


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2023-014975

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
23 June 2026	
DATE	SIGNATURE

In the matter between:

SEGONYE MAHLOMONYANE

First Plaintiff

CONSTANCE MBONANI

Second Plaintiff

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION

Respondent

This Judgment is handed down electronically by circulation to the Applicant's Legal Representatives and the Respondents by email, publication on Case Lines and saflii. The date for the handing down is deemed to be 23 June 2026 at 10 am.

JUDGMENT ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE

MUDAU J:

Introduction

- [1] The plaintiffs, two former employees of the Kungwini Local Municipality (later incorporated into the City of Tshwane), sue the defendant, a trade union, for damages arising from an alleged breach of a contract of mandate. They claim that the union failed to prosecute a review application diligently, causing their underlying unfair labour practice claim to lapse. At the close of the plaintiffs' case, the defendant applied for absolution from the instance. This judgment determines that application.
- [2] The matter has a long history. The plaintiffs were initially employed on fixed-term contracts in the Office of the Speaker. Following a municipal merger, they were offered permanent positions at lower grades and salaries. They contend this constituted a demotion. They approached the defendant union for assistance. The union referred an unfair labour practice dispute to the South African Local Government Bargaining Council (SALGBC). When the SALGBC issued a jurisdictional ruling that the referral was out of time, the union, on the plaintiffs' instructions, launched a review application in the Labour Court. That review application was never finalised. The plaintiffs now blame the union for the failure.
- [3] The defendant moved for absolution from the instance after the plaintiffs closed their case. The parties filed heads of argument, and I heard oral submissions. I reserved judgment. What follows is my ruling.

The legal test for absolution from the instance

- [4] The test is well settled. In *Claude Neon Lights (SA) Ltd v Daniel*¹ the Appellate Division held:

“... when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.”

- [5] The implication is that a plaintiff must make out a *prima facie* case with the evidence relating to all the elements of the claim to survive absolution because

¹ 1976 (4) SA 403 (A) at 409G–H

without such evidence no court could find for the plaintiff.² The Supreme Court of Appeal in *Gordon Lloyd Page & Associates v Rivera and Another*³, however, emphasised that absolution is to be granted sparingly, but when the occasion arises, a court should order it in the interests of justice. A decree of absolution effectively condemns the plaintiff unheard and denies the plaintiff the opportunity to test the defendant's version under cross-examination. The court should grant absolution only where the plaintiff's case is so weak that no reasonable court could find for the plaintiff.

- [6] Nevertheless, as the Constitutional Court held in *Carmichele v Minister of Safety and Security*⁴, absolution is an appropriate order where a court, applying its mind reasonably to the evidence, could not or might not find for the plaintiff. The underlying reason being that it is ordinarily in the interests of justice in such circumstances to bring the litigation to an end.⁵ Inferences drawn from the evidence need not be the only reasonable inferences, but they must be reasonable.⁶
- [7] For present purposes, the court assumes the plaintiffs' evidence to be true, unless it is inherently improbable or self-contradictory to the point of being unacceptable. Credibility findings are not finally made at this stage. The question is whether, on that assumed evidence, a reasonable court could or might find in favour of the plaintiffs.

The elements of the plaintiffs' claim

- [8] The plaintiffs' case is founded on a contract of mandate. The essential elements that they must prove are:
- a. the existence of a contract of mandate;
 - b. the material terms of that contract;

² See *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G - 38A

³ 2001 (1) SA 88 (SCA) at 92E-93A

⁴ 2001 (4) SA 938 (CC) at para 79

⁵ See *Mazibuko v Santam Insurance Co Ltd and Another* 1982 (3) SA 125 (A) at 134E - 135A

⁶ See *Smith v Road Accident Fund* [2015] ZAGPPHC 322 at para 10

- c. a breach of those terms by the defendant;
- d. causation – that the breach caused the plaintiffs to suffer loss; and
- e. the quantum of that loss.

[9] I will examine the evidence on each element, applying the *Claude Neon* test.

The evidence adduced by the plaintiffs

a. First plaintiff: Mr Segonye Mohlamonyane

[10] The first plaintiff testified that he commenced employment with Kungwini Local Municipality on 1 August 2007 as a Public Participation Coordinator. On 20 July 2009 he was appointed as Manager in the Office of the Speaker on a fixed-term contract ending 28 February 2011, at a salary of R257,154.52 per annum (post level 3). His contract was extended to 30 June 2011.

[11] On 19 May 2011, he was offered a permanent appointment as Clerk: Labour Relations with effect from 1 June 2011, at a salary of R103,678.08 per annum (post level 9). He said he signed the contract under pressure and did not agree to a demotion. He never applied for that position; it was not advertised. He was a member of the defendant union and paid monthly subscriptions, as reflected in his payslips (Exhibit U).

[12] He instructed the union through his shop steward, Mr Sonnyboy Moloto, to challenge the demotion. The union referred an unfair labour practice dispute to the SALGBC on 28 November 2014. On 17 September 2015, Commissioner Mathole issued a jurisdictional ruling that the referral was out of time (Exhibit N).

[13] The first plaintiff said the union then obtained a resolution from its Provincial Executive Committee authorising a review application. A review application was launched in the Labour Court on 16 November 2015. A condonation application was filed on 9 June 2016, supported by an affidavit deposed to by the first plaintiff himself (Exhibit O).

[14] Thereafter, nothing of substance happened for a long period. The first plaintiff testified that he followed up with the appointed attorneys, Maimane Inc. Initially

they said they were busy. Later, they told him that the union had not paid them, so they had put the file aside. He then approached the union's regional office, where Mr Ntuli informed him that the matter would be reallocated to other attorneys. Eventually, Phakedi Attorneys were appointed.

[15] On 29 January 2020, the first plaintiff and Mr Moloto consulted with Phakedi Attorneys. He said they were told that the attorneys would study the file and formulate an opinion. On 20 February 2020, he received a written legal opinion (Exhibit Q – but there was confusion about exhibit numbers; the opinion appears at pages 18-5 to 18-12). The opinion stated that the review application had been archived because more than 12 months had passed without prosecution, and that there were no reasonable prospects of success.

[16] The first plaintiff said he only then realised that his case was effectively dead. He consulted with his current attorneys, who advised him that the union might be liable for breach of mandate. He sued for the difference between his former managerial salary and his clerk's salary, quantified at R3,567,536.00.

b. Second plaintiff: Ms Constance Mbonani

[17] The second plaintiff's evidence followed a similar pattern. She was employed from 10 October 2006. By 2007 she was an MMC Coordinator. On 25 June 2009 her fixed-term contract was amended with a salary of R188,047.00 per annum (post level 6.2). Her contract was extended to 30 June 2011.

[18] On 9 May 2011 she was appointed as Clerk EAP with effect from 1 June 2011, at a salary of R103,678.08 per annum. She perceived this as a demotion and did not agree to it. She joined the union, paid subscriptions, and instructed the union to challenge the demotion.

[19] The union referred her dispute to the SALGBC and later launched a review application. She testified that the union appointed attorneys but that the matter was never finalised. She eventually obtained a legal opinion indicating that the review application had lapsed. She sued for damages of R1,240,184.00, being the difference between her former and current salaries.

c. *The documentary record*

[20] The plaintiffs placed a substantial volume of documentary evidence before the court, including:

- a. Employment contracts and amendments (Exhibits S, T).
- b. Payslips showing union subscriptions (Exhibit U).
- c. The SALGBC jurisdictional ruling (Exhibit N).
- d. The review application papers (Exhibit V – notice of motion).
- e. The condonation affidavit (Exhibit O).
- f. The memorandum of 10 May 2011 from Kungwini Local Municipality recommending the absorption of contract workers into permanent positions (Exhibit K).
- g. The letter from the Office of the Speaker dated 16 September 2011 concerning the placement of staff, which listed the first plaintiff as “Acting Deputy Director: Stakeholder Relation and Mobilisation” (Exhibit L).
- h. The legal opinion of Phakedi Attorneys (referred to as Exhibit Q or R, but in any event part of the record).

The defendant’s application for absolution

[21] The defendant argues that the plaintiffs have failed to make out a *prima facie* case of breach of mandate. Its main submissions are:

“The union complied with its mandate by referring the dispute to the SALGBC and by launching the review application. That is all that the contract of mandate required. In support, the defendant relies on *Food and Allied Workers Union v Ngcobo* 2014 (1) SA 32 (CC), where the Constitutional Court held that a union’s duty is to refer the dispute timeously to the relevant tribunal.”

[22] There is no evidence from the Labour Court file that the review application was archived, or that it could not have been reinstated. The legal opinion of Phakedi

Attorneys is an opinion, not primary evidence, and it contradicts the plaintiffs' own pleaded fact that the matter was indexed and paginated on 2 April 2019.

[23] The underlying unfair labour practice claim was prescribed in any event. The plaintiffs only instructed the union in November 2014, more than three years after the alleged demotion of May/June 2011. Section 191(1)(b) of the Labour Relations Act 66 of 1995 requires a referral within 90 days. Thus, even if the review had succeeded, the plaintiffs would not have been able to pursue the merits of the demotion claim.

[24] The plaintiffs have not identified which specific Labour Court rules were breached, nor have they provided objective evidence of the quantum of loss. The damages are based on bare assertions without reference to salary scales or expert evidence.

Analysis of the evidence against the test for absolution

[25] I turn to apply the *Claude Neon* test to each element of the plaintiffs' claim. I accept the plaintiffs' evidence as true for present purposes, unless it is inherently improbable or self-contradictory.

a. Existence and terms of the mandate

[26] The evidence of membership, payment of subscriptions, the instruction to the shop steward, the referral to the SALGBC, and the formal PEC resolution authorising the review application all point to the existence of a contract of mandate. A reasonable court could certainly find that the union accepted a mandate to challenge the demotion on behalf of the plaintiffs.

[27] The material terms of the mandate are pleaded at paragraphs 6 and 8 of the Amended Particulars of Claim. They include that the union would be an advocate for the plaintiffs' workplace rights, would represent them in court, and would execute its duties with necessary skill and diligence – including the diligent prosecution of cases to completion. The evidence supports the existence of such terms.

[28] On this element, the plaintiffs have crossed the low threshold for absolution.

b. Breach of mandate

[29] This is the core of the dispute. The plaintiffs contend that the union failed to prosecute the review application diligently, allowing it to lapse. The defendant contends that it did all that was required: it referred the dispute and launched the review.

[30] The leading authority is *Food and Allied Workers Union v Ngcobo*⁷. In that case, the Constitutional Court found that a union which had agreed to assist its members by timeously referring their dispute to the CCMA and, if necessary, to the Labour Court, was obliged to take the steps necessary to have the dispute determined in accordance with the Labour Relations Act. The union failed by not referring the dispute in time and by not securing condonation. Critically, the Court held that to succeed against the union, the employees had to establish only that their dispute, had it been properly referred, would have been resolved in their favour.⁸ That is a causation enquiry.

[31] In this case, the plaintiffs' evidence shows that the union did refer the dispute to the SALGBC and did launch the review application. The complaint is not about initial referral but about what happened afterwards – the failure to pursue the review to finality.

[32] The plaintiffs rely heavily on the legal opinion of Phakedi Attorneys, which states that the review application was archived in December 2016 because 12 months had elapsed with no prosecution and there were no prospects of success. However, this opinion is contradicted by the plaintiffs' own particulars of claim (paragraph 17), which state that on 2 April 2019 the review application was "indexed and paginated for set-down purposes". If the matter was archived in December 2016, it could not have been indexed and paginated in April 2019 without a court order for reinstatement. There is no evidence of any such order. This inherent contradiction is not merely a matter of weight; it goes to the plausibility of the plaintiffs' case. Even at the absolution stage, evidence that is

⁷ 2014 (1) SA 32 (CC)

⁸ *Id* at para 14

self-contradictory to the point of being inherently improbable need not be accepted as true.⁹

[33] Moreover, there is no direct evidence from the Labour Court file – no rule nisi, no notice of set-down, no registrar’s communication – confirming that the review application was indeed archived or that it could not be revived. The plaintiffs ask the court to infer from the opinion that the matter is dead. But an opinion is not primary evidence. Without objective facts from the court record, a reasonable court might not be able to draw the inference that the union’s conduct was the cause of the loss. At best, the evidence shows that the union’s appointed attorneys were slow and that the union changed attorneys several times. But whether that amounts to a breach of the mandate to “diligently prosecute” is, on this sparse record, highly doubtful.

[34] In addition, the plaintiffs themselves were not passive. The first plaintiff admitted that he followed up with the attorneys and with the union. The union did appoint alternative attorneys. The fact that the matter eventually came to a halt was not because the union refused to act, but because the attorneys (Maimane Inc.) allegedly were not paid. The plaintiffs do not suggest that the union refused to pay; rather, there appears to have been a payment dispute. Without evidence of what happened in the Labour Court, it is difficult to see how a reasonable court could conclude that the union breached its mandate.

[35] On the element of breach, therefore, the plaintiffs’ evidence is weak and contradictory. A reasonable court, applying its mind reasonably, might not find for the plaintiffs. Indeed, the evidence is so lacking that no reasonable court could find a breach on the facts presented.

d. Causation and loss

[36] Even if there were evidence of breach, the plaintiffs would need to show that the breach caused them to lose a real and substantial opportunity to succeed in the review and, ultimately, in the underlying demotion claim. The Constitutional Court in *Food & Allied Workers Union v Ngcobo NO and Another*¹⁰ held that causation

⁹ See *Anwary v Loch Logan Waterfront (Pty) Ltd* [2022] ZAFSHC 362

¹⁰ 2013 (5) SA 378 (SCA) at para 50

is established by showing that the dispute, had it been properly referred, would have been resolved in the employees' favour. That is a factual enquiry.

[37] The plaintiffs' case on causation is highly speculative. First, the underlying demotion claim was likely prescribed. The alleged demotion occurred in May/June 2011. The plaintiffs only instructed the union to refer the dispute in November 2014 – over three years later. Section 191(1)(b) of the LRA requires a referral within 90 days. The SALGBC already ruled that the matter was out of time. The review application was an attempt to challenge that jurisdictional ruling. But even if the review had succeeded, the bargaining council would still have had to consider whether to grant condonation for the late referral. There is no evidence that condonation would have been granted. The plaintiffs have not provided any explanation for the delay between 2011 and 2014. That is a fatal gap.

[38] Second, the plaintiffs claim that they would have been reinstated to their former grades and salaries, but they have produced no evidence of what the outcome of an unfair labour practice arbitration would have been. The documents show that the fixed-term contracts expired by effluxion of time. The plaintiffs accepted permanent employment at lower grades. Whether that constituted a demotion or a voluntary acceptance of a different position is a contested issue. There is no evidence that they would have succeeded on the merits.

[39] Third, the quantum of loss is not objectively established. The plaintiffs gave figures – R3.56 million and R1.24 million – but they did not produce salary scales, job grading documentation, or any expert report. The first plaintiff said he “went to HR” but did not produce any document from HR. The court is left with bare allegations. At the absolution stage, the evidence need not be conclusive, but there must be some objective foundation. Here, there is none.

[40] For these reasons, the plaintiffs have failed to make out a *prima facie* case on causation and loss. No reasonable court could find, on this evidence, that the plaintiffs lost a real opportunity to succeed in their demotion claim, or that the claimed amounts are even potentially recoverable.

e. *The underlying dispute: demotion or legitimate expectation?*

[41] The defendant also argued that the plaintiffs were never demoted because their fixed-term contracts came to an end, and they voluntarily accepted new permanent contracts. The plaintiffs relied on the letter of 16 September 2011 (Exhibit L) which listed the first plaintiff as Acting Deputy Director. They argued that this created a legitimate expectation that they would be placed at that grade.

[42] However, that very letter states that “as soon as the placement and migration process has been finalised, all staff members will be issued with confirmation letters”. There is no evidence that such confirmation letters were ever issued. The letter did not appoint the first plaintiff as Deputy Director; it merely reflected an acting arrangement during a transition. There is no appointment letter to that effect. The plaintiffs accepted permanent appointments as clerks in 2011 and worked in those positions for many years without taking any legal steps until 2014.

[43] Even if the plaintiffs had a legitimate expectation, that would be a matter for the Labour Court, not this court. The question for this court is whether the union breached its mandate. The weakness of the underlying claim is relevant to causation and to the reasonableness of the union’s conduct. The fact that the plaintiffs’ own case is so tenuous underscores why a reasonable court would not find in their favour on the mandate claim.

Conclusion on absolution

[44] I have considered the evidence as a whole. The plaintiffs have shown that they were union members, that they gave instructions, and that the union took initial steps. But on the critical elements of breach, causation, and loss, the evidence is either contradictory, speculative, or entirely lacking. The legal opinion on which they rely is contradicted by their own pleadings. There is no evidence from the Labour Court file. The underlying demotion claim appears prescribed and weak on the merits. The quantum of damages is unsupported.

[45] Absolution from the instance is to be granted sparingly, but it is not to be withheld where the plaintiff’s case is so weak that no reasonable court could find for the plaintiff. That is the situation here. A reasonable court, applying its mind to the

evidence, could not or might not find for the plaintiffs on the essential elements of breach of mandate. It follows that the defendant is entitled to absolution.

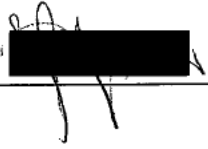
Costs

[46] The defendant has asked for costs. There is no reason to deviate from the ordinary rule that costs follow the result. The plaintiffs have not established any special circumstances that would justify a different order.

Order

[47] In the result, I make the following order:

1. The defendant's application for absolution from the instance is granted.
2. The plaintiffs are absolved from the instance.
3. The plaintiffs are ordered to pay the defendant's costs.



MUDAU J
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

For the Plaintiffs:

Mr N Xabendlini

Instructed by:

Xabendlini Attorneys

For the Defendants:

Mr E Gwebu

Instructed by

Madlela Gwebu Mashamba Inc

Date of Hearing:

12-14 May 2026

Date of Judgment:

23 June 2026