



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

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Date

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

Case no: JS973/20

In the matter between:

**NATIONAL UNION OF METALWORKERS**

**OF SOUTH AFRICA obo MEMBERS**

**Plaintiffs**

and

**ATL BLOW MOULDERS (PTY) LTD**

**Defendant**

**Heard: 16 March 2026**

**Closing arguments delivered: 23 March 2026**

**Delivered: 8 September 2026**

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**JUDGMENT**

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**PHEHANE, J**

Introduction

[1] The National Union of Metalworkers of South Africa (NUMSA) launched this referral on behalf of their members, nine in number,<sup>1</sup> claiming that their dismissal from the employ of the defendant for operational requirements was both procedurally and substantively unfair. They seek retrospective reinstatement, alternatively, compensation.

[2] The defendant opposes the referral.

### Background

[3] The business of the defendant is extrusion blow moulding. Simply put, the defendant converts raw materials into bottles and caps and services small- to-medium business enterprises. This was the undisputed evidence of Mr Hafeezur Rahman (Mr Rahman), the managing member of the defendant and its sole witness in the trial proceedings.

[4] The following facts are common cause:<sup>2</sup>

4.1 On or about 13 August 2020, the defendant received email correspondence from NUMSA in which NUMSA made a proposal to hold a meeting with the defendant to discuss the conferment of organisational rights.

4.2 The defendant confirmed receipt of this email correspondence and advised NUMSA that its management would arrange a meeting for early September 2020.

4.3 The plaintiffs were dismissed for operational requirements on 14 August 2020.

4.4 The defendant did not serve NUMSA with a notice in terms of section 189(3) of the Labour Relations Act<sup>3</sup> (LRA) nor did it invite NUMSA to participate in a consultation process in terms of the provisions of section 189 of the LRA.

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<sup>1</sup> The list of NUMSA's members who are plaintiffs in this application is common cause and appears at para 5 of the pre-trial minute on p 36 of the pleadings bundle.

<sup>2</sup> Pleadings, pre-trial minute as paras 9 to 12, on pp 36 to 37.

<sup>3</sup> Act 66 of 1995, as amended.

4.5 The plaintiffs subsequently referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and the dispute remained unresolved as at 11 September 2020.

[5] The plaintiff subsequently referred a dispute to this Court for adjudication in terms of section 191(5)(b)(ii) of the LRA, alleging that the defendant wholly departed from the provisions of section 189 of the LRA when it dismissed the individual plaintiffs.<sup>4</sup>

#### Issues for determination

[6] The issues that this Court is to determine is whether there was a genuine rationale for the dismissal and whether a fair procedure was followed.

#### Relevant legal framework

[7] Section 189 of the LRA provides for the procedure that an employer must follow when it contemplates dismissing employees for operational requirements and states thus:

‘(1) When an employer contemplates dismissing one or more *employees* for reasons based on the employer’s *operational requirements*, the employer must consult—

(a) any person whom the employer is required to consult in terms of a *collective agreement*;

(b) if there is no *collective agreement* that requires consultation—

(i) a *workplace forum*, if the *employees* likely to be affected by the proposed *dismissals* are employed in a *workplace* in respect of which there is a *workplace forum*; and

(ii) any registered *trade union* whose members are likely to be affected by the proposed *dismissals*;

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<sup>4</sup> Plaintiff’s heads of argument at para 1.2.

- (c) if there is no *workplace forum* in the *workplace* in which the *employees* likely to be affected by the proposed *dismissals* are employed, any registered *trade union* whose members are likely to be affected by the proposed *dismissals*; or
  - (d) if there is no such *trade union*, the *employees* likely to be affected by the proposed *dismissals* or their representatives nominated for that purpose.
- (2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on—
  - (a) appropriate measures—
    - (i) to avoid the dismissals;
    - (ii) to minimise the number of dismissals;
    - (iii) to change the timing of the dismissals; and
    - (iv) to mitigate the adverse effects of the dismissals;
  - (b) the method for selecting the employees to be dismissed; and
  - (c) the severance pay for dismissed employees.
- (3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to—
  - (a) the reasons for the proposed dismissals;
  - (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
  - (c) the number of employees likely to be affected and the job categories in which they are employed;
  - (d) the proposed method for selecting which employees to dismiss;

- (e) the time when, or the period during which, the dismissals are likely to take effect;
  - (f) the severance pay proposed;
  - (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
  - (h) the possibility of the future re-employment of the employees who are dismissed; the number of employees employed by the employer; and
  - (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.
- (4) (a) The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3).
- (b) In any *dispute* in which an arbitrator or the Labour Court is required to decide whether or not any information is relevant, the onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought.
- (5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsections (2), (3) and (4) as well as any other matter relating to the proposed *dismissals*.
- (6) (a) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.
- (b) If any representation is made in writing the employer must respond in writing.

(7) The employer must select the *employees* to be dismissed according to selection criteria—

- (a) that have been agreed to by the consulting parties; or
- (b) if no criteria have been agreed, criteria that are fair and objective.’

[8] It is well established that dismissals for operational requirements are ‘no fault’ dismissals as such dismissals are based on the employer’s economic, technological or structural needs. Therefore, the LRA places particular obligations on an employer directed towards ensuring that all possible alternatives to dismissal are explored, and that the employees to be dismissed are treated fairly. The obligations placed on an employer are both procedural and substantive. There must exist a fair reason for the dismissal and a fair process must be followed. When the employer contemplates dismissing employees for operational requirements, the employer must consult with the affected employees or their representatives.

[9] The purpose of consultation is joint consensus- seeking on issues listed in section 189(2). The employer should in good faith keep an open mind throughout the process and seriously consider the proposals put forward by the employees. The LRA provides for disclosure by the employer regarding information on matters that are relevant to the consultation in order to facilitate an effective process of joint consensus-seeking. In the absence of agreement on selection criteria, the selection criteria must be fair and objective. The consultation process may be truncated depending on the urgent operational needs of the employer.<sup>5</sup>

[10] In *Super Group Supply Chain Partners v Dlamini and Another*<sup>6</sup> the Labour Appeal Court (LAC) stated thus:

‘It is trite that an employer is permitted to dismiss an employee for its operational requirements. However, for the employer to do so successfully, it

<sup>5</sup> See: Part G of the Code of Good Practice: Dismissal, published in GN 3470 under GG No. 53294 of 2 September 2025. The now repealed Code of Good Practice Based on Operational Requirements which was operative when the present dispute arose, contained the same provisions.

<sup>6</sup> (2013) 34 ILJ 108 (LAC) at para 24.

is obliged to have a *bona fide* economic rationale for the dismissal and to comply with the provisions of s 189 as well as s 189A of the Act where applicable. Section 189 imposes an obligation on the employer to consult the employee or its representative on the matters listed in subsection (2). There is a duty on the employer not only to consult the affected employee(s) but to take appropriate measures on its own initiative to avoid and minimise the effect of the dismissal. The consultation envisaged by the Act is a “meaningful joint consensus seeking process” in which parties to the process should attempt to reach some agreement on a range of issues that may best avoid the dismissal and where not possible to ameliorate the effects of the dismissal for operational requirements.’

(Own emphasis).

- [11] In *Association of Mineworkers and Construction Union and others v Royal Bafokeng Platinum Limited and Others*<sup>7</sup> (AMCU) the Constitutional Court held that a consultation as contemplated in section 189(2) of the LRA that is consensus -seeking is neither collective bargaining nor negotiation. That being the case, the employer is still obligated to attempt to reach consensus in good faith.

### The evidence

#### *Evidence for the defendant*

- [12] Mr Rahman, the managing member of the defendant initially stated that he was fully involved in the retrenchment process. His evidence was two meetings were held with the affected employees, as TAWUSA was invited to the consultation meetings, but did not turn up. He was unsure of the dates of the consultation meetings and said they were held in early August 2020.
- [13] His evidence is that the defendant was in a dire financial state due to the impact of the COVID-19 pandemic. Mr Rahman stated that the defendant's financial problems began in March/April 2020. With reference to a letter to all employees by management dated 11 August 2020,<sup>8</sup> he stated that employees

<sup>7</sup> [2020] 5 BLLR 441 (CC) at paras 70 and 71.

<sup>8</sup> B1.

were made aware of the financial difficulty the defendant was experiencing, and as a result, some employees would be dismissed, and work on a '*short - time*' basis would be implemented.

[14] The letter reads:

'To All Employees.

Re: Retrenchment and Short time Notice.

Due to unforeseen circumstances and the Covid-19 pandemic the company finds itself in financial difficulty.

Customers in the hospitality sectors (restaurants, hotels, cinemas etc.) are only partially functional

A high percentage of customers are currently reducing orders.

Customers are delayed in making payment which is affecting the company considerably.

The company therefore has no option but to retrench a percentage of employees. Our working staff will be on short term basis effective from Monday the 17 August 2020.

The company will inform the affected employees by Friday 14 August 2020.

Management.'

[15] Mr Rahman explained that the defendant's 2021 annual financial statement (AFS)<sup>9</sup> revealed a loss of R76,231 in 2021 compared to a profit of R2m in 2020 and a decline in revenue of almost R2m. Short time was initially implemented. This was not sustainable. Therefore, the defendant had no option but to retrench employees in order to remain afloat.

[16] Mr Rahman stated that NUMSA was not invited to the consultation as it was not a recognised trade union. The defendant communicated with NUMSA on 13 August 2020 regarding a meeting to discuss organisational rights, but this

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<sup>9</sup> B6 to B23.

was after the consultation meetings with the affected employees had been concluded on 12 August 2020. Mr. Rahman stated that he was unaware that the plaintiff members were members of NUMSA at the time of the consultations. When he was presented with application forms signed by the plaintiffs to join NUMSA, his evidence was that he saw the forms for the first time when preparing for trial.

[17] Mr Rahman's conceded that the AFS of the defendant was not shared with the plaintiff members during the consultations. He explained that the AFS was not available when the consultations took place. His evidence is that during the consultation meetings, the defendant's financial difficulties were discussed. In particular, the following were discussed with the employees: the reasons for the retrenchment, measures to avoid and minimise the dismissals, the timing of the dismissals, limiting the adverse effects of the retrenchments, selection criteria for retrenchment which he stated was LIFO, and severance packages. He explained that the measures considered to minimise retrenchment was short-time over one or two days and when this was not viable, retrenchment had to be considered. He stated that the employees said nothing in response – they did not ask any questions and did not make any proposals. He confirmed that he did not have the minutes of the consultation meetings. He stated that out of his benevolence, the affected employees were afforded the opportunity to look for employment elsewhere. Out of a complement of 69 staff members in August 2020,<sup>10</sup> 17 employees were identified for retrenchment, and 17 employees were dismissed. They left immediately and did not work any notice period.

[18] Mr Rahman conceded that former employees ND Bokolo and Zamani Mgizela had longer service periods and ought not to have been dismissed given the LIFO selection criterion. He admitted that this was an 'oversight' on the part of the defendant.

[19] Considering the relief sought by the plaintiff of reinstatement, Mr Rahman stated that it would be tough to absorb 17 people after six years as this would lead to more retrenchments.

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<sup>10</sup> B24 to B25.

[20] During cross-examination, Mr Rahman could not specify when the two consultation meetings took place. He stated that they took place during the first week of August 2020 and no minutes were kept. He confirmed the plaintiff members were at the consultation meeting, as well as two managers, Messrs Romy Bellair and Dullah Mashamba. He stated that he did not attend the consultation meetings. He confirmed that he was instrumental in the retrenchment process, but he could not recall when notices in terms of section 189(3) of the LRA were served on the plaintiff members. He stated that the notices were served before 11 August 2020 and consultations were held before 11 August 2020 but he did not think minutes were kept as he '*tried looking for them*'.

[21] Mr Rahman confirmed that in terms of paragraph 4 of the letter dated 11 August 2020, short time was implemented *after* the dismissals. He repeated that the defendant's financial problems began in March/April 2020 and when August came, the defendant had to dismiss the employees '*immediately*'. Further, he stated that the employees were not required to serve notice so that they could go and look for jobs – he could not confirm whether or not they were paid in *lieu* of serving a notice period and would have to go and look for documents to demonstrate that the employees were told they did not have to serve notice.

[22] He conceded that the financial difficulties of the defendant were not disclosed to the affected employees, no figures were presented to them and that he could have done things differently by being more informative.

[23] He conceded that he was not prepared for the trial proceedings.

#### *Evidence for the plaintiff*

[24] Ms Mihleketo Baloyi stated that she was employed in 2018 and her job entailed making bottle caps. She states that she arrived at work on 11 August 2020 at approximately 7am. She was called by Dullah, who informed her that some employees would be '*cut*'. He later called her to his office, where Romy was present and was told to sign a piece of paper indicating that she is dismissed. She was given a piece of paper informing her she will receive

one week's wages. She was then told to leave the defendant's premises, and she left before 8am.

[25] Ms. Baloyi denied that any consultations were held regarding retrenchment and she denied that the defendant was experiencing financial difficulties when she was dismissed. She confirmed that she was a member of NUMSA at the time of her dismissal.

[26] Mr David Moloi stated that was employed by the defendant since 2019. He worked as a grinder at the time of his dismissal. His evidence was that a gentleman by the name of Ananias recruited him to work for the defendant. Mr Baloyi joined NUMSA in June 2020. After he joined NUMSA, Ananias told him that he would be dismissed for joining a trade union. On one occasion, Ananias phoned him and told him he was required at work. On arrival, he entered an office: present were Romay and Dullah and some of the plaintiff members. The plaintiff members were told that 'work is finished' and were required to sign a piece of paper indicating that they were dismissed. No reason was given for the dismissal. In his understanding, he believes he was dismissed for joining NUMSA. Mr Baloyi corroborated the evidence of Ms Baloyi in stating that no consultations were held before the dismissal. He also confirmed that he was not informed that the defendant was experiencing financial difficulties.

### Evaluation

[27] Section 189 of the LRA codifies the procedure of dismissals based on operational requirements.

[28] In the present application, the defendant failed to prove compliance with the requirements of section 189 of the LRA. No evidence was presented to this Court of any service of a notice in terms of section 189(3) of the LRA calling upon any cascading hierarchy of parties to be consulted – in the present case, the defendant failed to prove that a notice in terms of section 189(3) was served the employees who were dismissed and on TAWUSA. It is common cause that no section 189(3) notice was served on NUMSA, a registered trade union.

[29] The defendant was aware that NUMSA wanted to meet to discuss the conferment of organisational rights. This is common cause. That the defendant was not aware of union membership application forms does not absolve it from its obligation to consult with NUMSA.

[30] In *FAWU and Another v National Sorghum Breweries*<sup>11</sup> this Court stated that where there is no workplace forum, there is an obligation on an employer to consult with a registered trade union whose members are likely to be affected by the dismissals. In matters not that the union was not recognised. The evidence before this Court is that the plaintiff members were members of NUMSA. Therefore, the obligation arose for the defendant to consult with NUMSA when it contemplated dismissing the plaintiff members. The defendant did not do so. This renders the dismissal unfair. On 13 August 2020, NUMSA informed the defendant that it had recruited extensively at its premises, and wanted to discuss organisational rights. Ms Baloyi's evidence is that the workers elected to join NUMSA as TAWUSA was not representing them. The defendant undertook to meet with NUMSA in early September 2020. NUMSA was not amenable to this, as it stated that there were pressing issues that required it to represent its members' interests including the issue of the daily dismissal of their members.<sup>12</sup> Therefore, the defendant was aware before the dismissals on 14 September 2020, that NUMSA has recruited extensively at its premises. It would not have been difficult for the defendant to ascertain who the members of NUMSA were in order to invite NUMSA to a consultation before informing employees of its decision on 14 August 2020, as it had undertaken to do in its letter of 11 August 2020. It is improbable that the defendant was unaware that the plaintiffs were NUMSA members – it had a statutory obligation to consult with NUMSA on the retrenchment of its members and obstinately failed to do so.

[31] That should be the end of the matter.

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<sup>11</sup> (1998) 19 ILJ 613 (LC). See also: *United National Breweries (SA) Ltd v Khanyeza and others* (2006) 27 ILJ 150 (LAC).

<sup>12</sup> B3.

- [32] If I am wrong, which I do not think I am, I deal with the issue of whether the section 189(3) notice was served on the plaintiff members and whether joint consensus consultations were held to attempt to reach consensus on the issues as contemplated in section 189(2) of the LRA. Mutually destructive versions exist as to whether the notice in terms of section 189(3) of the LRA was served on the plaintiff members and whether consultations were held.
- [33] Mr Rahman states that a notice was served before 11 August 2020 yet he cannot recall when, and the defendant has not produced such a notice. The plaintiff members deny that any section 189(3) notice was served on them.
- [34] In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Cie SA and Others*<sup>13</sup> the Supreme Court of Appeal (SCA) gave guidance as to how a Court should deal with two mutually destructive versions. Mr. Rahman was neither a reliable nor a credible witness. His version was riddled with inconsistencies. He conceded that he was not prepared, and during cross-examination, he was reprimanded for grimacing at the Court when he could not answer questions. It is no joke dismissing employees in the midst of high levels of unemployment in our country.
- [35] His admitted lack of preparation demonstrates that the defendant did not take its statutory obligations seriously. With regard to the service of the section 189(3) notice, he was unable to inform this Court *when* the notice was served on the plaintiff members. It was convenient for him to state that it would have been served before 11 August 2020, as the letter he authored of the same date, effectively informs all employees that a percentage of employees will be retrenched, and the affected employees would be informed on 14 August 2020. Mr Rahman did not produce any section 189(3) notice that was served on TAWUSA to demonstrate that such notice was served, at the very least on TAWUSA.
- [36] It is improbable that TAWUSA would not turn up for a consultation to represent its members in a retrenchment process. If such notice existed, whether served on TAWUSA or on the plaintiff's members, it is vital to produce it, particularly

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<sup>13</sup> 2003 (1) SA 11 (SCA) at para 5.

on Mr Rahman's own version that he was instrumental in the process and the defendant was assisted by a labour consultant. The evidence of Ms Baloyi and Mr Moloi was clear and corroborative - no such notice was served on the plaintiff members. It is more probable that the employees were informed on 11 August 2020, with no prior service of a section 189(3) notice and no consultation after receipt of the section 189(3) notice, that some of them would be dismissed, and on 14 August 2020, the plaintiff members were called into a meeting by Messrs Bellair and Mashamba and were dismissed without notice.

- [37] The plaintiff's version that no discussion was held with them regarding the financial difficulties of the defendant is more probable, as such discussions would have occurred during consultations. No evidence was presented by the defendant to prove that it experienced financial difficulties and that such were disclosed to the plaintiffs during consultations to afford them the opportunity to make proposals on alternatives to dismissals, which would be seriously considered by the defendant. The AFS of June 2021 are irrelevant. On Mr Rahman's own version, no figures were presented to the plaintiff members on financial difficulties, which, according to Mr Rahman, commenced in March/April 2020, necessitating immediate retrenchment in August 2020. It is improbable that employees who were at risk of losing their employment would not make any proposals to minimise the effect of their dismissal.
- [38] On Mr Rahman's own version, no alternatives were considered and short time was implemented *after* the dismissals. In the absence of any consultations, no attempt was made to discuss selection criteria. Mr Rahman's concession that two plaintiffs ought not to have been dismissed as they had longer terms of service is indicative that LIFO was not a selection criterion. No attempt whatsoever has been made by the defendant to correct this '*oversight*'. Had LIFO been a selection criterion and such oversight occurred, some remedial action would have been taken. The conduct of the defendant demonstrates that it is an employer that has no regard for its statutory obligations and treated its former employees unfairly.

- [39] The plaintiffs did not plead the version that they were dismissed on account of having joined NUMSA. In the circumstances, this version cannot be entertained as litigants are bound to their pleaded case. This is trite.
- [40] In considering the extremely truncated time frame between 11 August to 14 August 2020, the 17 employees that were identified for retrenchment and the same number of employees retrenched, the failure to consult on the reason for the retrenchment and alternatives to dismissal or minimising the effect of the dismissal, the picture that emerges is that the defendant wanted to rid itself of the plaintiff members quickly. This is buttressed by it's not having immediately offered to reinstate the two plaintiffs, which it dismissed as an 'oversight'.
- [41] The defendant wholly disregarded its obligations in terms of section 189 of the LRA and failed to prove that the dismissal of the plaintiff members was both substantively and procedurally fair.
- [42] Mr. Rahman testified that Messrs Bellairs and Mashamba consulted with the plaintiff members twice in early August 2020, and no minutes were kept. It is telling that the defendant did not call them to give evidence before this Court, as he did not indicate that they were not available. Mr de Villiers, for the defendant, requested to take instructions on calling further witnesses at the end of Mr Rahman's re-examination, as he was taken by surprise by what emerged from the cross-examination of Mr Rahman. After taking instructions, the defendant closed its case. In the circumstances, a negative inference is drawn for the failure by the defendant to call Messrs Bellairs and Mashamba as witnesses.
- [43] Mr Rahman states that he cannot reinstate 17 former employees. There are nine plaintiffs before this Court. Two, he admitted ought not to have been dismissed. He has not explained why they cannot be reinstated. He has not explained why the remaining seven employees cannot be reinstated and he has not informed this Court that six years later, the defendant is not financially stable. Even if retrenchments could result following reinstatement as a

primary remedy, the defendant would be required, should his Court reinstate the employees, which it is inclined to do, to follow a fair process.<sup>14</sup>

### Costs

- [44] The conduct of the defendant in the manner in which it conducted itself in proceedings with the trial warrants censure. The defendant approached this Court unprepared, did not put up a convincing defence to the plaintiff's claim and failed to discharge its onus.
- [45] Employment is not only important for the livelihood of the individual plaintiffs, it is important for the family members and individuals that the plaintiffs support. Employment is further important for the dignity of a human being. In the scourge of unemployment and the cost of living which is on the increase, it is a serious injustice to dismiss employees in the unfair manner that the defendant did, wholly disregarding its statutory obligations aimed at ensuring fair labour practices, which is a constitutional right for everyone. The unpreparedness of the defendant and taking this serious issue of unfair dismissal in jest and over a period of six years, demonstrates that it had no regard for the plight of the plaintiffs who have been unemployed over this period.
- [46] Due to the conduct of the defendant as aforesaid, this Court marks its displeasure with a costs order.

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<sup>14</sup> Id fn 11.

[47] In the premises, the following order is made:

Order:

1. The dismissal of the plaintiffs is both procedurally and substantively unfair.
2. The defendant is to reinstate the plaintiffs retrospectively to the date of their dismissal, being 14 August 2020.
3. The defendant is to pay the costs of the referral.

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M T M Phehane

Judge of the Labour Court of South Africa

Appearances:

For the plaintiffs: Mr Myando, NUMSA official

For the respondent: Mr De Villers of De Villiers & Du Plessis Attorneys