Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: J256/19

In the matter between:

VODACOM (PTY) LTD	**First Applicant**
BIDVEST FACILITIES MANAGEMENT (PTY) LTD	**Second Applicant**
BIDVEST SERVICES (PTY) LTD	**Third Applicant**

And

NATIONAL ASSOCIATION OF SOUTH AFRICAN WORKERS ('NASA')	**First Respondent**
MPHO MOSES MOROLANE	**Second Respondent**

Heard: 14 and 25 February 2019
Delivered: 4 March 2019

Summary: (Interdict – unregistered union entering premises to communicate and meet with employees of contractor – nature of rights infringed – jurisdiction of court to entertain interdict concerning interference with property rights - requirements of final interdict met - costs)

JUDGMENT

LAGRANGE J

Background

[1] On 7 February 2019, the first applicant ('Vodacom') initially launched this application on a semi-urgent basis to prevent the first respondent ('NASA'), an unregistered union, and its official, Mr M Morolane ('Morolane'), from entering its premises and conducting any meeting on its premises.

[2] The context in which this occurred is that the property of the applicant is the Vodacom Midrand Campus, which houses a number of other facilities apart from businesses of Vodacom. The public has access to the property through a controlled security point and may be restricted. Vodacom has contracted with the second applicant ('Bidvest Facilities') to manage the premises on its behalf. Bidvest Facilities has, in turn, contracted an associated company ('Bidvest Services') to perform cleaning services at the premises.

[3] NASA has been attempting to organize the employees of Bidvest Services performing the cleaning services and is pursuing a demand that Vodacom should insource the cleaning services it contracts to Bidvest Facilities and employ the Bidvest Services cleaners directly. Initially Bidvest Services was amenable to the union holding meetings with its employees at the premises and did not attempt to prevent this. However, on two occasions in early December 2018, Bidvest Services granted permission for NASA to meet with the staff. On each occasion it designated a specific area for the meeting to be held, but the union proceeded to hold a meeting elsewhere on the premises. On one occasion the meeting appeared to have been convened directly in front of a function which was being hosted by Vodacom. Accordingly, on 11 December 2018, Bidvest Facilities and Bidvest Services

jointly refused to grant further access to the premises for the purpose of meeting their employees.

[4] The union's immediate response penned in an email by Morolane was unequivocally defiant:

> "Do what you have to do and we will do what we have to do for our members. Kindly cease from treating workers as criminals, when all they want is to have peaceful meetings within voter come premises."

[5] Despite this, Morolane gained access to the premises, apparently using a Bidvest employee's access card, and held an unauthorized meeting with the employees on 16 January 2019. He also demanded a meeting with Vodacom and threatened that if a meeting was not convened "all hell would break loose". When Bidvest Facilities wrote to NASA imploring it not to persist with its conduct, Morolane's belligerent response was:

> "Kindly note that we will continue to have meetings with our members, and you will not stop us or any of our deployees. I engaged with your representatives were present in that meeting. I am further telling you that next week we will be having a meeting at Lapa with workers stop us if you can." (*sic*)

[6] This reply referred to a meeting with representatives of Bidvest, which did in fact take place on 16 January, at which there was a discussion about proper requirements that had to be met for meetings to be held. However, Vodacom denied that any agreement was reached and this is not disputed by the union.

[7] On 25 January, Morolane and other officials of NASA once again entered the premises, without prior notice or agreement, and held a meeting with Bidvest employees in their canteen on the premises.

[8] In consequence, Bidvest Services demanded a written undertaking from the union by 1 February 2019, to stop entering its premises and convening meetings with its members. The letter further warned that in the absence of the undertaking it would seek an interdict on an urgent basis. No undertaking was forthcoming and on 29 January capital Morolane once again entered the premises without permission. Further, on 4 February,

the union's attorneys wrote to Vodacom's attorneys. In the replying letter, the union denied ever holding unauthorized meetings and further advised that it was unable to give the undertaking requested because that would effectively 'disassociate' from workers. Vodacom then advised of its intention to launch the interdict, which was served on 19 February.

[9] Vodacom set out the rights it sought to assert in the following terms in the founding affidavit, which I repeat *verbatim*:

9.1 The applicant has the right to exclusive, peaceful and undisturbed use of its premises.

9.2 The applicant is a mobile network company that derives a significant portion of its income from the operations at the premises in question. It has a right to conduct its business in a lawful manner and without interference and disturbance from third parties.

9.3 NASA and Mr. Morolane's conduct unlawfully frustrates the right of the applicant to its use and enjoyment of its premises and to conduct its business free of interference from the unlawful trade union activities.

9.4 The applicant further has the right not to be intimidated through unlawful conduct to be subject to unlawful gatherings, not convened in terms of the Regulation of Gatherings Act, 1993 [none of the gatherings by NASA on the applicants premises have the necessary authority in terms of this act)

[10] NASA and Mr. Morolane apparently justify their actions as a manifestation of their constitutional rights to Association and fair labour practices. They have no protected rights in respect of the applicant and its employees. The applicant is not the employer of the employees who are the focus of the dispute. NASA is not a registered union and has no rights arising from the LRA or elsewhere entitling it to come on to Vodacom's property and disrupt its business.

The urgent proceedings

[11] When the application was first set down, only Vodacom and the respondents were parties to the application. In the course of their argument the court raised a concern whether the labour court had jurisdiction to hear the application, given the fact that Vodacom is essentially asserting its property rights to bar meetings of the union with employees of third parties, namely Bidvest Facilities and Bidvest Services, on its premises. In passing, the court also noted the absence of the Bidvest firms as parties.

[12] The hearing was adjourned to permit both parties to file further heads of argument on this issue and the respondents gave an undertaking not to attempt to enter Vodacom's premises pending judgment in the application being handed down.

[13] In the interval before the court reconvened on 25 February, Bidvest Facilities and Bidvest Services applied for leave to intervene in the application. When the hearing resumed, the union accepted that the two additional applicants were entitled to intervene having a material legal interest in the outcome of the proceedings, but contested that they were not entitled to address the merits of their own entitlement to an interdict, which had been canvassed in argument but not decided in the first hearing. There is no authority for this proposition and they were entitled to address the merits of the application.[1]

[14] The intervening applicants aligned themselves with the case pleaded by Vodacom, and articulated various grounds why they had a substantial interest in the outcome of the proceedings. In summary, these were that:

14.1 the union's failure to adhere to terms of access disrupted the services they rendered to Vodacom, and

14.2 Notwithstanding their claim that they were entitled to have access to and meet with employees on the basis of their right to freedom of

[1] Erasmus: Superior Court Practice, D Loggerenberg *et al*, RS 7, 2018 at D1-141 characterises the position of the intervening party thus:

> "When leave to intervene is granted by the court, the party given it is placed in the same position as and is clothed with the same rights as the other parties, unless of course such rights are specifically curtailed."

association and fair labour practices in the Constitution, in fact the respondents had no right to organize and conduct meetings with their employees because the NASA is not a registered union and the premises of Vodacom are not the premises of the intervening applicants.

Urgency

[15] The union argued that the application was not urgent because there was no imminent meeting on the premises which could be anticipated. Accordingly, it argued that Vodacom was not threatened with any imminent harm. Moreover the union denied that the meetings which had been held were disruptive, threatening or unruly.

[16] It is arguable that the application could have been launched sooner after the union refused to give the undertaking, but the union's attack on urgency ignores the fact that it is precisely the unpredictability of its arrival at the premises, which constitutes an ever present threat that Vodacom's rights would be violated. The nature of the rights in question is discussed further below, but where a clear right exists it is not necessary for an applicant to also demonstrate some other form of harm, for example in the form of damage or losses that it might suffer, before it can assert its right on an urgent basis.

Jurisdiction

[17] Section 157 of the Labour relations act 66 of 1995 ('the LRA') provides:

"(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –

(a) employment and from labour relations;

…"

[18] In ***Zungu v Premier, Province of Kwazulu-Natal & another***, the LAC reaffirmed the correct approach to determining this court's jurisdiction:

> [17] Perhaps the point of departure ought to be the question whether the Labour Court is required to assess what character the dispute manifests to determine its own jurisdiction. It is not argued that it may not do so, and the decision in *Gcaba v Minister for Safety & Security & others* is dispositive of that proposition:
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> > 'Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While *the pleadings — including, in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits — must be interpreted to establish what the legal basis of the applicant's claim is*, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If, however, the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba,who is unable to plead facts that sustain a cause of administrative action that is cognizable by the High Court, should thus approach the Labour Court.' (Emphasis supplied; footnote omitted.)
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> [18] Accordingly, the first exercise in any proceedings is to read, as in this case, the allegations in the affidavits, and make the determination. It is not, primarily, the form of relief sought, but rather the necessary averments to demonstrate the 'cause of action' that determines the 'character' of the dispute, although the form of the relief, if it is consonant with the cause of action, will point in the same direction."[2]

[19] In this instance, the essential averments relied upon by Vodacom concerned the alleged interference by the respondents with its right to undisturbed use of the property and the right to conduct its business without unlawful interference. It further contends that the right of freedom of association and the right to fair labour practices, which the respondents

[2] (2017) 38 *ILJ* 1644 (LAC) at 1649-1650.

believe override Vodacom's proprietary and business interests, cannot be asserted against it unless provided for in the LRA. As the union is unregistered, it cannot even invoke the provisions of Chapter III of the LRA which can result in a 'sufficiently representative' registered union being granted rights of access and meeting facilities in terms of s 12 of the LRA.[3]

[20] Clearly, the LRA does not contain provisions giving labour court exclusive jurisdiction to deal with the infringement of property rights. The question then is whether the alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from employment and from labour relations;

[21] There are two ways of approaching the question: narrowly, by considering only the constitutional right that the party seeks to assert, or more broadly, by considering if the infringement of any constitutional right arises for consideration in matter. On either approach the alleged infringement must also arise from 'employment and labour relations'.

[22] The narrower interpretation will be considered first. The Constitutional Court has held that the right in s 25 of the Constitution of an owner of property not to be "deprived" of it "except in terms of law of general application", includes deprivation of use and enjoyment of the property.[4] This

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[3] Sections 11 and 12 of the LRA state:

> 11. Trade union representativeness
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> In this Part, unless otherwise stated, "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by an employer in a workplace.
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> 12. Trade union access to workplace
>
> (1) Any office-bearer or official of a representative trade union is entitled to enter the employer's premises in order to recruit members or communicate with members, or otherwise serve members' interests.
>
> (2) A representative trade union is entitled to hold meetings with employees outside their working hours at the employer's premises.

[44] ***First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank V Minister of Finance*** **2002 (4) SA 768 (CC)** at 796:

> "[57] The term 'deprive' or 'deprivation' is, as *Van der Walt* (1997) points out, somewhat misleading or confusing because it can create the wrong impression that it invariably refers to the taking away of property, whereas in fact

right which Vodacom asserts is being threatened would provisionally bring its claim under s 157(2) of the LRA, subject only to the requirement that the alleged violation 'arises from employment and labour relations'

[23] Mr Mdludla, appearing for the respondents, argued that the phrase 'employment and labour relations' must be read conjunctively, and in the absence of an employment relationship between Vodacom and the Bidvest employees NASA is organising, the violation complained of falls outside the ambit of s 157(2)(a). However, the section does not specify that the parties to the litigation must *be in* an employment relationship. If the legislature wanted to restrict the interpretation solely to disputes concerning infringement of fundamental rights arising between employers and their employees, it would surely have stated this explicitly, rather than using a phrase which essentially describes a context from which the alleged infringement arises.

[24] The term 'labour relations' is also wide in ambit, but in the context of the LRA must at least encompass collective labour issues and dispute resolution, which are described in the preamble to the LRA.[5] There is an

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'the term "deprivation" is distinguished very clearly from the narrower term "expropriation" in constitutional jurisprudence worldwide'.92

In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If s 25 is applied to this wide *genus* of interference, 'deprivation' would encompass all species thereof and 'expropriation' would apply only to a narrower species of interference."

[5] The preamble to the LRA states it is intended:

"To change the law governing labour relations and, for that purpose-

to give effect to section **23** of the Constitution;

to regulate the organisational rights of trade unions;

to promote and facilitate collective bargaining at the workplace and at sectoral level;

to regulate the right to strike and the recourse to lockout in conformity with the Constitution;

to promote employee participation in decision-making through the establishment of workplace forums;

to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose;

employment relationship between Bidvest Services and the employees the union wants to meet with and have access to. The union is clearly attempting to exercise organisational rights which is a labour relations matter. The demand it is making to Vodacom, to employ the cleaners directly is also an employment related matter and the presentation of the demand is a bargaining issue falling squarely within the sphere of labour relations.

[25] Accordingly, even if I only consider the property right Vodacom seeks to assert and even if I assume the phrase 'employment and labour relations' must be interpreted conjunctively, I am satisfied that an assertion of property rights by owner of premises vis-à-vis a union attempting to have access to a workplace on those premises, and to meet with employees there, involves the alleged infringement of a constitutional right arising from employment and industrial relations.

[26] The union's submission is that the terms 'employment' and 'labour relations' are distinct and both criteria must be met. In my view, the proper interpretation of the phrase 'employment and labour relations' is that it describes an entire sphere of relations embracing both issues of employment and labour relations. If the terms were to be treated as distinct, no case involving an individual employment relationship where a constitutional right was at issue could be entertained by the court because the collective 'labour relations' component would be absent. That could never have been the legislature's intention.

[27] Considering a broader interpretation of the alleged infringement of a constitutional right, it is not implausible to argue that the union's own

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to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act;

to provide for a simplified procedure for the registration of trade unions and employers' organisations, and to provide for their regulation to ensure democratic practices and proper financial control;

to give effect to the public international law obligations of the Republic relating to labour relations;

to amend and repeal certain laws relating to labour relations; and

to provide for incidental matters."

allegation that the affected employees' right to freedom of association and to fair labour practices is threatened by the application could also satisfy the first part of the jurisdictional requirement of s 157(2)(a) , even though that is an alleged consequence of the right asserted by Vodacom, rather than the cause of action in the application. However, it is unnecessary to attempt to answer this definitively on the facts in this case in the light of applying the narrower interpretation above.

[28] In relation to the Bidvest companies, they assert *inter alia* that the interdict is necessary to prevent the disruption of the services they render to Vodacom. However, there is nothing to indicate that the performance of cleaning services was in any way disrupted. Further, they argue that they have a clear right to bar the respondents from the premises for the purposes of gaining access to their employees and hold meetings with them. This is because the union has not obtained rights of access and holding meetings using the mechanisms of Chapter III of the LRA which regulate the exercise of freedom of association and organisational rights in the workplace. There is also no collective agreement in place, which grants the union such rights, that it might have obtained through the alternative mechanism of collective bargaining.

[29] The union contends that by not granting it access to the workplace of Bidvest Services where its employees are situated on the premises of Vodacom negates their rights of freedom of association and fair labour practices, forcing it to 'dissociate' from its members. It placed some reliance on the case of ***Unica Plastic Moulders CC v National Union of SA Workers***.[6] In that case an employer had sought an interdict *inter alia* to interdicting and restrain a deregistered union "from approaching or being within 50 metres of the applicant's premises and from recruiting and writing letters to the applicant."[7] The court refused the relief sought, holding that:

> "An unregistered trade union is also not barred from recruiting members nor is it barred from negotiating on behalf of its members. I can also find no basis as to why NUSAW should be interdicted and restrained from

[6] (2011) 32 *ILJ* 443 (LC)

[7] At 445, para [1].

> approaching or being within 50 metres of the applicant's premises. An unregistered trade union may, however, not claim, as a matter of right any of the organizational rights provided for in the LRA."[8]

(emphasis added)

[30] The emphasised portion of the extract above is what distinguishes the situation in *Unica* from the situation here. In this instance, it is the union's insistence on exercising its right to meet with employees *in the workplace* that Bidvest Services is resisting. It is true that meetings with employees in the workplace is probably the most effective way of organising employees, but the LRA does not even afford this right automatically to registered unions: a registered union must still satisfy the requirements of being 'sufficiently representative' in terms of s 11 of the LRA to exercise the rights of access to employees and the right to hold meetings in terms of s 12(1) and (2) of the LRA.

[31] If the respondents believe the mechanisms of Chapter III, or the alternative approach of obtaining rights through collective bargaining, are insufficient to give effect to the right of freedom of association, then they would need to challenge the constitutionality of the offending provisions of the LRA. The Constitutional Court reiterated the principle of subsidiarity in ***Mbatha v University of Zululand*** [9]:

> [173] Consistent with the principle of constitutional subsidiarity , where legislation has been passed to give effect to a right in the Bill of Rights, a litigant is not permitted to rely directly on the Constitution for its cause of action. In *SA National Defence Union*, this court held that a litigant who wishes to assert a constitutional right given effect to by legislation must rely on that legislation, and not directly on the right in the Bill of Rights. In that case, the court said:
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> > '[A] litigant who seeks to assert his or her right to engage in collective bargaining under s 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on s 23(5). If the legislation is wanting in its protection of the s 23(5) right in the litigant's view, then that legislation should be challenged constitutionally. To

[8] At 453, para [25].

[9] (2014) 35 *ILJ* 349 (CC)

> permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognize the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights."[10]

[32] Therefore, as matters stand, the respondents cannot bypass the LRA mechanisms for achieving rights of access and convening meetings of members at the workplace of the employer by trying to directly enforce their constitutional rights to freedom of association and fair labour practices. Consequently, have no right to insist on access to the premises to communicate with Bidvest Services' employees or to hold meetings with them on the premises. By the same token, Bidvest Services is entitled to seek relief to prevent them from doing so in the absence of obtaining such rights through the alternative mechanisms of the LRA. In regard to Bidvest Services the relief sought relates to the exercise of rights provided for in Chapter III, in the absence of there being an issue about whether the right can be obtained through collective bargaining, and ultimately falls within the labour court's jurisdiction under s 63(1) to (4) of the LRA, and does not fall under the jurisdiction of any other court.

Entitlement to final relief

[33] In conclusion, I am satisfied Bidvest Services and Vodacom have demonstrated they have clear rights to assert. In an application for final interdictory relief, the three requirements which must be met are that the applicant must demonstrate (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[11]

[34] The injury apprehended and already sustained is the infringement of the clear rights as such.[12] Is there a reasonable alternative remedy available to them in due course? The respondents have shown themselves to be adept in avoiding the access controls to the premises by using employee's access

[10] At 395, para [173].

[11] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd & another v Helicopter & Marine Services (Pty) Ltd & others* 2006 (1) SA 252 (SCA) at para 20

[12] See discussion in C B Prest, The Law of Interdicts, Juta, 1993 at 44.

cards. The respondents refuse to give any undertaking they will desist from accessing the premises and meeting with employees in the absence of any right to. I do see what alternative remedy the applicants have in the circumstances.

Costs

[35] Ordinarily, I would be reluctant to grant costs and I am mindful of the decision of the constitutional court in ***Zungu v Premier of the Province of KwaZulu-Natal & others***,[13] However, the respondents adopted an implacable approach in insisting on entering and holding meetings on the property despite being clearly told on more than one occasion they were not given authorisation to do so. They had ample time to reflect on whether to persist with their chosen course of action. It is also clear that they were initially granted rights of access, but abused that concession by arriving and entering the premises without prior notification or ignoring designated meeting venues. Had they not done this, they probably would still be accessing the premises and meeting with Bidvest Services employees today. The respondents also made no attempt to initiate the dispute procedures of the LRA to try and obtain such rights through collective bargaining. Lastly, they were asked to give an undertaking not to enter premises before Vodacom launched these proceedings, but were unwilling to accede to that. Had they done so, it would have obviated the need to launch the application.

[36] To the extent that the subsequent joinder of the second and third respondents joined the proceedings somewhat reluctantly and that the second day of the hearing was occasioned by the court raising the jurisdictional question, I am of the view that the respondents should not be held responsible for costs of the respondents, except those of Vodacom up to the end of the first day of proceedings on 14 February 2019.

[13] (2018) 39 ILJ 523 (CC) at paras [22] to [26]

Order

[1] The second and third applicants are granted leave to intervene in the proceedings.

[2] The matter is heard as one of urgency and the usual forms and service provided for in the Labour Court Rules are dispensed with.

[3] It is declared that the first respondent is not a registered trade union at the time of judgement being handed down and is not entitled to exercise organisational rights afforded by Chapter III of the Labour Relations Act insofar as it remains unregistered, or alternatively, in the absence of a collective agreement affording it such rights.

[4] The first respondent and any official, or office-bearer of the first respondent, including the second respondent are interdicted and restrained from:

4.1 Entering, or being upon, the premises on which the first applicant, second and third applicants conduct business at Vodacom Midrand Campus (comprising Vodacom World, Corporate Park, Service Park, Commercial Park, NSN, Innovation Centre and Business Park) situated at 082 Vodacom Boulevard, Noordwyk, Midrand, Guateng, unless that person has received, and is in possession of, written permission to do so that has been granted by the Applicant's Managing Executive: Employment Law, Claire Margaret Alexandra Lapham, and then strictly subject to any conditions that may apply in respect of such written permission;

4.2 Conducting, organising, attending or in any manner participating in any gathering or meeting on the aforesaid premises;

4.3 Interfering with the first applicant's right to undisturbed use of its premises.

[5] Insofar as the applicants require the assistance of the South African Police Services ('the SAPS') to enforce this order the SAPS must do so.

[6] The respondents are jointly and severally liable for the first applicants' costs incurred up to and including 14 February 2019.

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R G Lagrange

Judge of the Labour Court of South Africa

APPEARANCES:

FIRST APPLICANT:	REDDING SC INSTRUCTED BY ENS AFRICA
SECOND AND THIRD APPLICANTS	SONETTE LANCASTER OF LANCASTER KUNGOANE ATTORNEYS
FIRST AND SECOND RESPONDENTS:	SIHLE MDLUDLA INSTRUCTED BY NDOBELA LAMOLA INC