

ARBITRATION AWARD

Panelist/s: Madeleine Loyson _____
Case No.: NWRFCB 6601 _____
Date of Award: 19 FEBRUARY 2010 _____

In the matter between:

R MOHALE, W RATAU & Z NOCHUBELA

(Union / Applicants)

and

ALMAR INVESTMENTS (PTY) LTD

(Respondent)

Union/Applicant's representative: Mr C Dire (SAEWA) _____
Union/Applicant's address: PO BOX 1573 _____
RUSTENBURG _____
2000 _____
Telephone: 014 597 0341 _____
Telefax: 014 597 0341 _____

Respondent's representative: Mr N Pelser (ASAMBO) _____
Respondent's address: PO Box 82323 _____
RUSTENBURG _____
0300 _____
Telephone: 018 297 7285 _____
Telefax: 018 297 4409 _____

ARBITRATION AWARD

1. DETAILS OF HEARING AND REPRESENTATION:

- 1.1 The arbitration in the abovementioned dispute relating to alleged unfair dismissals was conducted at 9h00 on 24 August 2009 and 14 January 2010 at the Council premises in Rustenburg. The applicants were represented by Mr C Dire of SAEWA and the respondent by its Mr N Pelser of ASAMBO. The parties also utilized the services of an interpreter. The proceedings were digitally recorded.

2. ISSUE TO BE DECIDED:

- 2.1 Whether the dismissal of the applicants was substantively fair, more specifically with regard to whether the applicants had breached the rule in question and whether dismissal was an appropriate sanction in the circumstances.

3. BACKGROUND TO THE MATTER:

- 3.1 The applicants, Messrs R Mohale, W Ratau and Z Nochubela had been in the employ of the respondent since 1996, 1996 and 2002 respectively as dumper truck operators and were earning R 900.45 per week at the time of their dismissal. They were dismissed on 13 March 2009 for alleged misconduct: failure to work at a designated site and leaving the workplace without arrangement or permission from management on 5 March as well as unauthorized absence on 6 March 2009.
- 3.2 They referred their allegedly unfair dismissals to the Council on 16 March 2009. On 13 May 2009 the dispute was conciliated and a certificate of outcome issued, indicating that it remained unresolved.
- 3.3 The parties submitted bundles of documents. The documentation therein was agreed to be what it purported to be and evidence would be led on the contents.

4. SURVEY OF EVIDENCE:

- 4.1 After opening statements by the representatives of the parties, evidence of witnesses was lead under oath:

4.1 RESPONDENT'S EVIDENCE:

4.1.1 WITNESS 1: D ERASMUS: GENERAL MANAGER / DIRECTOR:

- 4.1.1.1 The witness testified that during December 2008, senior management at Xstrata Wonderkop where the respondent was contracted to render services, advised that all furnaces would be shut down for an indeterminate period of time. That decision had a huge impact on the respondent as it meant that a number of machines would stand idle. He, the witness, was quite shocked and at first did not know how the respondent would be able to deal with the situation.
- 4.1.1.2 A process of consultation with employees was then started. Measures such as employees being granted leave in advance were implemented as it was hoped

that the furnaces would be opened again during January. A small recovery plant was indeed reopened at which some employees could be utilized. Prior to that, the company had done its very best to retain long serving employees especially. It was a very emotional period and when it was decided to retrench, it was done in the nicest way possible. Negotiations were entered into with the trade union about possible job opportunities in Natal. That did not materialize, however. No new opportunities came the way of the respondent during December either, despite every attempt that was made to secure new work contracts.

- 4.1.1.3 The respondent then obtained a client, Jumbou Construction, which would utilize a few of the respondent's machines. Jumbou had a contract at Impala Platinum Mine. Employees of Almar who operated the machines for Jumbou at Impala would still remain the respondent's employees. However, the contract at Impala was that of Jumbou and as a result, medicals had to be undergone by the employees under the auspices of Jumbou. Employees were advised that nothing would change in respect of their terms and conditions of employment. They would remain Almar employees and would be paid by Almar. The only change would be that they would work at Impala, operating machines of Almar for Jumbou Construction. There was no work at Wonderkop any longer and that was a way of retaining the employees in jobs. It would in any event only be for a short while, until such time as Wonderkop reopened. However, employees would not understand that. The scenario was explained by him to them over and over again. They insisted that they rather wanted a retrenchment package and would then go to work for Jumbou at Impala.
- 4.1.1.4 The witness stated that the employees had refused to work at Impala and he called them in to his office. The employees again refused to work at Impala. He re-explained the situation. At that stage, he said, he was very tired. He had been trying to source work in very difficult circumstances. There was no income and no work. Management at the one company he obtained a contract with, Jumbou, was becoming impatient and kept asking when the machines and operators would arrive. The situation was extremely problematic because the employees simply refused to go to work for Jumbou. They insisted they wanted to return to Wonderkop. They also wanted to be retrenched and only once they had received a retrenchment package, would they go to work at Impala.
- 4.1.1.5 The witness testified that he then realized that the employees wanted a retrenchment package. That was their priority and not a job. The respondent lost a lot of money because other employees had to be found to do the work at Impala. After explaining the situation several times, he eventually asked the employees whether they would work or not. They refused to work at Impala. He then said: "You can do whatever you want to do." They then left his office and he never saw them again until the enquiry. Their request for retrenchment pay and to work at Wonderkop had been unreasonable. Their refusal to work for Jumbou was coupled with a request to be retrenched. They wanted retrenchment money first.
- 4.1.1.6 The employees were not ever going to be employed by Jumbou at all. They were merely going to drive the hired Almar machines for Jumbou, as Almar employees. The employees knew the machines belonged to Almar. Were they in fact going to be employees of Jumbou, they would not have been driving Almar machines.

- 4.1.1.7 The witness stressed that the employees were never dismissed in order to get rid of them or to avoid retrenchment pay-outs. There was no work and the respondent had tried to keep them in a job. "Their whole thing was to get a retrenchment package." Furthermore, the applicants never indicated to him that they did not understand the situation. The trade union also did not contact him in that regard, nor did it request consultation regarding possible retrenchment of the applicants.
- 4.1.1.8 Under cross-examination the witness stated that the applicants were never part of a retrenchment exercise. There were a certain number of employees who had indeed been retrenched, but it was never the intention to retrench the applicants at all. LIFO had been applied and the applicants were not affected at all. The respondent actively searched for contracts in order to keep them in its employ. It was never proposed at any stage that they should be retrenched as well. The work at Jumbou was the only work available at that time. The machines at Wonderkop were the ones to be utilized by Jumbou. There was no alternative available where the applicants could be utilized.
- 4.1.1.9 In respect of the day on which the applicants were taken to the Impala site to undergo medicals under the auspices of Jumbou Construction, the witness testified that the site manager, Mr Botha, had taken them to Impala. He, Botha, had been instructed to take employees to Impala. He, the witness, was not directly involved in that and did not deem it necessary, as was put to him, to call the applicants into his office first. Botha was capable of doing that.
- 4.1.1.10 Every mine had its own medical requirements and contractors had to comply with that. Every one knew that. The employees had to undergo medicals under Jumbou's auspices at Impala as that firm was the contract holder, not the respondent. That was an Impala requirement in order to allow employees onto their site. This was all explained to the applicants. When they refused to undergo the medicals on the day in question, he had them brought to his office so that he could personally explain the situation again. That discussion was lengthy. They still refused to go back to Impala. He did not dismiss them or call them to a hearing at that point at all. He had said to them: "As soon as Wonderkop reopens, I will take you back there. You know the work there. But this is just a difficult time we have to go through."
- 4.1.1.11 A version that they did not refuse to work, but merely misunderstood what the situation was, was not acceptable to him. The applicants indeed understood clearly what the position was at the time. They refused to work at Impala and wanted to be retrenched first.
- 4.1.1.12 In response to a question from the commissioner, the witness confirmed that the applicants were merely told that they would be going to Impala on that day. The administrative aspects of the situation or what would be expected of them at Impala, had not been explained to them prior to them being taken to Impala. He stated that when they refused to work, he then called them to his office and attempted to explain the situation to them, as he had testified. When asked whether he would concede that in the absence of any prior explanation, the applicants must have been anxious when confronted with Jumbou documentation for purposes of the medicals, he agreed, but added that that was

the very reason he had had them brought to his office, so that he could explain the situation to them as he then did. That consultation and explanation took a long time and was done carefully and repeatedly. He attempted to create understanding of the situation.

4.1.2 WITNESS 2: D MOGAPA: SUPERVISOR:

4.1.2.1 The witness testified that he had received a call from Mr Botha who instructed that medicals had to be organized for the applicants at Impala. He then organized the medicals and called the applicants. The applicants stated that they were prepared to go for the medicals, but were not prepared to work at Impala because those employees who were not retrenched were to remain at Xstrata Wonderkop in accordance with an agreement reached with the union. The applicants were then taken to Impala. He did not know, however, what happened there, what the situation was with Jumbou or that there had been any agreement that those who were not retrenched would remain at Wonderkop.

4.1.2.2 The witness also stated that at the time they had stated they would not work at Impala, they had not seen or received any paperwork related to the medical they had to undergo at Impala.

4.1.2.2 Under cross-examination the witness stated that a driver had transported the applicants to Impala. The instruction about the medical had been received during the course of the day. At the time the instruction came, the applicants were on duty. Some were working and others not, dependent upon the shift they were working on and the availability of work and machines. They were all called and spoken to. He stated too that he did not query why they did not want to work at Impala as he had only told them they were going for medicals. However, he told them to talk to management about it. He did not know for what purpose the employees had to undergo the medical and the employees at that point would have been unsure as to the purpose of the medical as well.

4.1.2.3 He finally stated that it did not really matter which site an Almar employee worked on – he was an Almar employee. Before they could work on a site, however, they had to undergo a medical examination. When he arranged the medicals that day, he had told the person whose telephone number he was given by Botha, that employees of Almar would be coming for medicals. That person then said he would complete the necessary paperwork for the medicals when they arrived there. He had not spoken directly to the Impala medical centre.

4.1.3 WITNESS 3: P J BOTHA: SITE OPERATIONS MANAGER:

4.1.3.1 The witness testified that on the day in question he had received a call from a Jumbou employee who stated that applicant Mohale wanted to speak to him. He agreed and Mohale then asked him why they, the applicants, were there at Impala for medicals. He responded that they had to undergo medicals. If they did so they could be utilized to work at Impala by Jumbou as well as at Wonderkop. Mohale then asked why Jumbou was reflected on the paperwork. He explained that the work at Impala would be performed under Jumbou, but that the applicants would still be employed by Almar. The applicant responded in an adamant manner that the applicants refused to work for Jumbou. He was

definitely not confused. He, the witness, then told Mohale that they were not going to be employed by Jumbou and that they would still be paid and receive pay slips from Almar. They would merely work under Jumbou at Impala. He then told Mohale to come back to the office to discuss the matter further with them as it was unacceptable for them to refuse to work. The respondent had tried to keep them working, but they refused.

4.1.3.2 The witness stated that he was not present at the time the applicants returned to the office and spoke to Mr Erasmus. However, he had told Mogapa that their medical status would be expiring soon in any event and that if they underwent the medical at Impala on that day, they could be used at Impala as well as Wonderkop. He gave Mogapa the name of the employee of Jumbou to contact to arrange the medicals.

4.1.3.3 He testified that on that day, the applicants had not been instructed to go to work at Impala yet, but merely to go for the medicals. Undergoing a medical was nothing new at all and they understood the need for that.

4.1.3.4 After his telephonic discussions with Mohale, he had told him that they should rather discuss the issue with Mr Erasmus.

4.1.3.5 Under cross-examination, the witness stated that he had instructed Mogapa to take the applicants for medicals. He had specifically picked the applicants because their medicals would soon be expiring. He also informed Jumbou that the employees would be coming and provided their names. As far as he knew at that point, it was not definite that they would be working for Jumbou, although Almar was a sub-contractor of Jumbou. However, as a precautionary measure, he had the medicals done under the auspices of Jumbou so that if the need arose due to the situation of closures at Wonderkop, they could be used there as well when the time arose and if there were no work for them to perform at Wonderkop. On the day in question he had not yet decided whether or not to use them at Jumbou. He was in charge of deployment and had not yet made up his mind at that point in time as to where to use the applicants. Deployment decisions were made by him and only if he deemed it necessary under unusual circumstances, would he consult with the General Manager, Mr Erasmus.

4.1.3.6 Under re-examination the witness stated that the respondent had previously done work for Jumbou. He did not know however, whether any of the applicants specifically had previously worked for Jumbou under the previous sub-contracts. At the time the applicants went for the medical, other employees of Almar were already working for Jumbou under the new sub-contract.

4.2 APPLICANT'S EVIDENCE:

4.2.1 APPLICANT 1: MR R MOHALE:

4.2.1.1 The applicant testified that he started work with the respondent during 1996 as a dumper truck operator.

4.2.1.2 On the day in question he was on duty. During the course of the day he and the others were told to go for a medical at Impala Platinum. Because he knew that his medical status was due to expire, he stopped working and complied with the

request. Upon arrival there, they were not taken to the medical centre, but to offices on the site which were housed in containers. There they were handed forms to complete by a white man with the heading "Jumbou Construction." They then asked what the forms were for, because they were supposed to come for medicals. They were told they were no longer working for Almar Construction, but for Jumbou and that they would be taken for medicals before starting work. They responded that they were not aware of that.

- 4.2.1.3 They were then taken back to Almar. There they met with the manager of Almar. He asked them whether they were going to sign the forms or not and whether they still wanted to work. They did not respond "happily" and refused to sign the forms. He then told them that they could go wherever they wanted to.
- 4.2.1.4 They then approached the trade union. The union contacted the respondent in order to request a meeting and then instructed the employees to go back to work. However, when they arrived at work, their clock cards were blocked and they could not enter. They then called their supervisor who told them to return to work on the Monday. They did so and were then handed notices to attend a disciplinary enquiry after which they were dismissed.
- 4.2.1.5 The applicant stated that he had previously gone to Impala for medicals. On those occasions they would be taken to the medical centre and called in for examinations. On this occasion it was not done like that.
- 4.2.1.6 He testified that he and the others were never told that they would in fact be going to work at Impala for Jumbou Construction. They knew nothing about that at all.
- 4.2.1.7 Under cross-examination, the applicant conceded that there had been retrenchments at the respondent. Prior to retrenchment negotiations, more than 170 persons had been employed by the respondent. Afterwards, there were about 24 employees remaining. After the retrenchments, Erasmus has said that the remaining 24 would stay at Wonderkop where the respondent was contracted to Xstrata at the smelter to deliver certain services, including the supply of its machines and drivers e.g. dump trucks and front-end loaders. The applicant agreed that the respondent contracted out its equipment and operators to other construction companies as well.
- 4.2.1.8 The applicant confirmed that he had spoken telephonically to Botha on the day in question after he and the others had refused to sign the forms and to work for Jumbou. Botha had told them to sign the forms. His view was that he and the other applicants should have been informed, prior to going to the site, that they were going to work for Jumbou and would have to sign certain papers, despite still being employed by Almar. They knew none of that at the time and Botha did not tell them that at the time when he spoke to them on the telephone. Botha said he must speak to Erasmus back at the office.
- 4.2.1.9 The applicant testified that when they went to Erasmus' office that day, he was angry. He insisted that they sign the papers or leave. When they tried to explain their position, he said if they did not sign they just had to go wherever they wanted to go. He chased them away. All they wanted was an explanation. When it was put to the applicant that he had said that all they want is their

retrenchment money, he responded that “when we were talking about being taken to Jumbou Construction, we asked why we were not dealt with like the others who firstly were given their retrenchment money and then taken to other construction companies.” They were just told to sign the papers or go away. When asked whether they had first asked for their retrenchment money prior to working elsewhere, he responded that they were scared to sign papers for another company because they had not been retrenched and did not know why they were going to another company. Usually when there were changes, the union was called, but on that occasion the union official was in court. The question they had was why they were being moved to Jumbou whereas prior to other employees being moved to a different company, they were retrenched first. They were given no explanation. When they went to the union, the union told them to go to the site at Wonderkop, but when they did so, they could not enter. Had they known the position as explained, they would not have refused to sign. It was put to the applicant that everything was indeed explained to them by Erasmus. He denied it once more and said that the union had indicated that an urgent meeting would be arranged with the respondent and that they should return to work. However the meeting did not take place and they could not return to work. He stated that he did not know how the union communicated with the respondent at the time. He also stated that if they had been given retrenchment money on that day, they would have worked at the site. He denied demanding retrenchment money, however, and had merely asked how they could work for another company without being retrenched.

4.2.1.10 Under re-examination the applicant stated that there were two furnaces at Wonderkop working at the time and 24 of the respondent’s employees working there. No one had said that people would be taken to other sites from Wonderkop. Usually when people were taken to work at different sites, it was always explained to them first.

4.2.2 APPLICANT 2: MR W RATAU:

4.2.2.1 The applicant stated that he had commenced employment with the respondent as a dump truck operator in 1996.

4.2.2.2 He also explained the usual procedure for undergoing medicals. No documents were signed as was required on the day in question.

4.2.2.3 On 5 March, a Thursday, they were busy working when they were told to go for medicals to Impala. However, they did not go directly to the hospital, but to offices on site where a white man gave them papers to sign. On the papers the name Jumbou Construction was reflected. They refused to sign the papers. He overheard the telephonic conversation between applicant Mohale and Botha when Mohale responded that they were never told anything. Mohale was told that everyone had to sign and that explanations would follow. They were afraid and would not sign. Afterwards, they were told to go to Erasmus’ office.

4.2.2.4 At Erasmus’ office, he asked them why they would not work at the site. They told him that it was because the papers they were asked to sign were headed Jumbou Construction. He then instructed them to go and work there. They still refused. He then asked each individual applicant whether he would go and work

at Impala and all refused. He would not listen to explanations and told them to go away. Erasmus was the first one to leave the office and just left them there.

- 4.2.2.5 After leaving the office, the applicants then all went to the union and were told by the official to go back to work. However, when they returned to their site, their entry was blocked. They were told to return on the Monday, the 9th of March. When they did so, they were served with charges.
- 4.2.2.6 They had asked Erasmus for retrenchment packages because people who had been retrenched had been given retrenchment packages and were working for other sites.
- 4.2.2.7 Under cross-examination the applicant stated that employees of the respondent had in the past gone to Impala for medicals, but that was a long time ago in the Nineties, not recently.
- 4.2.2.8 He admitted that they wanted retrenchment money because other employees received retrenchment packages. Had they been given retrenchment packages on that day, they would have gone to work at Impala. However, the main reason for the refusal was because the papers they were given, were headed Jumbou Construction. When they wanted explanations from Erasmus, he did not give them any and did not want to hear their side of the story. Erasmus told the union, when they asked for a meeting, that the notice was too short and it was not possible.
- 4.2.2.9 In response to a question from the commissioner as to what exactly the contents were of the paper they were given to sign, given that they could read the words Jumbou Construction on it, he responded that he did not know. Jumbou Construction was in bold print, but the rest in small letters. They were told to sign the papers, but they refused.

5. ARGUMENT:

- 5.1 The respondent submitted very detailed argument in writing and made the following points:
 - 5.1.1 The respondent had proved the alleged misconduct on a balance of probabilities;
 - 5.1.2 The applicants' evidence was unsatisfactory, contradictory and improbable and should be rejected;
 - 5.1.3 The respondent's witness testimony was clear and satisfactory, with no material contradictions;
 - 5.1.4 The applicants really wanted to be retrenched to receive retrenchment pay and therefore refused to do their duties;
 - 5.1.5 The version of the applicants that Erasmus was angry and never let them ask questions in his office was never put to the witness;

- 5.1.6 The respondent's financial situation was very grave and there was no possibility of reinstatement or reemployment at all. It would only lead to other employees having to be retrenched;
- 5.2 In addition, the respondent's representative referred to several decisions of the Labour Court which upheld a view that the duty to obey an employer's instruction was paramount and a refusal to do so, especially if it is persistent, serious and deliberate, cannot be condoned.
- 5.3 The applicants' representative also submitted argument in writing and made the following points:
 - 5.3.1 The respondent company could be described as a "malevolent dictator" which issued militant instructions without explanation to employees and especially the applicants;
 - 5.3.2 The applicants did not understand the document they were asked to sign and were not given an interpreter to assist them;
 - 5.3.3 The respondent had intended to transfer them "under false misrepresentation";
 - 5.3.4 There was no rule of law which prevented employees from rejecting a transfer;
 - 5.3.5 The applicant worked at a dedicated site – Xstrata Wonderkop – and were removed from that site whilst not being afforded a chance to ask or seek clarity and without being given any explanation;
 - 5.3.6 In other cases (e.g. *CWIU v Algorax(Pty) Ltd* [2003] 11 BLLR 1081 (LAC)) an employer who dismissed employees for refusing to work a new shift system, had to reinstate them. Other cases were also mentioned where employees were reinstated following a refusal to accept amended terms and conditions of employment and for refusing to accept a final wage offer;
 - 5.3.7 The employer failed to produce its sub-contract with Jumbou as requested;
 - 5.3.8 The applicants require reinstatement.

6. EVALUATION OF EVIDENCE AND ARGUMENT:

- 6.1 In this matter, the issues to be decided were whether the applicants had breached the rules against refusing to work on a site and unauthorized absence from work and whether dismissal was an appropriate sanction in the circumstances.
- 6.2 The respondent bore the *onus* to prove that, on a balance of probabilities, the applicants had indeed breached the rules and that dismissal was an appropriate sanction. It presented its case through the evidence of three witnesses.
- 6.3 The first witness for the respondent, its general manager and a director, was indeed a most compelling witness. He testified in an uninhibited manner, without reservation, in detail and with clear sincerity. He appeared extremely upset that the applicants could have done what they did, after he had attempted

everything in his power to retain their positions and employment with the respondent. It was also evident that he operated one step removed from the coal face, and relied on his subordinates to give effect to the practical application of contracts and policies. This became clear when he explained that his subordinate, Botha, was told to ensure that staff was supplied to Jumbou. The mechanics of that instruction, he was not involved with. I do not think he knew that the applicants had not been told exactly what the purpose of their visit to Impala was. However, once he did get involved, I accept that he did try his very best to explain to the applicants exactly what was going on. It is a pity that there was not closer liaison between him and Botha, because he seemed to be under the impression that the applicants had already been assigned to start work at Jumbou, whereas Botha seemed to indicate that he had not made a final decision yet as to who exactly would be moved to the Impala site. The purpose of the applicants being taken there according to Botha, was simply to undergo medicals so that in the event he needed them to go and work there, they could be dispatched immediately.

- 6.4 Erasmus explained the context within which the dismissal of the applicants took place. The reality of the closure of all the furnaces at Xstrata was clearly a massive blow to the respondent at the time. It was clear from his evidence too, that he had had no problem with consultation with the trade union as he had, even according to the applicants' evidence, consulted about the earlier retrenchments of which they were fully aware. Therefore, had he needed also to retrench the applicants, he probably would have done exactly the same as he had done before – enter into consultations with the trade union. I do not therefore accept that the move to Jumbou was a permanent termination of the applicants' contracts with the respondent, but a genuine attempt at retaining their services at another work site. The work at Jumbou was a godsend in his view, as it meant that the core 24 employees he had retained, could still be gainfully employed by him. I accept that he explained all this to the applicants as he testified.
- 6.5 It is clear that the communication with the applicants on the day in question indeed appeared to be dictatorial as they were simply told to go to Impala for medicals and nothing more by their supervision. However, when they met with Erasmus, his revelations must have been new to them, understandably leaving them confused and concerned. However, once he had explained the situation to them and had given them all the assurances he could, they indeed demanded retrenchment money prior to going to work for Jumbou.
- 6.6 Based on Erasmus' evidence and the applicants' grudging admissions under cross-examination, they did indeed demand retrenchment packages despite the explanations. They also simply did not want to work at Impala as they had already indicated that prior to leaving for the medicals. They therefore must at least have suspected something. They were quite happy to remain at Wonderkop where very little work was taking place.
- 6.7 Erasmus also clearly explained the underlying contractual situation regarding medicals at Impala and that the contract was that of Jumbou and that therefore Jumbou would have to organize the medicals for people who would be rendering services to them as sub-contractors.

- 6.8 A question also raised by the evidence of Erasmus was the exact nature of the applicants' contracts. It was argued by the trade union that the applicants worked at a "dedicated" site. It was not made clear whether that meant that their contracts of employment indicated that they would only work at Wonderkop. However, in evidence, applicant Mohale who had worked for the respondent since 1996, stated that he was aware that the respondent's business was that of contracting out its equipment and operators thereof to other companies. He also stated that the respondent had agreed with the union that employees who were not retrenched would stay at Wonderkop. However, no such agreement was tabled and from what Erasmus stated, the situation at Wonderkop had deteriorated significantly since previous retrenchments, thereby justifying a different strategy to keep employees gainfully employed. It is therefore strange that they could demand to work only at Wonderkop, especially in the critical situation the respondent found itself in with the furnaces closing down.
- 6.9 I accept Erasmus' evidence that there was no intention to try to get rid of the applicants or to avoid having to pay them retrenchment packages. The company had not shirked in that duty towards the huge number of employees it had already retrenched. I therefore do not believe that that was the motive for the dismissal at all.
- 6.10 The second witness for the respondent was Mr Mogapa. His evidence only really served to indicate that he also received an instruction with no real explanation. He was simply told to send the applicants for medicals. However, he mentioned that the applicant stated prior to leaving that they would not work there. That indicates some knowledge that a possibility existed of them working there and a definite indication that, even if the situation were explained to them as Erasmus attempted to do, they would not accede to the request. Finally, Mogapa indicated that there was not much work at Wonderkop as, at the time, some of the applicants were working and some not. He also confirmed that due to the nature of the respondent's business, employees of Almar worked at different sites.
- 6.11 Botha, the site operations manager, testified that he had, after the fact, also explained to Mohale, that if they were to work at Jumbou, they would remain Almar employees. He stressed that despite that, Mohale was adamant that they would not work there. He also explained that he had not yet at that point decided to use the applicants at Jumbou. He confirmed the evidence of Erasmus that he, not Erasmus, was the one who decided on operational matters and staff deployment. It is indeed unfortunate that he did not attend the meeting with Erasmus together with the applicants in order that everyone could have clarity as to what exactly was envisaged with the applicants.
- 6.12 All in all, the respondent's witnesses painted a picture of a company in a desperate situation, doing its best to keep employees employed in very difficult economic circumstances. However, it was clear too, that communication with the applicants was not satisfactory at all, leading to obvious uncertainty as to what exactly was happening as far as they were concerned. Nevertheless, albeit belated, I am convinced that Erasmus did his very best in the circumstances, but that it was not good enough for the applicants. They wanted to remain in their positions at Wonderkop, where it was clear not much was


happening in so far as consistent work availability was concerned, or, receive retrenchment packages as many of their colleagues had.

- 6.13 The applicants' evidence was that they were told they were no longer working for Almar, but for Jumbou. They were told to sign forms, but refused to do so. They then went to Erasmus who was angry, did not explain anything and chased them away. According to Mohale's evidence, no one told them they would still be working for Almar. Had that been the case, they would have signed the document. However, under cross-examination, it soon became evident that Mohale's brief evidence in chief did not convey much of what had transpired in Erasmus' office. He conceded that there had been significant retrenchments at the respondent, that the respondent did indeed contract out its employees and machinery to other construction companies in the mining industry and, most importantly that they wanted to be retrenched like the other employees before them and that, had they been given retrenchment money on the day, they would have gone to work at Jumbou. He contradicted his own evidence that there had been no explanations by Erasmus when he stated that had they been given the explanation before going to Impala, they would not have refused to sign the document. It is therefore clear that the situation was indeed explained to them. It is significant too, that the trade union, according to the applicants' evidence, instructed them to return to work and that they then did so. Had they been viewed as dismissed, no such instruction would have been given and a dispute declared.
- 6.14 Ratau's evidence was that they were afraid when faced with the forms and asked to sign. It is strange that he could read the words Jumbou Construction on the document and nothing else. It is also strange, as mentioned by their representative in argument, that no interpreter was called for. It would have been up to the applicants to ask the stranger who handed them the forms to call an interpreter if they could not understand the English on the document. Ratau confirmed that the union instructed them to go back to work, that they had in fact asked Erasmus for retrenchment packages and that, had they been given such packages, they would have gone to work at Impala.
- 6.15 The applicants were dismissed for not obeying an instruction to go for a medical at Impala and refusing to work for Jumbou. It is clear that the applicants did not want to go for the medical as instructed, under the auspices of Jumbou, and that they first wanted a retrenchment package. However, the respondent has not shown that it had dealt with the situation appropriately, to avoid exactly the situation which had arisen. Had the consultation and explanations not taken place belatedly and after the fact, the situation the respondent found itself in, with Jumbou waiting for employees to arrive, would not have arisen. They would have either convinced the employees to work at the site or, would have known in advance that the employees would not do so. The respondent was definitely also to blame for the situation which arose and should have communicated its thinking and plans in a much more open manner. In that context, the remark of the applicants' representative that the respondent acted as a "dictator" appeared to be quite apt. However, it could be described as a "benevolent dictator" in the circumstances.

- 6.16 I find that the refusal to allow the applicants back into the workplace was premature. They were told to go and do what they wanted to do. When they returned after having consulted the union and having been absent for one day, they were barred from the premises, served with notices to attend an enquiry and dismissed. It is correct, as argued, that their refusal to work without a retrenchment package was persistent, serious and uncalled for. They were therefore not blameless in the circumstances. However, given their extremely long service, especially in the cases of Ratau and Mohale, with no prior record of similar refusals to work, the sanction of dismissal appeared to be extremely harsh in the circumstances. The matter could have been dealt with in a more constructive manner at the time, as when communication did take place with Erasmus, tensions were clearly very high and the participants emotional and upset. Once the applicants spoke to the union, they returned to work, but were prevented from entering. At that stage, perhaps, the union could have been called in and the applicants issued with final warnings for their part in the unfortunate situation the respondent found itself in. In fact, the situation was akin to an unprocedural strike, with employees refusing to work unless a demand is acceded to, and the respondent not willing to accede to the demand at all. In such circumstances, consultation and cooling off periods are prescribed. I see no reason why, in this instance, such consultation and “cooling off” period was not considered, but the employees “locked out” and disciplined thereafter.
- 6.17 Given that both parties were at fault, it is extremely difficult to decide upon an appropriate award in the circumstances.
- 6.18 I find that the parties were equally to blame for the situation which arose. The applicants’ demand for a retrenchment package was unreasonable in the circumstances, but brought about through clearly insufficient consultation and communication on the side of the respondent. When the consultation did take place, it was in a context of heightened emotions and polarized positions. The course of events which subsequently unfolded, resulted in the dismissal of the applicants – a rather harsh penalty, given the background and long service of the applicants.
- 6.19 On the side of the applicants, their refusal was persistent, serious and calculated to attempt to gain financially from the move to Impala and Jumbou. However, I believe that once the trade union addressed them, they were in a better frame of mind and returned to work.
- 6.20 Since the *onus* is on the respondent to prove that it had acted fairly in dismissing the applicants, and since it is found that the respondent’s actions were not entirely appropriate at the time either, it is appropriate to award the applicants some compensation, as, I believe, had they been permitted to resume work and had consultation taken place with the trade union around the incident, the result might have been very different. However, given the applicants’ own contribution to the events that unfolded and which led to their dismissals, they can only be awarded token compensation.

7. AWARD:

- 7.1 The dismissal of the applicants is found to have been substantively unfair on the basis that dismissal was too harsh a sanction in the circumstances.
- 7.2 The applicants (R Mohale, W Ratau and Z Nochubela) are awarded compensation of two months' remuneration each, calculated at the gross rate of pay as at the date of their dismissal and subject to the normal statutory deductions.
- 7.3 The amount due to each applicant must be paid to them by the respondent Almar Investments (Pty) Ltd by no later than 15 April 2010 i.e. R 900.45 per week x 4.33 x 2 = R 7 797.90 payable to each applicant.
- 7.4 The applicants must collect their payments (either in cash or per cheque made out to each of them) at the respondent's premises on 15 April 2010 or in accordance with any other payment arrangement made and agreed between the representatives of the parties prior to 15 April 2010.
- 7.5 There is no order as to costs.

A handwritten signature in black ink, appearing to read 'M. Loyson', with a long horizontal stroke extending to the right.

NBCRFI PANELLIST: M LOYSON

19 February 2010