” existing between the members and their Union, which has the effect of precluding any claim by a member, whether couched in contract or *delict*, against the Union, unless expressly permitted in terms of the Constitution.

[18.4] In the present case, in the light of the finding I have made that the defendant breached the contractual undertaking given to the plaintiffs, I am not concerned with the enquiry as to whether a *delictual* claim may be advanced by a member against

his/her Union. By virtue of the fact that the claim advanced by the plaintiffs, include an allegation that the defendant in acting on behalf of the plaintiff, would do so “without negligence” and in breach of the defendant’s obligations, the defendant “acted negligently”, Counsel were accordingly required to deal with both causes of action in the submissions they made.

[18.5] In support of his contentions, Mr. Pillemer referred me to the decision in

S A Municipal Workers Union v Jada & Others
2003 (6) SA 294 (W)

where the term “identity of interest” was formulated. In this case the claim was *delictual*, but I understood that Mr. Pillemer relied upon certain *dicta* in this case, as support for his argument, that the plaintiffs could not sue the defendant, whether in contract or *delict* without specific provision for such an action in the Constitution of the defendant.

In Jada’s case the appellant was a Trade Union and the respondents members of the appellant. The respondents (plaintiffs) had been successful in a *delictual* claim for damages against the appellant (the defendant) in a Magistrates’ Court. The members had been dismissed for embarking on an illegal strike. They alleged that an official of the Union has instigated them to strike and their claim for damages was based upon the allegations that:

- [18.5.1] The defendant owed them a duty of care which flowed from the special relationship between them, which existed by virtue of the defendant's Constitution, to ensure that they did not do anything which would result in their being dismissed.
- [18.5.2] The defendant breached this duty in that they were dismissed as a result of their embarking on the illegal strike action.
- [18.5.3] In consequence of such breach they suffered damage for which the defendant was liable to compensate them.
- [18.6] Horwitz A J, in whose Judgment Schabert J concurred, upheld the appeal, set aside the order of the Magistrate and substituted therefore an order absolving the Union from the instance, *inter alia*, on the ground that the plaintiffs had failed to establish that the defendant owed them a duty of care.
- [18.7] Of significance however for present purposes are certain *dicta* of the learned Acting Judge, which however were *obiter*, regard being had to his statement that notwithstanding his concerns, he would for the purpose of the Judgment, accept that there were no legal impediments which stood in the way of the plaintiffs suing the defendant.
- [18.8] The learned Acting Judge's concerns were as follows:

[18.8.1] In terms of the definition in Section 1 of the Labour Relations Act No. 28 of 1956, which was still in force at the time of the events in question, the definition of a Trade Union was

“any number of employees in any particular undertaking, industry, trade or occupation associated together for the purpose, whether by itself or with other purposes, of regulating relations in that undertaking, industry, trade or occupation between themselves or some of them and their employers or some of their employers”.

Section 5 (1) of that Act, provided that a Trade Union was a body corporate, capable in law of suing or being sued. The learned Acting Judge then had the following to say at pages 297 G – 298 A

“Despite its being accorded a personality of its own under s 5 (1), however, I have a notional difficulty conceptualising a trade union in the same light, for instance, as a company incorporated under the Companies Act 61 of 1973. Clearly, in the case of the latter, the interests of the company and the persons who hold shares therein may diverge, with the consequence that there is no problem with the shareholders (who themselves may be corporate entities) suing the corporation in which they hold shares, as if the latter were just another person. The same does not appear to hold true in the case of a trade union. There is a clear identity of interest between a trade union and its members. Members of a trade union are not ‘members’ in the same sense as

shareholders in a company are 'members' of the latter. Trade union members do not merely hold a financial stake in the trade union of which they are members. They have a collective interest which they pursue *via* the medium of the trade union structure, but not in the same way as members of a company incorporated under the Companies Act".

and the following at 301 F to 302 E

"What lies at the heart of Mr. *Helberg*'s submission is that there existed the type of relationship between the plaintiffs and the defendant which imposed on the defendant certain obligations towards the plaintiffs such that, if the defendant breached them, it could potentially find itself saddled with liability to the plaintiffs for damages. His putting to witnesses that there was a 'relationship' between the plaintiffs and the defendant begged the question, however, whether there was indeed a duty on the defendant to act. Before one can determine whether there was such a duty, as suggested by Mr. *Helberg*, one must identify the nature of the relationship between the plaintiffs and the defendant. It cannot be equated, for example, to the relationship between a client and his attorney whom he consults for advice and whom he pays for that advice. I have difficulty with the notion that a number of persons co-operate to form a body as a negotiating forum, which is then alleged to stand in relation to its members in a similar relationship to them as does, for example, the attorney. The terms 'relationship' and 'special relationship' were bandied about as if it were axiomatic that a relationship which would give rise to a delictual action of the nature in issue, existed. It was erroneous to take what, in my view, was a conclusion and make it the starting point.

I referred above to the plaintiffs' allegation at the pre-trial conference that the relationship stemmed from the defendant's Constitution, which contained contractual provisions which obliged the defendant to see to its members' interests in the field of their employment. Whilst I can conceive of a contractual relationship between two unrelated parties (such as an attorney and his client) bringing into being a situation in which the one becomes obliged to display a duty of care towards the other, I have difficulty contemplating how that occurs in a situation in which one party (*in casu*, the defendant) comes into existence at the behest of other parties (employees), who are responsible for chartering the course which it takes, or is a party to whom others (future employees) ally themselves and take part in its decision-making process. In most cases in which a special relationship between two parties is alleged to exist, the party claiming that the other owed the former a duty of care would usually have no control over how the latter acted, for otherwise it would be inappropriate to speak of a breach of duty. In a case such as the present, in which a trade union exists as the medium through which its members can bargain and negotiate with their employer, I fail to perceive how it can be said that the defendant owed the plaintiffs a duty of care, especially where, as in the present case, the plaintiffs embarked on industrial action beyond the scope of their union's collective bargaining process".

- [18.8.2] What is immediately apparent is that the learned Acting Judge was solely concerned with the issue of whether a duty of care, could be found to exist in the relationship between a Union and its members.

The concerns expressed with regard to the implication of a duty of care in a contractual setting, where the parties are related and the one party has a degree of control over the other, do not arise in the present case.

[18.3] The defendant is a body corporate and has legal personality in terms of Section 97 (1) of the LRA. As pointed out above, it is an independent legal subject, distinct in law from its members and officials. In addition, the Constitution of the defendant determines the nature of the relationship between the defendant and its members, as well as their rights and obligations *inter se*. The Constitution also accords to the defendant the power to provide legal assistance to its members and/or officials, when it deems to be in the interests of the Union to do so. It also provides that the National Executive Council has the power to provide legal assistance to members on matters related to their employment and a Shop Stewards' Committee, at the request of an employee in the workplace has the power to assist and represent an employee, *inter alia*, before the CCMA .

[18.4] It is therefore clear that the defendant had the necessary authority in terms of its Constitution, to conclude the said agreement to provide legal assistance to the plaintiffs, by referring their grievance against Nestle to the CCMA, and thereafter to the Labour Court.

[18.5] As pointed out above, Landu was of the view that the

defendant was acting in the interests of the defendant and also on behalf of the plaintiffs, by reference to the provisions of Section 200 (1) of the LRA. In so far as this may constitute an “identity of interest”, between the parties, this cannot stand as a bar to the conclusion of an agreement of the type which is in issue in these proceedings. There is no need to draw a comparison between the relationship of an attorney and client on the one hand and the relationship between the defendant and the plaintiffs, as a consequence of the agreement concluded, on the other and infer that the conduct of the defendant could never be expected to be that of an attorney. This is because all that is required of the defendant, was to refer the plaintiffs’ case to the Labour Court. Sophisticated levels of legal knowledge and expertise, were not required of the defendant and its officials to achieve this straightforward task, or any subsequent application.

[18.6] I therefore disagree with Mr. Pillemer’s submission that a pre-condition for the ability of the plaintiffs to sue the defendant, would be a provision in the Constitution of the defendant, permitting them to do so. Such a requirement would be an effective bar to any member seeking to enforce any contract concluded with the defendant, which cannot be the case.

[18.7] I am accordingly satisfied that the plaintiffs have the necessary *locus standi* to institute the present action against the defendant.

[19] Is it against public policy to hold the defendant liable to compensate the plaintiffs in damages?

[19.1] The defence as pleaded was that regard being had to the Constitutional roll played by Trade Unions in society, as embodied in Section 23 of the Constitution and the LRA, it is against public policy for a member of a Trade Union to be able to sue his/her Trade Union for damages, suffered by reason of actions taken by the Trade Union in furtherance of the interests of the Union and its members on his/her behalf, unless this is expressly provided for in the Constitution of the Trade Union as this:

[19.1.1] Would place Trade Unions at huge financial risk, which in turn would require Trade Unions to carry professional indemnity insurance, where the premiums would be astronomical and where the need to pay such premiums, would be to the prejudice of the general body of members, that it represents.

[19.1.2] Could potentially result in the destruction or significant weakening of the Trade Union and its ability to represent its members in its core function of collective bargaining, as recognised and provided for in the Constitution and the LRA.

[19.1.3] Would potentially undermine the Union's ability to fulfil its mandate to its members.

[19.1.4] Would be against the interests of the general body

of members that it represents (which includes the plaintiffs).

[19.1.5] The defendant received advice from its attorney that the case of the plaintiffs had no reasonable prospects of success. It is against public policy for the defendant as a Trade Union to be compelled, against the possible claim for damages from the plaintiffs as the members concerned, to pursue a claim on their behalf which it has been advised has poor prospects, irrespective of whether the advice is sound or not.

[19.1.6] Accordingly, a claim based upon a failure to so pursue that claim is against public policy and does not in law establish a cause of action against the defendant.

[19.2] In light of the conclusion I have reached, that it was an implied term of the agreement between the parties, that the defendant would be entitled to withdraw legal assistance to the plaintiffs, if advised that the plaintiffs did not have prospects of success, it becomes unnecessary to consider the question whether it would be against public policy, if the defendant were obliged to do so.

[19.3] As I understand the defence as pleaded, it is based upon the financial consequences for a Union, if a member was entitled to sue the Union for damages the member may have

suffered, as a result of actions taken by the Union on the member's behalf.

[19.4] Landu was asked to comment upon this defence and stated that if the Union was flooded by law suits "they would be failing in their role as embodied in the Constitution of South Africa". When asked whether the answer was to obtain professional indemnity insurance against such claims, his reply was that this would not assist the Trade Unions because they were dealing with "workers who earn petty salaries". If they had to increase the subscriptions for this purpose, this would result in individuals not joining the Union. Members of the defendant were resistant to any increase in their subscriptions. He had not however been able to obtain any quote from an insurance company, as to what it would cost the defendant to obtain professional indemnity insurance. He was accordingly unable to say what the cost would be to the defendant.

[19.5] There is consequently no evidence before me as to what increase would be demanded of individual members of the defendant if indemnity insurance was obtained by the defendant. I am consequently unable to determine whether the views of Landu, of the consequences for the defendant if indemnity insurance was obtained, are valid or not. The concept of public policy "is a question of fact not law and changes with 'the general sense of justice of the community, the *boni mores*, manifested in public opinion' ".

[19.6] The defendant was obliged to place before this Court clear evidence that the factual consequences to the defendant of obtaining professional indemnity insurance, would be as described by Landu. Only once such consequences to the defendant were established, would it be possible to determine whether it was against public policy, to hold the defendant liable to compensate the plaintiffs in damages. In any event I have grave reservations whether public policy would preclude the advancement of the plaintiffs' claim against the defendant, where the omission of the defendant, consists of a gross failure to do that which it had undertaken to do, on behalf of the plaintiffs.

[20] Would the plaintiffs have succeeded in the Labour Court in their claim for unlawful dismissal against Nestle?

[20.1] The evidence of second plaintiff was that at the time when the deceased and himself were dismissed for alleged operational requirements, they were both employed by Nestle as sales representatives. The first they heard of the proposed restructuring of the Grocery Division in which they were employed, was in January 2002 when a Keith Green of Nestle, told them they were going to be converted to trade specialists. He stated that they never heard of such a restructuring as set out in a letter dated 19 November 2001, from Nestle to the defendant (Bundle "D" page 53).

[20.2] Green assured them that everybody would be provided with adequate training which would involve the initial training and a

further assessment. Each individual would be given an opportunity to undergo three training programmes. If the individual did not meet the requirements on the first programme he would be referred to the second and third programmes, failing which he would be considered for an alternative position. All of the sales representatives were told this at a meeting in Nestle's boardroom in New Germany.

[20.3] Neither he nor the deceased went for any training. Whilst they were still employed at Nestle none of the sales representatives went for any training.

[20.4] They were then told by Green that they would be interviewed to assess where they fell short, before they were appointed as trade specialists, so that they could be given the appropriate training relevant to that specific area. They were never told that if they did not pass the initial assessment, they could face retrenchment.

[20.5] By reference to the document headed "Trade Specialist Interviews" (Bundle "D" page 60) he said that they were never told how the assessments were to be done, how to prepare or anything about the interview.

[20.6] They were never told what the results of the assessment were and the first sight he had of the document was at Court. It appears that second plaintiff had also never been shown a document headed "Targeted selection score sheet – Trade Specialist Interviews" with the candidates classified as "suitable candidates", "not

suitable", or "possibly suitable". It appears this document reflects the outcome of the "interviews" that were conducted by Nestle.

[20.7] The first that he heard about the possibility of retrenchment, was when he was told by a colleague, that the colleague had heard that the second plaintiff and the deceased, had taken a voluntary retrenchment package.

[20.8] He made enquiries from David Levuna, his line manager, who told him he must forget about it and get back to work.

[20.9] He however feared that Nestle wanted to dismiss them, but his fears were allayed when he received the letter dated 12 April 2002 referred to above, from Nestle giving them both an increment and saying they were good workers (Bundle "B" page 6).

[20.10] On 06 May 2002 they received letters from Nestle dated 03 May 2002 headed "Retrenchment of Grocery Staff" in which they were informed that in a meeting held with the defendant, Nestle formally informed the second plaintiff and the deceased "that your services as per Section 189 of the LRA will be terminated from 15 May 2002" (Bundle "C" page 57).

[20.11] After receiving these letters they went to the defendant and saw Dlomo, who told them to return after they were retrenched, which they did, as set out above.

[21] Second plaintiff said that nobody from Nestle had ever spoken

to them about the restructuring exercise, retrenchments or about the reduction in the Grocery Division of the six sub-divisions to three. He also denied that the function of sales representatives had changed. He stated that he had never seen any notice on the notice board, stating that trade specialists whose jobs were made redundant, due to the restructuring exercise, would be permitted to apply for jobs in other divisions of Nestle, should vacancies exist. He was never given a list of vacancies, or asked to apply for any vacancies and was never offered any alternative to staying on as a sales representative, or trade specialist.

[22] To counter the assertions of the second plaintiff, the defendant called Brian Nayager, who was at the relevant time the Group Employee Relations Manager for the South East Africa Region of Nestle. His duties encompassed industrial relations and retrenchment matters concerning the restructuring of the organisation. He recalled the retrenchment exercise at Nestle, which is in issue in the present case. He explained that his function was to implement the process when the Board of Nestle took a decision to restructure the company. He would convey the decision to the unit managers in Nestle and they would have to start the process in terms of the collective agreements with the Unions.

[22.1] He confirmed that he started the process by writing to the defendant, by way of his letter dated 19 November 2001 (Bundle "C" page 6), where he advised that the Grocery Sales Division was divided into six geographical areas. He advised that

Nestle “has now resolved to rationalise and restructure the Grocery Sales Division” by “creating only three business areas of the six mentioned above”. He then went on to say

“There will be an amended staffing level required in the new business areas. This restructuring could affect the job security of some of your members who are employed as sales representatives and admin personnel”.

He stated that “we envisage the proposed set up being in place by 01 March 2002” and concluded by saying

“You are therefore invited to consult with us in terms of the procedural agreement and Section 189 of the LRA”.

[22.2] Nayager said that the reason for the restructuring was that Nestle found that they “had a duplication of services” which meant that they “employed too many people doing the same job”.

[22.3] Nestle consequently started interacting with the defendant to advance the process. As regards employees who were not members of the defendant, he would send out a notice to all the operating unit managers, stating that they were in the process of restructuring. Operating unit managers were instructed to put up the notice on the notice board. Operating unit managers were advised that line managers should consult with such employees and advise them of the progress being made. As regards the defendant he would head up the discussions with the defendant. He said that this process was followed in the present case.

[22.4] Nayager confirmed that he had written the letter dated 05 March 2002 to the defendant (Bundle “C” page 16), setting out the agreement that had been reached between Nestle and the defendant. He had stated in the letter “trade specialists whose jobs are made redundant due to the restructuring exercise, would be permitted to apply for jobs in other divisions of the company, should vacancies exist” and added “Regional Sales Offices are to place this memo on the notice board and to communicate its contents to all trade specialists”.

[22.5] Nayager said that if this notice had not been placed upon the notice boards, the defendant would have immediately complained.

[22.6] Regarding the vacancies that were advertised which the plaintiffs applied for and were not given (Bundle “D” page 155), he explained that the job functions of the posts advertised differed from that of the posts the plaintiffs had occupied.

[23] Before dealing with the evidence that emerged during the cross-examination of Nayager, it is necessary to deal with the status of the minutes of various meetings which appeared to have been held between the defendant and Nestle, concerning the restructuring exercise. The minutes were discovered by the defendant, who however declined to admit their accuracy. Mr. Pillemer stated that there was no available witness who was able to say whether they were accurate or not. The minutes were part of the documents received from the defendant.

[24] During the cross-examination of Nayager, the following emerged:

[24.1] He conceded that the letter referred to above (Bundle “C” page 6) did not constitute compliance with the written notice requirements of Section 189 (3) of the LRA, stating that “the provisions of 189 (3) would have been addressed at the meeting that we set up with the Union”. When asked whether he had written a letter setting out the requisite information in terms of Section 189 (3) of the LRA, to the defendant, he said he could not remember. He was referred to the minutes of a meeting held on 08 April 2002, at which he was recorded as being present (Bundle “D” page 102) at which the following was minuted:

“It’s difficult why Union wants the information in writing. They have dealt with the Union previously in the same way. Only prepared to talk about this information in the meeting” as well as the following

“Management want for a caucus – note that the Union is not fully equipped with facts – but will give information verbally today 08 April 2002”.

He said he could not remember this, and could not say whether he disputed it or not, but if there was any information that the defendant required, they would have supplied it. When asked by M/s Nel, whether Nestle’s attitude was that the request for information was not going to be complied with in writing and they would deal with it at the meeting, he replied “I cannot say what would have been the Company’s attitude”. When he was reminded of his previous statement that the provisions of Section 189 (3) would be addressed

at the meeting, he said that he had also said he could not remember where the Section 189 (3) letter was, so he did not know whether there had been a Section 189 (3) letter or not, but conceded that he was in charge at the time.

[24.2] He stated that there were numerous meetings held with the defendant concerning the proposed restructuring, and asking for the defendant's input on whether it should be changed from six to three divisions etc. He conceded that in order for the defendant to participate meaningfully in such discussions, the information required by Section 189 (3) of the LRA, would have to have been given to the defendant. He maintained that there was lots of information, that was not in the defendant's bundle, particularly minutes of meetings with the defendant. He conceded that there was a complaint by the defendant that there was no information, but said that Nestle had corrected this.

[24.3] When asked what steps were taken to send a letter in terms of Section 189 (3) of the LRA to non-Union employees, in November 2001, he referred to the letter dated 19 November 2001 (referred to in paragraph [22.1] above), but then referred to a letter dated 05 March 2002, (referred to in paragraph [22.4] above) saying it could possibly be that letter. When asked by M/s Nel again where the letter in terms of Section 189 (3) was, he replied that he did not see it in the bundle and could not say there was or wasn't one "at this stage". He maintained however that Nestle had complied with the Act, in their restructuring process and "therefore there had been no challenge" but then conceded "there was a challenge about information, but there was no challenge about the process".

[24.4] In the light of his statement that the non-Union employees were going to be consulted by the line managers, Nayager was asked what information was given to the line managers to carry out this task. His reply was simply that “we train all our line managers on the soft skills that are required”.

[24.5] Such consultation would happen after Nestle had consulted with the defendant and he conceded that any employee who was not a Union member, would have to be consulted with directly. He said that he did not engage directly with non-Union employees, but this would have been done by Keith Rossiter-Green (the Keith Green referred to by the second plaintiff) and his managers. If he had not done this, Nayager maintained that he would have heard about it. He said he would have told Bruce Loubser (who was the sub-ordinate of Keith Rossiter-Green) that the non-members of the Union “need to be kept abreast of the developments and what’s taking place”.

[24.6] When it was put to Nayager that the evidence of the second plaintiff was that neither he, nor the deceased, had been communicated with, or consulted in any manner before February 2002, he stated that this was impossible. The date of February 2002 was erroneous because the evidence of the second plaintiff was that they had heard from Keith Rossiter-Green in January 2002, about a proposed restructuring of the Grocery Division. Be that as it may, Nayager said unit managers would have to have reported to Head Office on the progress being made and discussions with “non-Union members”.

[24.7] As regards the assessment, or interview process the second plaintiff and the deceased were subjected to, he was unable to comment upon this process, as it fell outside his function. He was also unable to explain why two employees had to be made redundant, because of the reduction of six divisions to three divisions, in the Grocery Sales Division.

[24.8] Nayager was referred to the minutes of a meeting headed "Grocery Division Restructuring Meeting 29 November 2001" (Bundle "D" page 59) where it was recorded "Management noted that the Union had raised the problem that the meeting being held without representatives from the Grocery Division, because of the urgency of the matter they felt the meeting was necessary". It was also recorded "looking at 01 March 2002 being implementation date". It was also recorded "Disclosure of information. Number of people in this Division that are in affected areas and who would be affected". M/s Nel then put it to Nayager, that the Union wanted this information, to which he replied "and that would have been supplied to them".

[24.9] M/s Nel then referred Nayager to the minutes of a meeting held on 26 February 2002 (Bundle "D" page 70) which appeared to be the next meeting held, and asked whether there was any other profiling exercise undertaken in the interim other than the one 25 February 2002, to which he replied "I wouldn't be able to tell you". Nayager was then asked when between 29 November 2001 (being the first meeting) and the 26 February 2002 (being the second meeting) was the issue of the selection criteria put to the Union or non-Union members, what it would entail and how it would

be implemented. He replied that he was not able to say as there were numerous minutes of meetings not in the bundle. He said there could have been a series of meetings.

[24.10] When asked who negotiated with the Union or non-Union employees about the selection criteria to be used, he replied "it would have been part of my negotiations". He said that he had negotiated with Sam Mashiloane and put their proposal to him. When asked what the proposal was, he said he could not recall exactly what it was. He said the profiling exercise would have been developed by the Human Resources Services and he was not an expert in profiling. When asked how he was then able to negotiate this aspect with the Union, he said that after the criteria had been developed he would negotiate it with the Union. He was then asked whether he recalled the Union saying the criteria were subjective and unfair, to which he replied "It could have been. Could have been yes". He was then asked whether he was not saying that the selection criteria were agreed and he replied "I am not saying it was unfair". When M/s Nel put to him "the question is you are not suggesting that it was agreed" he did not reply. When I asked him whether it was agreed or not, he said he could not vouch that it had been agreed, in the absence of the documents in the bundle. When I asked him whether he therefore had no recollection of whether it was agreed or not, he replied that his view was that it had been agreed with the Union, "but the fact that there had been a challenge by the Union at a later stage indicates that it could not have been agreed".

[24.11] By reference to the minutes of the meeting held on 01 March 2002 (Bundle "D" page 71) Nayager was referred to the

following:

“Company has moved beyond information disclosure. Keith had gone to unit to make presentation”.

M/s Nel then put to Nayager that the only presentation there had been, was when Keith Green had told the plaintiffs they were going to be assessed and retrained, and there was no question of retrenchments, to which he replied “I cannot vouch for his presentation”.

[24.12] In the same minute the following is recorded:

“Interviews. Was to see if the process fits the profile of the new description. If he doesn’t fit the profile the process would decide. If he does fit it the process will decide”.

Nayager agreed that what this meant, was that people were going to be selected solely on the basis that they would be profiled against the job description. When asked how this related to the need to reduce the number of workers, he replied that the available staff were profiled against the job description and the number of workers needed. He was unable to explain however, how the number of workers needed was determined, as he was not involved in operations.

[24.13] The minutes of a meeting held on 15 April 2002 (Bundle “D” page 105) were referred to, where the following is recorded:

“Profiling was used by the Company to get the people they wanted. Certain individuals have been shown by the process to be unable to meet the

demands. Due to this reason the current number is not needed. Some would be retrenched”.

M/s Nel put to Nayager that this indicated that Nestle profiled people and those who they perceived were not as efficient or effective, were retrenched and it had nothing to do with reducing the regions from six to three. Nayager agreed that was what it said, but denied that was the process, and said the profiling was done and this was then negotiated with the defendant. M/s Nel then put to him that the selection criteria were made into the operational requirement, which determined the need to get rid of the plaintiffs, which he said he did not agree with.

[24.14] The following was recorded in these minutes:

“Does it mean profiling was objective? The selection was based on targeted selections” and the following:

“Profiling was not agreed. Union requests list of all the trade specialists plus their years of service”.

Nayager agreed that the minute recorded that after the profiling exercise had already taken place, the defendant was saying they had not agreed, but he disputed that this was the case.

[24.15] Nayager said by reference to a list of vacancies (Bundle “D” page 125) at Nestle that the fact that this list was produced at the time, was to make such vacancies available to the affected

employees, as positions they could apply for. He agreed that Nestle were obliged to offer such vacancies to affected employees and not to make employees apply for such jobs. He believed that this had been done, and this would have been done by Bruce Loubser at Nestle. M/s Nel then put to Nayager, that the plaintiffs had never seen this list of vacancies and they were never told about it. To this he replied that he could not vouch for this, as it was a function of Human Resources Service.

[24.16] Nayager was also referred to a letter written by the defendant to Nestle dated 13 May 2010 (Bundle “D” page 135) in which the defendant complained of the fact that the profiling exercise was not fair and objective, and the defendant was not consulted about it, prior to applying it to the defendant’s members. Nestle had refused to consult with the defendant about this. Nayager said that he was unable to comment because he was no longer employed at Human Relations at Nestle at the time.

[25] In assessing whether the plaintiffs would have succeeded in their claim for unfair dismissal before the Labour Court, it has to be borne in mind that the *onus* would rest upon Nestle to establish that the dismissal of the plaintiffs, was both substantively and procedurally fair

Section 192 (2) of the LRA

[26] Procedural fairness

[26.1] Nestle was obliged to give written notice to the plaintiffs in terms of Section 189 (3) of the LRA of the proposed retrenchments, before the termination of their employment. This notice had to set out the information specified in the Section. The second plaintiff had never been given such a notice and said he had never seen any notice on the notice board. To the contrary, he had been told by Keith Green that they would be interviewed to assess where they fell short and would be retrained to rectify this. Nayager conceded that he did not know whether there had been a Section 189 (3) letter or not. When asked about such a letter in respect of non-Union employees, he replied he could not see it in the bundle. It is clear that Nestle sought to satisfy compliance with the information to be furnished, in terms of Section 189 (3), by doing so orally at meetings with the defendant.

[26.2] Nestle was obliged when contemplating the retrenchment of employees first to consult with the other parties before making a final decision.

Lawsa Vol 13 Part 1 2nd Edition paragraph 789

[26.2.1] When regard is had to the letter written by Nayager dated 19 November 2011 (Bundle “C” page 6) it is difficult to see how what was being conveyed was not a *fait accompli*, that a restructuring was to take place. This is particularly so when regard is had to

the statement that it was envisaged, that the “proposed” set up would be in place by 01 March 2002, despite the emphasis placed by Nayager upon the word “proposed”.

[26.2.2] As regards the assertion of the second plaintiff that he and the deceased were never consulted about the possibility of retrenchment, all that Nayager could say was that line managers were instructed to consult with non-Union employees. As regards the information that was furnished to line managers to enable them to do this, all he could say was that they were trained on the “soft skills” required. That he regarded the likelihood of non-Union employees not having been consulted with as “impossible” I find unconvincing, particularly in light of the letters that were furnished to the plaintiffs by Nestle dated 12 April 2002, giving them an increment and saying they were good workers. This is hardly the conduct of an employer actively engaged in a consultation process with the plaintiffs, because of a possible retrenchment of their positions.

[26.2.3] It is clear that an employer has to consult with the Union and individual non-Union employees, in an attempt to reach consensus on the selection criteria to be adopted, to decide which employees should be retrenched.

Lawsa *supra* at para 793

If no agreement on selection criteria is reached, then the employer must adopt and implement fair and objective criteria, in identifying the employees to be retrenched.

Lawsa *supra* at para 793

The criteria of fairness and objectivity are applicable to both the criteria and the way in which they are applied.

Lawsa *supra* at para 793

It is clear that no proper consultation was held with the defendant, or the plaintiffs, concerning the selection criteria to be applied to employees. Nayager stated that he would have negotiated this issue with the defendant, but was unable to say what “the proposal” was that he had put to Sam Mashiloane. His explanation that the profiling exercise was developed by the Human Resources Services at Nestle and he was not an expert on profiling, starkly illustrates Nayager’s inability to meaningfully negotiate these issues with the defendant. In addition he conceded that the defendant had complained that the selection criteria

were subjective and unfair. He also could not vouch that they had been agreed, but conceded that the fact the defendant raised a challenge in this regard, indicated that they could not have been agreed. As regards the manner in which the selection criteria were applied, it is clear that employees were to be selected solely on the basis that they would be profiled against the job description. Nayager was unable to explain how this related to the need to reduce the number of workers. In my view, it is clear that the selection criteria were used by Nestle to decide who Nestle regarded as not being effective or efficient. These workers were retrenched and this had nothing to do with reducing the regions from six to three.

[26.2.4] I am therefore satisfied that Nestle would not have discharged the onus of establishing in the Labour Court, that the dismissal of the plaintiffs was procedurally fair.

[27] **Substantive fairness**

[27.1] Retrenchment must be substantively fair towards the employees affected. This means that valid and fair, or *bona fide* and reasonable reasons, must exist for the termination of the employment of an employee, on account of operational reasons and

the dismissal was a measure of last resort.

Lawsa *supra* at para 778

[27.2] Courts are entitled to scrutinise the reasons for the retrenchment, particularly the *bona fides* and fairness thereof, but not the commercial rationale of the decision.

Lawsa *supra* at para 778

The retrenchment must be based upon operational reasons

LRA Section 213

which includes economic or financial reasons, technological reasons and structural reasons

Lawsa *supra* para 779

[27.3] According to Nayager the reason for the restructuring was that Nestle had a duplication of services in that they employed too many people doing the same job. It was directed at the efficient operation of the business. On this basis Nestle was entitled to restructure based upon financial reasons.

[27.4] As regards technological reasons, second plaintiff disputed that he and the deceased would not have been able to carry out the functions demanded of the new posts of sales representatives. Be that as it may, the uncontradicted evidence is

that they were told they would be assessed and where they were found to be lacking in skills, they would be trained to enable them to fill the new posts of trade specialists. If after training they were not suitable for the new posts, they would be considered for alternative positions. The uncontradicted evidence however is that although they were both assessed, neither were given any training. On the evidence before me, there would consequently be no basis upon which the defendant would be able to contend, that the plaintiffs were retrenched because they did not have the necessary skills to fill the posts of “trade specialists”.

[27.5] As regards the issue of structural reasons, it is clear on the evidence that the plaintiffs would have been prepared to accept posts wherever situated within the Republic. There was accordingly no question that the plaintiffs, because of such restructuring, were not prepared to accept changes to their terms of employment. In addition, Nayager was unable to explain why it was necessary for two posts to become redundant, because of the reduction in areas from six to three, in the Grocery Sales Division. He said that the operating unit in KwaZulu-Natal would have determined its manning levels, which he knew nothing about.

[27.6] It is clear that even though reasons to retrench employees may exist, they will only be accepted as valid, if the employer can show that alternative steps have been considered and taken to prevent the retrenchments, limit the dismissals to a minimum and mitigate the adverse effects of the dismissals.

Lawsa *supra* at para 781

In addition, it must be shown that the alternatives are fair and reasonable, that the employer resorted to dismissal as a last resort, and the alternatives were properly offered or communicated to the employees.

Lawsa *supra* at para 781

[27.7] Second plaintiff said he had never seen any notice on the notice board, stating that trade specialists whose jobs were made redundant, due to the restructuring exercise, would be permitted to apply for jobs in other divisions of Nestle, should vacancies exist. He said he was never given a list of vacancies, or asked to apply for any vacancies and was never offered any alternative, to staying on as a sales representative or trade specialist. When it was put to Nayager that the list of vacancies (Bundle “D” page 125) had never been seen by the plaintiffs and they were never told about it, he replied he could not vouch for this as it was a function of Human Resources Service. I am therefore satisfied that such vacancies were never offered to the second plaintiff and the deceased, as Nestle was obliged to do.

[27.8] I am therefore satisfied that Nestle would not have discharged the *onus* of establishing in the Labour Court that the dismissal of the plaintiffs was substantively fair.

[27.9] In the light of the foregoing the plaintiffs have established that they would have been successful, in their claim for

unfair dismissal before the Labour Court.

[28] Have the plaintiffs proved their quantum of damages?

[28.1] The claims advanced by the plaintiffs as a consequence of their unlawful dismissal, were compensation in the form of retrospective re-instatement, alternatively payment equivalent to the sum of twelve months' compensation, calculated at the rate of the plaintiffs' remuneration as at the date of the termination of their services with Nestle, being the sum of R7,436.00 per month. The damages allegedly suffered were accordingly R178,464.00 (being twenty-four months' compensation calculated for the period May 2002 to June 2004 when the matter would have been finalised in the Labour Court), alternatively R89,232.00 (being the sum equivalent to twelve months remuneration).

[28.2] When giving evidence the second plaintiff said that the amount of R7,436.00 per month, did not include the commission he was paid, which varied between R1,500.00 and R2,000.00 per month and was sometimes above this amount. He said he had never earned less than R1,500.00 a month in commission. In addition, neither he nor the deceased were able to secure employment after they were dismissed. He said that the deceased and himself had discussed the relief they would seek before the Labour Court and their first choice would have been re-instatement.

[28.3] As regards the deceased, Mr. Pillemer put to the second

plaintiff, whether he was aware that the deceased, after his retrenchment, had offered the services of his taxi business to the defendant, should there be a need to transport members. Second plaintiff replied that he had no knowledge that the deceased possessed taxis. As a consequence of this, the widow of the deceased was called and she confirmed that the deceased had operated two taxis before his retrenchment. However, before his retrenchment he was experiencing problems with his taxis, because they were old and he had problems with the drivers. His taxis were then taken off the road and the deceased was supposed to have followed the Government's taxi re-capitalisation programme. The deceased however did not have enough money to do so, and therefore ended up not operating at all. Both taxis ended being sold. She said that despite his efforts the deceased was unable to obtain employment. She confirmed his salary of R7,436.00 per month and that he used to earn commission of between R1,500.00 and R2,000.00 per month and above.

[28.4] As a consequence of the evidence of the second plaintiff and the widow of the deceased, the plaintiffs applied to amend the plaintiffs' claim by increasing their monthly income to an amount of R8,936.00 per month. The total amounts claimed were also increased respectively to R214,464.00 and R107,232.00.

[28.5] In terms of Sections 193 and 194 of the LRA in the case of an unfair retrenchment, the Court may order the re-instatement of the employee, or the payment of compensation to the employee, where the reason for the dismissal was unfair, or a fair procedure

was not followed, or both. The amount of compensation must be just and equitable, but may not be more than twelve months remuneration.

Lawsa *supra* at page 806

[28.6] As regards the quantum of plaintiffs' damages, Mr. Pillemer submitted that the plaintiffs had failed to prove the quantum of their damages, because the plaintiffs had failed to prove what amounts they were paid in respect of their severance packages. It is common cause that the plaintiffs received severance packages, but no evidence was led as to the amount paid.

[28.7] M/s Nel's answer to this was to submit that because the plaintiffs, in their claim for re-instatement had limited the amount claimed to twenty-four months salary, without seeking payment for any future loss of earnings, or pension benefits, the amount paid in respect of severance pay should not be taken into account. I disagree. The claim is one for payment of the money equivalent of two years of salary after such a period of re-instatement. The claim was limited to a period of two years, on the basis that by reference to a number of decided cases in the Labour Court, to which I was referred, by reference in each case to the date of dismissal and the date when Judgment was handed down, a period of two years was reasonable. The fact remains however that on re-instatement an employee is bound to repay the amount of any severance package received. The plaintiffs cannot be excused from making such a deduction, simply because they have chosen not to include claims

for future loss of earnings and pension benefits. That the plaintiffs seek remuneration, *in lieu* of actual re-instatement does not alter the fact that the claim is based upon re-instatement. I accordingly agree that the plaintiffs have failed to prove the quantum of their damages based on a claim for re-instatement.

[28.8] However, as regards the claim for twelve months' remuneration, M/s Nel referred me to Section 41 (5) of the Basic Conditions of Employment Act No. 75 of 1997, which provides that

"The payment of severance pay in compliance with this Section does not affect an employees right to any other amount payable according to law".

It is therefore clear that that severance pay is not to be taken into account on this alternative claim. As regards the claim for twelve months' compensation, at the rate of the plaintiffs' remuneration, it appears that the compensation to be awarded for the unfair procedure, is not based upon patrimonial or actual loss, but is in the nature of a *solatium*, for the loss of the right to a fair procedure.

Lawsa *supra* at paragraph 806

Regard being had to the unfair procedure, to which the plaintiffs were subjected, I am satisfied that the payment of the equivalent of twelve months' remuneration, is justified and reasonable in all of the circumstances.

[29] Turning to the issue of the interest payable on the amount

awarded. The plaintiffs sought the payment of *mora* interest in their particulars of claim, on the amounts claimed. M/s Nel submitted that interest should run from the date of service of summons, which is 28 August 2004. This would be on the basis that a demand for payment was made on this date. It is clear that the purpose of *mora* interest, is to place the creditor in the position he would have been, if the debtor had performed in terms of the undertaking.

Bellairs v Hodnett
1978 (1) SA 1109 (A) at 1145 D – G

Regard being had to the list of Labour Court cases, to which I have referred in paragraph [28.7] above, I am satisfied that it would be reasonable to assume a two year delay, in the finalisation of the plaintiffs' cases by that Court, if the defendant had performed its obligation and referred their cases timeously to that Court. Regard being had to the date of the plaintiffs' dismissal being 15 May 2002, the termination of the proceedings before the CCMA on 18 June 2002 and the obligation of the defendant to thereafter refer the plaintiffs' cases to the Labour Court, within ninety days of that date in terms of Section 191(11) (a) of the LRA, the date by which the cases of the plaintiff should have been lodged in the Labour Court, would have been no later than 16 September 2002. A two year delay from this date, produces a date by which the claims of the plaintiffs ought reasonably to have been finalised, which is sufficiently close to the date of service of summons, that I am satisfied this is an appropriate date from which interest should run on the facts of this case.

[30] The only remaining issue is a determination of the liability of the parties to pay a number of costs orders, which were reserved during the course of the present proceedings. Having considered the arguments advanced by Counsel, I am satisfied that the defendant should be ordered to pay the plaintiffs' costs, save and except for the costs of the adjournment of the matter before Van Zyl J on 20 May 2009. That adjournment was granted because the plaintiffs amended their particulars of claim.

I accordingly grant the following orders:

- A. In Case 13501/2004 – L. Ngcobo N.O. (Ndlela) v Food & Allied Workers Union Judgment is granted in favour of the plaintiff as follows:
 - (i) Payment of the sum of R107,232.00.
 - (ii) Interest on the sum of R107,232.00 at the rate of 15.5 percent per annum from date of service of summons, being 28 August 2004, to date of payment.
- B. In Case 13502/2004 – Mkhize v Food & Allied Workers Union Judgment is granted in favour of the plaintiff as follows:

- i) Payment of the sum of R107,232.00.
- ii) Interest on the sum of R107,232.00 at the rate of 15.5 percent per annum from date of service of summons, being the 28 August 2004, to date of payment.

C. The defendant is ordered to pay the plaintiffs' costs in both cases, save and except for the wasted costs occasioned by the adjournment of the matter on 20 May 2009, which the plaintiffs are ordered to pay jointly and severally to the defendant.

K. Swain J

Appearances /..

Appearances /...

Appearances:

For the Applicant : M/s C. Nel

Instructed by : MacGregor Erasmus
Durban

For the Defendant : Mr. R. Pillemer

Instructed by : Brett Purdon Attorneys
Durban

Dates of Hearing : 16 February 2011
13 May 2011 (Chambers)
27 May 2011
14, 17 November 2011
06, 07 and 13 February 2012

Date of Filing of Judgment : 03 April 2012