(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised

_____ _____
Signature Date

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**



Not Reportable
Case no: **2025-237716**

In the matter between:

**SABELO MHLANGA AND 24 OTHERS** **Applicants**

and

**SILVER SOLUTIONS 2870(PTY) LTD** **First Respondent**
**HJB SERVICES (PTY) LTD** **Second Respondent**

**Heard**: **In Chambers**
**First and Second Respondents' submissions received on 11 December 2025.**
**Applicant's submissions received on 08 April 2026.**
**Delivered**: **This judgment was handed down electronically by emailing a copy to the parties on 19 June 2026. This date is deemed to be the date of delivery of this judgment.**

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**JUDGMENT**

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**KROON AJ**

Introduction

[1] This matter concerned an opposed urgent application. The primary relief sought was an interdict against the Second Respondent prohibiting the employment of staff pending an unfair dismissal dispute referred to the Bargaining Council. The Respondents prayed that the Applicants' attorneys be saddled with a costs order *de bonis propriis*.

[2] On 10 December 2025, the Court issued a Directive regarding the further conduct of proceedings. I quote as follows:

> "***RE: S. MJALISWA INC. ATTORNEYS v SILVER SOLUTIONS (PTY) LTD – CASE NO. 2025-237716***
>
> *Dear All,*
>
> *[1] The Respondent will furnish, by close of business today, 10 December 2025, a timeline of events concerning the conduct of the Applicant's attorneys of record, S Mjaliswa Inc. Attorneys on which it relies in support of the submission that such attorneys should be liable for a costs order de bonis propriis.*
>
> *[2] S Mjaliswa Inc. is afforded, as per agreement, until close of business on Friday, 12 December 2025, to make representations as to whether it should be liable to pay the costs de bonis propriis should the Court be of the mind that an adverse costs order is warranted.*
>
> *…*
>
> *Regards*
>
> ***Ms. Mmathato Mokatse***
>
> *Associate to Acting Justice Kroon"*

[3] On 6 January 2026, the Court issued an order in the following terms:

> *"Having heard the Mr Mvuthuza for the Applicants and Mr Du Plooy for the First and Second Respondents, the following order is hereby issued:*

1. *The application is dismissed.*

2. *An order on costs and reasons will follow as soon as is reasonably possible.*

***BY THE COURT***

***REGISTRAR****"*

[4] At that stage, no representations had been received from the legal representative of the Applicants as to the appropriateness of a *de bonis propriis* costs order. After several follow-ups, the legal representative of the Applicants eventually delivered his submissions on 8 April 2026, although they were due on 12 December 2025. In this context, I mention that the date of 12 December 2025 was agreed to and was based on an undertaking by Counsel for the Applicants. There was no application for condonation for the non-compliance with the Directive, and in truth, no justification for considering the belated submissions. This all notwithstanding, in my view, it is in the interests of justice to take into account the representations made by the Applicants' legal representative, this in the light of the potential prejudice which may flow from disregarding the submissions.[1]

[5] Essentially, there are two grounds advanced as to why a *de bonis propriis* costs order should be granted. The first concerns the alleged lack of merit in the application. The second concerns the manner in which the litigation was conducted.

The submissions of the parties

[6] It is convenient first to quote from the affidavit of Mr du Plooy, who appeared for the two Respondents, and who deposed to an affidavit, at the request of the Court, setting out the timeline on which the Respondents would rely to seek a costs order *de bonis propriis*:

*"I, the undersigned,*

[1] *Cf Pangbourne Properties Ltd v Pulse Moving CC and Another* 2013 (3) SA 140 (GSJ)

***LEON GERHARDUS DU PLOOY***

*hereby declare under oath as follows:*

*…*

***TIMELINE***

1. *Firstly, we received the unissued notice of motion with no founding affidavit or annexures at around 11h30 on 4 December 2025.*

2. *We only gained access to Court Online at 14h00 on 4 December 2025. At this stage no service of the urgent application, founding affidavit or annexures has been affected on our offices or the Respondents.*

3. *At 14h51 on 4 December 2025, the Applicants' legal representative served the urgent application with the founding affidavits and annexures on our offices and the Respondents.*

4. *It was required of us to draft an answering affidavit and to appear in Court on the 5th of December 2025 at 10h00. Therefore we had less than 24 hours' notice.*

5. *We constantly contacted the Applicants representatives to invite us on caselines, which they failed to do.*

5. *[duplicate number] On the 5th of December 2025, we appeared for the urgent application and the matter was removed with costs due to the Applicants' Legal Representatives failing to upload the matter on caselines. This is no excuse as the Judge's Secretary also attached the directive on how to upload the case for the Legal Representatives and sent same to them at 9h00 on the 5th of December 2025. Therefore they ought to have been aware.*

6. *The* [sic] *we received a new notice of motion on the 5th of December 2025 at 14h50, stating that the urgent application will be heard on the 9th of December 2025 at 10h00.*

7. *We were once again not invited to caselines. I reiterate that the directive on how to upload documents on caselines where* [sic]

*furnished to them on morning of the 5th of December 2025 at around 9h00.*

8. *The entire Monday, 8 December 2025 we followed up regarding the matter as it did not appear on the roll. I also wrote an e-mail to the Legal Representatives indicating that this matter is not enrolled and that we are not invited to caselines.*

9. *I spoke to your Lordship's Secretary Ms Mokatse at 15h20. At this stage the matter was still not on the roll. She ensured myself that the matter is not going to proceed on the 9th of December 2025.*

10. *I wrote to the Applicants' legal representative and confirmed the above at 15h37. Therefore they were clearly aware that we have ensured that the matter is not enrolled for 9 December 2025.*

10. *The matter was then enrolled in the morning of 9 December 2025. Ms Mokatse e-mailed the link to the Applicant's Legal Representative at around 11h11 directing them to invite our offices, as we were not included in the e-mail.*

11. *The Applicant's Legal Representatives only phoned our offices at 12h45 indicating to us that the matter is enrolled and they are waiting for us to join the link. Once again affording us less than 10 minutes' notice. The Applicants' Legal Representative failed to inform us that the matter is on the roll once they have established it.*

12. *The Applicant's Legal Representative only sent us the link at 12h46.*

13. *I was on my way to Vereeniging for another case, where I had to stop at a Sasol Garage to join the link.*

14. *At this stage we were still not invited to Caselines.*

15. *Ms Mokatse then had to invite us to Caselines during the virtual meeting and we gained access at 13h16.*

16. *It then came to our attention that the Applicant's Legal Representative failed to upload the Respondent's affidavits,*

*annexure and documents that were uploaded on Court Online and therefore only uploaded their own papers.*

17. *Due to the above and myself sitting in my vehicle with no documentation, we postponed the matter to today at 10h00. Once again less than 24 hour's notice.*

18. *The aforementioned conduct of Mjaliswa Attorneys shows clear unhanded* (sic) *tactics and I humbly submit that the nature of this urgent application, together with the two "With Prejudice" correspondences sent to the Applicant's Legal Representatives justifies a cost order de bonis propriis.*

19. *Wherefore we humbly request the aforementioned cost order in the alternative the appropriate cost order against the Applicants."*

[7] In response to the submissions, the Applicants' legal representative deposed to an affidavit from which I quote as follows:

*"I, the undersigned*

*SIYAMTHEMBA MJALISWA*

*…*

6. *On the 13th of November I was approach by the representatives of suspended employees of Silver Solution who have informed me about their suspension from work and the interim order granted against them by the Applicant's attorneys from labour court Johannesburg.*

7. *On approaching us it was made clear that the employees have no funds but they requested us to assist them on pro bono as they were still yet to be paid the November salaries, it was based on this request that we decided to assist them pending the finalization of the matter.*

8. *The instruction was for us to respond to the interim order granted against them by filing the Answering Affidavit, surprisingly the return date for the interim order was in February 2026, that alone*

*has put the employees on a disadvantage as this clearly shows that this matter is far from over*

9. *The employees have complied with the court Order by not distabing* (sic) *the employer at his work premises*

10. *While still on suspension by the second respondent, the employees received letters informing them to respond in writing as to why they cannot be suspended and in deed* (sic) *the applicants responded thought us as their attorneys of record.*

11. *It has come to our attention that the company started with the recruitment of staff just immediately after suspension which we felt that the company is in a mission to dismissed the employees.*

12. *On the date of the 27 of November the employees received letter of termination from the second respondent despite the submission by the employees that they do not recognized the Second Respondent as their employer since there was never a formal handover and compliance with Section 197 of labour relations*

13. *On recelvrng the letters of termination we were informed that the company is busy recruiting the new staff regardless of the case being filed at the bargaining council for adjudication. The dater* (sic) *was set for the 29 of January 2026.*

14. *The employees decided to file an urgent application for the company to stop the employment of the new staff pending the outcome of the Baragining* (sic) *council.*

15. *The urgent application was to halt the operations of the employment of the new staff not to decide about the issue of unfair dismissal as that has to be determined by the Bargaining council and we were of the view that the parties will have meeting of the minds at the conciliation before the matter goes to Arbitration.*

16. *The employees have got a right for protection in terms of section 23(1) of the constitution for any unfair labour practice even if the*

*unfair labour practice is not covered by scope of section 186(2) of the labor* (sic) *relations Act*

17. *The advise* (sic) *given to the Applicants was there to protect their employement as the employer had started recruiting the new staff even before the Conciliation by the Bargaining Council.*

18. *There was nothing wrong in filing the court interdict if the relief from the Bargaing Council was going to defeat the purpose as the employer by that time he would have employed all the staff they needed.*

19. *The relief sought by the applicants ware* (sic) *in line with section 23 of the constitution*

20. *The acknowledgement made by the respondent is welcome when they submit that the employees employed on the spaces of the Applicants will be dealt with in terms of section 189 of labour relations Act.*

21. *The treats* (sic) *by the Respondents attorneys is uncalled for and misleading, he was trying to scare us from continuing with the urgent application knowing it very well that the case at the Bargaining Council can take up to three years to be decided.*

22. *Therefore I maintain that the Respondent were right in bringng the matter on urgent basis for relief sought and the case sited on the main application was the correct one in dealing with this matter*

23. *On the issue of court on line I want to apologies to the court unreservedly, the pressure received from technical errors in registering the court online and feeding the information was beyond our knowledge as you know that Easton Cape has just been part of the Court on line unlike Gauteng and other provinces, therefore we are still on the learning cave* (sic).

24. *We have sought assistance from the help desk of Court on line which they have assisted us greatly and we hope that we will not experience such technical errors going forward as well as the*

*issue of time frames as we continue to empower ourselves with this new technology*

25. *Therefore I request the above honorable court to be lenient as this was beyond our control as the law firm and we promise that such errors will be avoided in future.*

26. *The request by the Respondent for de popres* (sic) *costs be dismissed and the normal cost be applicable as it is supposed to be as the applicants have straggled* (sic) *to get assistance until we assisted them with pro bono."* (own emphasis)

The validity of the claim of the Applicants

*Introduction*

[8] The Court deals first with the absence of a legal basis for the application brought by the Applicants' attorneys on behalf of the Applicants. The Second Respondent dismissed the Applicants on 27 November 2025. They referred an unfair dismissal dispute to the Bargaining Council. The relief set out in the notice of motion was inelegantly formulated. It was made clear during argument that the Applicants do not wish to have their dismissals reversed. Rather, they seek to interdict the Second Respondent from employing new staff pending the outcome of a case in front of the Bargaining Council.

[9] Shorn of all elaboration, the case of the Applicants is that they have a right to interdict the Second Respondent from filling the vacancies left in the wake of the dismissed employees' departures. The alleged right is based on the premise that if the posts are filled, this could somehow frustrate or affect the unfair dismissal claim. As will appear from what is set out below, the relief sought is specious in the extreme.

*Preliminary points*

[10] Before dealing with the merits of the application, I make three observations.

[11] The first is that I do not understand why the First Respondent was joined in these proceedings. No substantive relief is sought, nor could it have been sought, against it when it comes to the interdict, because the Applicants were employed by the Second Respondent and not the First Respondent. It is trite that to demonstrate that a party has a legal interest in the outcome of proceedings, it must be demonstrated that the order sought may prejudice that party.[2]

[12] The second point is that the relief formulated is extremely vague and overly broad, and, for that reason, would result in an unenforceable order. The Applicants seek to interdict the Second Respondent from employing any *"new staff".* What the Applicant should have sought was that the filling of the vacancies which were left as a result of their dismissals be placed in abeyance pending the outcome of the contemplated litigation. However, what the Applicants have done is to seek relief that would result in the Second Respondent being unable to employ anyone at all, even in posts not previously occupied by the Applicants. For this reason alone, I have reservations as to whether the relief sought was competent.

[13] The third point is that the relief was sought on a wrong premise, i.e., that the Bargaining Council would have jurisdiction over the merits of the unfair dismissal disputes. It is, however, clear that, because the reasons for the dismissals concern the participation in an allegedly unlawful strike, in terms of section 191(5)(b)(iii) of the LRA, it would be the Labour Court which would enjoy jurisdiction. Again, for this reason alone, I have reservations as to whether the relief sought was competent.



<u>The merits of the application</u>

[14] The granting of the relief sought against the Second Respondent would truly be unprecedented. The Court is unaware of any authority supporting the notion, let alone the proposition, that, pending the outcome of an

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[2] *Gordon v Department of Health: Kwazulu-Natal* 2008 (6) SA 522 (SCA); [2009] 1 All SA 39 (SCA) ; 2009 (1) BCLR 44 (SCA); [2008] 11 BLLR 1023 (SCA); (2008) 29 ILJ 2535 (SCA) at para [10]

unfair dismissal dispute, an employee may interdict his or her erstwhile employer from appointing a person into his or her erstwhile post. To put it plainly, there is no legal foundation to contend that the Applicants could ever have enjoyed a right to interdict the Second Respondent from appointing staff so that it could run its business.

[15] The argument advanced on behalf of the Applicant appeared to be that because there was merit in the unfair dismissal claims, this somehow translated into a right to be able to interdict the Second Respondent from filling the post. That is a *non sequitur*. It does not follow. Rather, the correct position is that should an employer dismiss an employee and should that employer elect thereafter to fill the vacancy left in the wake of the employee's departure, the employer is at liberty to do so, but it does so at its peril in the sense that should it be found that the dismissal was substantively unfair and that the employee falls to be reinstated, the employer will, so to speak, have to make a plan when it comes to the person who was appointed into the vacant post. This may entail, *inter alia*, transferring that employee, negotiating a settlement with that employee or even dismissing that employee for operational reasons. The one thing, however, which is beyond doubt is that it will not be open to an Arbitrator or a Judge to find that he or she would have ordered reinstatement, but that his or her hands are now tied because the employer has filled the vacancy previously occupied by the employee who was unfairly dismissed. For the sake of completeness, I would note that the approach contended for by the Applicants is unconstitutional in that it would infringe the Second Respondent's right to freedom of economic activity.

[16] In *Trevin Ralph Olifant v Thembelihle Municipality*[3] Tlaletsi JP explained the position as follows:

> *"[22] In casu, should the* ***Municipality*** *employ someone in the position contested by the applicant, it will run the risk of creating a problem for itself in the event of a reinstatement order. It will either*

[3] *Oliphant v Thembelihle Local Municipality and Another* (2023) 44 ILJ 413 (NCK)

*have to terminate the contract it entered into with the new employee or come to an arrangement with that employee or the applicant.*

*[23] The right that the applicant wants to protect will only come into existence once he successfully demonstrates to the Bargaining Council that this "dismissal" is substantively unfair. He may or he may not succeed in that endeavour. Either of the parties who might be aggrieved by the award by the Bargaining Council has the right to take the award through the dispute resolution systems provided by the law. That might cause more delays which will be to the detriment of the residents of the* ***Municipality*** *. It is not for the applicant to decide that the person who is currently acting in the contested position should continue until the dispute with the* ***Municipality*** *is finally resolved. It is the prerogative of the* ***Municipality*** *to decide whether to keep the person or permanently fill the position. Whatever delay might be there, if, in the end, the applicant is successful, he will be reinstated without any loss of emoluments due to him. His conditional right does not translate into a right to keep the position he occupied vacant indefinitely, for just in case he succeeds.*

*[24] In the result I am not persuaded that the applicant has shown that he has a prima facie right to protect and further that there is no alternative remedy should he be entitled to be reinstated. The application should be dismissed on this basis. With this conclusion, it is not necessary to consider other requirements for interdictory relief."*

[17] In *Mashaba v South African Football Association*[4] LaGrange J dealt thoroughly, and might I say lucidly, with the legal position which, in the Court's view, has been entrenched since the dawn of Labour Law jurisprudence. The Learned Judge explained as follows:

[4] (2017) 38 ILJ 1668 (LC)

*"…*

*[6] Under the Labour Relations Act, 66 of 1995 ('the LRA') an employee whose dismissal is found to be substantively unfair is entitled to expect reinstatement as a remedy if the employee does not simply want compensation, provided two other considerations are not applicable. Section 193(2) of the LRA states:*

*"The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-*

*(a) the employee does not wish to be reinstated or re-employed;*

*(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;*

*(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or*

*(d) the dismissal is unfair only because the employer did not follow a fair procedure."*

*[7] It is clear from the preamble of the section that the Commissioner or the Court is obliged to order the reinstatement or re-employment of an employee whose dismissal is substantively unfair, unless one of the conditions in the subsections applies. In Mr* ***Mashaba*** *'s case, he believes he will succeed in establishing that his dismissal was substantively unfair and accordingly he will not be denied reinstatement on account of section 193 (2) (d) which has no practical effect unless a dismissal is found to be only procedurally unfair. Clearly, subsection 193(2)(a) will not apply unless Mr* ***Mashaba*** *changes his mind and abandons his quest for reinstatement. Consequently, if he is successful in convincing the arbitrator that his dismissal by SAFA was substantively unfair only subsections 193 (2) (a) and (b) could stand in the way of his reinstatement or reappointment. Whether subsection 193 and (2)(a) would present a problem for his reinstatement will not*

*depend on the appointment of another coach, because that provision is only concerned with the extent to which the relationship between the dismissed employee and the employer had deteriorated to such an extent around the time the dismissal took place that the prospect of a relationship of mutual respect and trust being restored is unlikely.*

*[8] The remaining provision which could present an obstacle to his reinstatement, assuming he is successful in establishing that his dismissal was substantively unfair, is subsection 193(2)(c). Mr* ***Mashaba*** *fears that if a new national coach is appointed, a Commissioner contemplating reinstating him might feel that the existence of a newly appointed coach would make it "not reasonably practicable" for the employer to reengage him and might deprive him of the reinstatement he believes he deserves.*

*[9] However, merely because Mr* ***Mashaba****'s reinstatement would present a problem for SAFA if it appoints another person to the position in the meantime, that would not be sufficient justification for SAFA to say that the employment of a replacement would make it "reasonably impracticable" to reinstate him. The phrase "reasonably impracticable" does not simply mean inconvenient or impractical. The LAC has made this clear in its decision in Xstrata* ***South*** *Africa (Pty) Ltd (Lydenburg Alloy Works)* ***v*** *Num Obo Masha and Others[2], where it said amongst other things:*

*"The object of section 193(2)(c) of the LRA is to exceptionally permit the employer relief when it is not practically feasible to reinstate; for instance, where the employee's job no longer exists, or the employer is facing liquidation, relocation or the like. The term "not reasonably practicable" in section 193(2)(c) does not equate with "practical", as the arbitrator assumed. It refers to the concept of feasibility. Something is not feasible if it is beyond possibility. The employer must show that the possibilities of its*

*situation make reinstatement inappropriate. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile."*

*[10] An employer may not thwart a dismissed employee's bid for reinstatement by replacing him and then arguing that it cannot reinstate the dismissed employee because there is someone occupying his former position.[3] That is an eventuality the employer must take into account when it replaces a dismissed employee who is challenging their dismissal. In other words, if the employer does not take suitable steps in its contract with the replacement, it ought to realise it runs the risk that it will be faced with the possibility of terminating that relationship or of trying to renegotiate the replacement's contract if the former incumbent is reinstated.*

*[11] Thus, on a proper interpretation of section 193(2)(c), if SAFA does appoint a replacement head coach before learning of the outcome of Mr* ***Mashaba****'s case, that appointment cannot protect it against an order of reinstatement. Consequently, Mr* ***Mashaba*** *will not be deprived of his right to reinstatement, if the only consideration which might stand in its way is the employment of a replacement coach before his CCMA case was decided. That is not a factor which should influence any arbitrator deciding if there is anything which prevents his reinstatement, if he decides that Mr* ***Mashaba*** *'s dismissal was substantively unfair.*

*[12] In light of the above, if SAFA takes the risk of employing a replacement coach there is no reason to believe that this factor will cause Mr* ***Mashaba*** *irreparable harm in his bid for reinstatement. It is the arbitrator exercising his or her powers under section 193(2)(c) who is given the power of reinstatement under the LRA, which is the right which Mr* ***Mashaba*** *seeks to preserve by bringing this application. The arbitration proceedings provide not merely a suitable alternative remedy but the primary*

*remedy for any dismissed employee seeking reinstatement who has been dismissed for misconduct. There was no need to bring this application in order to preserve that remedy for the reasons already discussed. Thus the potential harm Mr* ***Mashaba*** *may suffer as a result of the appointment of a replacement before the CCMA decides his case is not irreparable and the remedy of reinstatement remains available as an alternative remedy notwithstanding such an appointment.*

*Existence of a prima facie right to prevent SAFA employing a replacement*

*[13] The right which the LRA provides by virtue of section 193(2) is the right of an employee to be reinstated if their dismissal is found to be substantively unfair and provided none of the subsections are applicable. As discussed above, an order of reinstatement pays no heed to other contractual arrangements that might have come into existence between the employer and a replacement. That is of no concern to the arbitrator or the court and the employer is left to its own devices to sort out the mess it finds itself in having employed someone and then being ordered to re-engage someone in the same position. However, the fact that the arbitrator or the court may impose a reinstatement on an employer does not necessarily mean that the court can dictate how the employer conducts itself in concluding employment contracts with other third parties, unless such appointments may be challenged on other grounds such as being unlawful in terms of a statute.[4] The Labour Court, certainly has the power to enforce the terms of employment contracts,[5] but I know of no provision in any of the statutes which empowers the court to prevent the conclusion of private employment contracts. Likewise, the fact that Mr* ***Mashaba*** *may acquire a right to reinstatement once he is able to establish that his dismissal was substantively unfair, does not translate into a right to keep his position vacant merely on the assumption that he might be able to do so.*

*[14] This brings to the fore a further complicating factor which is implicit in this application. Since his right to reinstatement will only arise as a possibility if Mr* ***Mashaba*** *succeeds in establishing the substantive unfairness of his dismissal, and assuming that the right of reinstatement in some way could be a platform for a right to interfere beforehand in the employment of replacement staff, the court would necessarily have to take a provisional view that his dismissal will most probably be found to be substantively unfair. This is because his prospect of reinstatement will only arise if that is established. This would require the court to effectively second-guess the outcome of the arbitration proceedings, which the LRA has designated as the appropriate proceedings in which the substantive fairness of a dismissal for misconduct and any award of consequential relief must be determined.*

*[15] Consequently, the right Mr* ***Mashaba*** *argues for, apart from the difficulties highlighted above, is also fundamentally premised on his expected success in the CCMA proceedings, which is not for the court to evaluate in the context of urgent motion proceedings.*

*[16] In all the circumstances, I am not satisfied that Mr* ***Mashaba*** *has demonstrated the existence of a right to prevent the employment of a replacement coach pending the outcome of his arbitration proceedings, even if he would be entitled to reinstatement at the conclusion of those proceedings. In these circumstances, it is also not necessary for me to consider the balance of convenience."*

[18] In summary, the correct position is that, irrespective of whether an employer has appointed a person into the post from which the complaining employee was dismissed, if an employee is successful in the pursuit of the unfair dismissal dispute in the sense that it has been demonstrated that reinstatement is, in terms of the LRA, the appropriate remedy, that employee will, by operation of law, have a right to be

reinstated.[5] An employer is not permitted to frustrate a legitimate claim to reinstatement by the subsequent employment of an employee into the post left vacant by the dismissed employee. As the maxim goes, *ubi jus, ibi remedium* (where there is a right, there is a remedy). One can go further. If a Court were to accept the proposition that an employer could thwart the remedy of reinstatement by filling the vacancy prior to the determination of the unfair dismissal dispute, that would effectively be equivalent to the Court countenancing impermissible *"self-help"* (by the employer), something which has been eschewed by the Constitutional Court.[6]

[19] To aggravate matters, there was an undertaking contained in the answering affidavit that, should the Applicants be reinstated, the Second Respondent would embark on a retrenchment exercise. The relevant paragraph reads as follows:

> *"4.12. Furthermore, the Applicants will suffer no harm. If the Applicants are successful in their unfair dismissal claims and if the Applicants are awarded reinstatement, the Second Respondent will then have to follow procedures set out in section 189 of the LRA to dismiss any of the Employees that were appointed in the place of the Applicants. We hereby give an undertaking that we will do so."*

[20] Notwithstanding this undertaking, which was, itself, strictly speaking, unnecessary because it served only to restate the law, the application was blindly persisted with by the Applicants. Even if the Applicants' legal representatives were ignorant of the trite legal position set out above



[5] *BKL Monitoring & Inspectorate CC v Maduka and Others* (2026) 47 ILJ 887 (LAC) where the Labour Appeal Court recently stressed that the primary remedy for an unfair dismissal is one of reinstatement and in order to avoid this consequence, there is an onus on the employer to demonstrate that reinstatement is not reasonably practicable *"…by adducing compelling evidence"* at para [46]

[6] *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng and Others, Head of the Department of Health, Gauteng and Another v Public Servants Association obo Ubogu* 2018 (2) BCLR 184 (CC); (2018) 39 ILJ 337 (CC); [2018] 2 BLLR 107 (CC); 2018 (2) SA 365 (CC)

before the launching of the application, then at this point they should have advised the Applicants that the application should be withdrawn.

[21] I would add only that the relief sought by the Applicants, if granted, would be draconian in nature. Given the circumstance that the unfair dismissal disputes would, if pursued, fall to be adjudicated by the Labour Court, experience has taught us that it may take many years before it is finalised. The result would be that the Second Respondent would be precluded from employing persons for many years 25 vacant posts. This would self-evidently be disruptive and highly prejudicial to the operations of the Second Respondent. When one steps back and looks at the matter objectively, it is difficult not to get the impression that the application is vexatious in nature. It is aimed at, impermissibly so, harassing the Second Respondent by seeking to interfere with the running of its business by placing a bar on it reaching any contractual arrangements with third parties, i.e. the job applicants.

[22] In my view it follows, ineluctably, that the case presented on behalf of the Applicants should justifiably attract the epithet *"hopeless"*. It was untenable and unarguable. It was a non-starter from its inception. It was a case which no reasonably competent legal representative would have advanced. In *Lion v Ram N.O and Others*[7] the Court commented as follows:

> *"[37] ... In Wheatley, it was stressed that a legal representative is much more than the mere mouthpiece or hireling of his or her client.*[8]
>
> *[38] In my view, it is appropriate to make a de bonis propriis costs order against Ms Lion's legal representatives. I say this for three primary reasons. Firstly, I cannot see how, either as a matter of law or fairness, Ms Lion, who stated in her affidavit that in bringing the application she had relied on the advice of her legal representatives, should, on these facts, be penalised for the legal strategy which her legal representatives advised her to employ.*

[7] (2025/240674) [2026] ZALCJHB 127 (24 April 2026)
[8] para [38]

*[39] Even if Ms Lion had not relied on the advice of her legal representatives, as pointed out in Wheatley, there comes a stage where legal representatives are, in terms of their overarching duty to the Court, obliged to refuse to follow instructions which would make them a party to an abuse of the Court process. The Court put it like this:*

> "*[43]... No reasonably competent legal representative would have persisted with the application. A bare assertion that the practitioner was acting on instructions does not constitute an answer where those instructions, if followed, would necessarily involve a departure from the practitioner's paramount duty to the Court. As explained in Engen Petroleum Ltd v Moodley NO and Another, a legal representative's duty to a client "…never translates into the embarrassing charade of putting up silly points that are unarguable…".*[9] *The duties of legal practitioners in this respect have now been formalised in the Code. The Code is not confined to forbidding direct abuse of Court process: It equally condemns a supine or acquiescent posture that enables a practitioner to facilitate or become a conduit for such abuse.*[10]"

*[40] In Brown and Another v Papadakis and Another NNO,*[11] *Davis J, dealing with an abuse of the process of Court and an attempt to frustrate a proper hearing of the matter, awarded costs de bonis propriis on an attorney and own client scale, the same order which the Court made in this matter. The sentiments expressed by the learned Judge apply to the current matter, and it is apposite to quote from the judgment:*

> *"The question therefore arises as to costs. A punitive order of costs needs to be made in this case. <u>There is no proper basis for this application</u>. It is misconceived; there is no order against which an appeal is lodged. It is nothing more than a desperate*

[9] [2017] ZAGPJH 78 para [52]

[10] The Code provides that:

> *"60.1. A legal practitioner shall not abuse <u>or permit</u> abuse of the process of court or tribunal and shall act in a manner that shall promote and advance efficacy of the legal process."* (own emphasis)

[11] 2009 (3) SA 542

*rummaging-around in affidavits to throw dirt at the bench to prevent due process from taking its course.*

*The question arises as to whether the costs order should be* de bonis propriis*, ...*

*Mr Khan submits that he was given instructions to so pursue this course of action, but attorneys must surely apply a professional standard in deciding to do this. See the dictum of Innes CJ in* Vermaak's Executor v Vermaak's Heirs *1909 TS 679 at 691. Applicants have rights, but the courts are not playthings, to be abused at the convenience of litigants who raise spurious, reckless arguments which jeopardise the integrity of the court, ...*

*In my view, this is a case where the court should say: Of course, litigants have rights; of course, courts must fastidiously respect these rights; of course, all rights should be exhausted and an attorney should act as energetically as he or she may be able, to protect these rights. But when the boundary is overstepped so grossly in circumstances where there is no legal basis, no precedent, no serious evidential edifice on which to launch such an application (ie even on these vague affidavits could a recusal application ever be brought?), the court should say, you have overstepped the mark and have crossed a bridge in circumstances where an order of costs* de bonis propriis *must follow."* (own emphasis)

[23] Lastly, there was an ancillary issue about the non-payment of salary. It was all but conceded that the application for relief under this heading should not have been brought on an urgent basis. The other difficulty is that the relief sought under this heading was so vague that the Court couldn't grant it. Furthermore, it was clear that what the Applicants were doing in this matter was seeking final relief under disguise of temporary relief. The Applicants remain at liberty, should they so wish, to persist with the claim, properly formulated, in the ordinary course.

The manner in which the litigation was conducted

[24] As appears from the affidavit of the Applicants' legal representative, he does not, in any material way, dispute the version put forward by Mr du Plooy regarding his conduct of the litigation. He chooses instead to offer an apology. I have reservations as to whether there is true remorse here.

[25] As part of the explanation, the Applicant's attorneys baldly contend that they experienced *"technical difficulties"*. The statement is so vague that it can carry little evidential weight. No details are furnished to substantiate this assertion. There is also an allegation that the *"help desk"* was approached but again no details are provided concerning any communications with the help desk. The interactions with the help desk, as described in the explanation, does however suggest that the fault lay not with undescribed technical difficulties but with the Applicant's legal representatives. There is also no explanation as to why the Applicant's legal representatives, when they eventually appeared to get it right to upload the papers on Case Lines, only uploaded their Court papers and not the Court papers of the Respondents.

[26] Thus, the Court has not been taken into the confidence of the Applicants' legal representative as to the nature and extent of the technical difficulties, as well as, *inter alia,* the interactions with the help desk. As has often been said, albeit in a different context, what is required is an explanation sufficiently full and with the requisite particulars to place the Court in a position where it can properly assess the conduct and motives of the applicant.[12]

[27] Insofar as it was the case that the Applicants' legal representatives were still, as it were, *"learning the ropes"* when it came to the new system, I do not think that this is an attractive argument. Just as there is a duty on legal representatives to acquaint themselves with the Rules of the forum in which they appear, so too is there a duty to acquaint themselves with the applicable Directives.

[12] *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A

[28] Mr Mjaliswa also appeared to contend, through the vehicle of his submissions, that because the Applicants' attorneys were prosecuting the urgent application *pro bono*, this should also serve as a basis for not making a costs order *de bonis propriis*. The Court fails to understand the connection between the fact that a party is running a matter *pro bono* and the issuance of a costs order *de bonis propriis*. To the extent that the submission is that legal representatives who conduct a matter *pro bono* are assessed against a lesser professional standard, such a submission needs only to be stated to be rejected. The Court would venture to suggest that the fact that the Applicants are impecunious and unable to afford their own legal representation would, if anything, in these peculiar circumstances, be a factor counting in favour of the granting of a costs order *de bonis propriis.*

[29] Finally, it is noted that the Applicants' legal representative has apologised for how he conducted the litigation. Recently, in *Nelson Mandela Bay Municipality v Bukula*[13] Prinsloo J observed that there comes a stage where a party cannot avoid the consequences which naturally attach to objectionable conduct by a legal representative and the offer of an apology, *ex post facto*, even if genuine, cannot be used as a proverbial get out of jail free card.

[30] The Applicants already have a cost order against them. Such cost order will, in all likelihood, be meaningless or very difficult to enforce. The Court has to guard against legal representatives taking advantage of uneducated indigent litigants and then litigating with impunity pursuing untenable and vexatious claims. Legal representatives are required, at all times, to maintain a level of professional independence and to earnestly and objectively consider the implications of instituting litigation before rushing off to Court.



[13] PR 17323 (12 June 2026)

Conclusion

[31] On the case presented on behalf of the Applicants by the Applicant's attorneys, it would mean that an employer could divest an employee of a right to claim reinstatement through the mere act of employing someone in the vacancy left by the dismissed employee. Thus unscrupulous employers could dismiss employees for an unfair reason or no reason at all and then immediately employ persons in the place of the dismissed employees and then, on the back of that decision to employ a new persons in the vacancies left by the dismissed employees, cheerfully contend that, through their cynical manoeuvring, the employers had stripped the employees of their statutory right to be reinstated. The more one thinks about it, the more silly and absurd the notion, which formed the foundation of the application, appears. Outrageously so, although the application was without a scintilla of merit, the Applicants sought a cost order on an attorney and own client scale against the Respondents *irrespective* of whether the application was opposed. Legal representatives need to appreciate that making excessive demands under the heading of costs does not somehow, magically, change the fact that the underlying case has no merit.

[32] In my view, the institution of the litigation was reckless having due regard to the circumstance that the application was doomed from the outset and, to boot, the litigation was conducted in an unprofessional fashion. If regard is had both to the manner in which it was conducted as well as the complete absence of any merit when it comes to an application which was in truth unarguable, law and fairness dictate that the appropriate costs order to make would be an order *de bonis propriis* against the Applicant's legal representatives.

Order:

1. The Applicant's attorneys are to pay the costs of the application *de bonis propriis* on Scale B.

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P N KROON

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: X Mvuthuza
Instructed by the S. Mjaliswa Inc Attorneys

For the Second and Third Respondent: LG du Plooy of LG du Plooy and Associates Inc