**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 154/20

In the matter between:

**NATIONAL UNION OF MINEWORKERS OBO VIOLET MASHA AND OTHERS** Applicant

and

**SAMANCOR LIMITED (EASTERN CHROMES MINES)** First Respondent

**NICHOLUS SONO N.O.** Second Respondent

**COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** Third Respondent

**Neutral citation:** *National Union of Mineworkers obo Violet Masha and Others v SAMANCOR Limited (Eastern Chromes Mines) and Others* [2021] ZACC 16

**Coram:** Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J

**Judgments:** Mhlantla J (unanimous)

**Decided on:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Constitutional Court website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 22 June 2021.

**Summary:** Appeal from the Labour Appeal Court — costs — no reasons from Labour Appeal Court for departure from the general rule that costs

follow the result does not apply in labour matters — appeal on costs upheld and costs orders set aside

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**ORDER**

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On appeal from the Labour Appeal Court, Johannesburg:

1. Condonation is granted.
2. Leave to appeal on the merits is refused.
3. Leave to appeal against the costs orders of the Labour Appeal Court is granted.
4. The appeal against the costs orders of the Labour Appeal Court is upheld.
5. The costs orders granted by the Labour Appeal Court are set aside.
6. No order as to costs is made in relation to the proceedings in this Court.

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**JUDGMENT**

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MHLANTLA J (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring):

*Introduction*

[1] This is an application for leave to appeal against a judgment and order of the Labour Appeal Court.[1] That Court upheld an appeal against a decision of the Labour Court with costs.[2]

[1] *Samancor Limited (Eastern Chrome Mines) v Commission for Conciliation, Mediation and Arbitration Limpopo* [2020] ZALAC 17; (2020) 41 ILJ 2135 (LAC) (Labour Appeal Court judgment).

[2] *Samancor Limited (Eastern Chrome Mines) v Commission for Conciliation, Mediation and Arbitration* [2018] ZALCJHB 435 (LC) (Labour Court judgment).

*Background facts*

[2] The National Union of Mineworkers (the applicant) is acting on behalf of five of its members, namely, Ms Violet Masha, Mr Vincent Pholwane, Mr Nkipilili Siqalane, Mr Father Mhlongo, and Mr Moses Khoza. These members were employed by SAMANCOR Limited (Eastern Chromes Mines), the first respondent, until their dismissal.

[3] On 19 October 2015, Mr Madikwane, the mine overseer, visited the North 8 North Tip section of the first respondent's mine. He found five employees (the five members listed above) working under unsafe conditions. They had failed to install a temporary support and a safety net before drilling in the area. At the time, one of the team members, Ms Maseko, was not present as she had been sent by one of the five employees to fetch explosives that would be used when the site was ready. Mr Madikwane verbally instructed the team to stop working in those unsafe conditions and further instructed them to install the safety measures before continuing to work. He left the site, and a few minutes later, heard the sound of the drilling machine. Upon his return, he found two of the employees still working under unsafe conditions whilst the other three were watching. Mr Madikwane then issued a written instruction to the crew to stop working until it was safe to do so.

[4] A few days later, Mr Madikwane returned to the site and discovered that nothing had changed, as the employees had continued to work notwithstanding his written instruction. The five employees were charged with misconduct for failing to comply with a verbal and written instruction issued by their supervisor. Following a disciplinary inquiry, they were found guilty of misconduct and dismissed.

*Litigation history*

*CCMA*

[5] The dismissed employees lodged a dismissal dispute with the Commission for Conciliation, Mediation and Arbitration (CCMA), the third respondent. During the arbitration proceedings, the dismissed employees alleged that the employer had been inconsistent in disciplining its employees in that: (a) Ms Maseko, who was on duty with them, was not initially charged. It was only after a complaint by the applicant, that the employer had charged her, but she was acquitted; and (b) another employee, Mr Motlhabing, had also been charged for working under unsafe conditions, but had not been dismissed.

[6] After considering the evidence, the arbitrator concluded that the employees had been guilty of working without installing the safety measures as instructed.[3] However, he held that there was an unjustifiable differentiation between the employees and Ms Maseko which amounted to an inconsistency in the implementation of the disciplinary measures. Accordingly, the arbitrator held that the dismissal was unfair and issued an award for reinstatement of the employees.

*Labour Court*

[7] The first respondent instituted review proceedings in the Labour Court. The Labour Court held that Mr Madikwane, the employees' supervisor, did not immediately return following his written instruction to inspect the working area, but did so only three or four days later when he found the site in the same condition as before. The Court held that there was insufficient evidence relating to the defiance of the written instruction to make a finding on credibility. It noted that the supervisor could have made a full report on what he had found and how his instruction had been defied.

[3] Mr Nicholus Sono N.O. was the arbitrator. He is the second respondent and is cited in his official capacity as a commissioner for the third respondent, the CCMA. Both are cited for their interest in the matter and no relief is claimed against them. Neither is participating in these proceedings.

Further, the lack of clear evidence on when he returned to visit and inspect the site, pointed to him not having done so.

[8] The Labour Court, therefore, held that the first respondent had failed to prove, on a balance of probabilities, that the employees had defied the written instruction given to them by Mr Madikwane. The review application was dismissed with no order as to costs.

*Labour Appeal Court*

[9] The Labour Appeal Court held that the Labour Court had failed to consider the main issue, that is, whether the inconsistency in the application of disciplinary measures had been proved. After evaluating the evidence, the Labour Appeal Court rejected the arbitrator's finding of inconsistency of discipline on the basis that Ms Maseko, who had been acquitted, was not present when the instructions were issued. Furthermore, it held that the dismissed employees could not rely on the fact that Ms Maseko had been acquitted and use that as a basis for their challenge in respect of inconsistency of discipline. The Labour Appeal Court held that the Labour Court adopted an opposing position to that of the arbitrator concerning Mr Madikwane's instructions. Consequently, there was no basis for the Labour Court to hold that a reasonable decision-maker could find that the five employees did not disregard the instructions.

[10] The Labour Appeal Court held that the five employees were aware of the rules and that dismissal was an appropriate sanction for contravening the rules. It also held that, while it is generally not appropriate to dismiss an employee for a first offence, this default position need not be adopted if the misconduct is serious, including the wilful endangering of the safety of others. Further, the employees disregarded both a verbal and written instruction. Relying on *Impala Platinum*,[4] which underscored the

[4] Labour Appeal Court judgment above n 1 at para 26 citing *Impala Platinum Limited v Jansen* (2017) 38 ILJ 896 (LAC); [2017] 4 BLLR 325 (LAC) at para 17, in which that Court explicated the degree of seriousness which accompanies a failure to observe safety regulations in the mining context:

> "It is clear that the mining industry has been under tremendous scrutiny regarding safety measures due to the high risk in the nature of the work done. In order to have a safe mining

importance of safety measures in the context of mining operations, it held that the sanction of dismissal was justified. The Labour Appeal Court upheld the appeal with costs. The order of the Labour Court was set aside. In its place, the Labour Appeal Court declared that the dismissal of the five employees was procedurally and substantively fair and the applicant was ordered to pay the costs of the application.

*In this Court*

[11] The applicant approached this Court for leave to appeal against the order of the Labour Appeal Court. On 25 November 2020, the Chief Justice issued directions calling on the parties to file written submissions on costs, having particular regard to this Court's judgment in *Zungu*.[5]

[12] The parties have filed written submissions and the matter was determined without oral argument.

*Applicant's submissions*

[13] The applicant submits that the Labour Appeal Court was wrong on the law and facts when it set aside the judgment of the Labour Court. The applicant submits that at the heart of the matter is the inconsistent application of disciplinary measures and the Labour Appeal Court's misapplication of this principle. It submits that, as a matter of law, if an employer applies selective discipline and retains some employees while dismissing others, it is enjoined to reinstate the dismissed employees as the employer is taken to have condoned the misconduct. Therefore, the judgment and orders are inconsistent with section 23(1) of the Constitution, which provides for the right to fair

environment, the regulations which were contravened by Jansen were promulgated to ensure that workers doing underground work underwent competency training, and declared competent before being allowed to do underground work. By his actions Jansen did not only undermine the regulatory framework and put in danger life and limb, he also placed his employer at risk of section for contravening the statutory regulations."

[5] *Zungu v Premier of the Province of KwaZulu-Natal* [2018] ZACC 1; (2018) 39 ILJ 523 (CC); 2018 (6) BCLR 686 (CC).

labour practices. Furthermore, the application raises constitutional issues as it implicates the right to fair labour practices and the right to access courts, as provided for in section 23(1) and section 34 of the Constitution respectively.

[14] Regarding the allegation of the inconsistency of discipline amongst the employees, the applicant submits that Mr Motlhabing was charged for similar conduct, but not dismissed. Further, Ms Maseko was not dismissed, while she was also part of the group that worked with the dismissed employees. The applicant submits that there is no reason why Ms Maseko was treated differently, despite her not being present when Mr Madikwane visited the team. In addition, her being subject to the disciplinary inquiry was merely a formality and her relationship with Mr Madikwane played a role in her receiving different treatment. It submits that the Labour Appeal Court failed to consider all material evidence before it, and also failed to ensure that all parties were treated fairly. The applicant submits that not all of the dismissed employees had carried out the work after the verbal instruction. Others were merely standing around and, therefore, those employees were dismissed for derivative misconduct. This, it submits, is in conflict with this Court's decision in *Dunlop Mixing and Technical Services*.[6] The applicant submits that, despite evidence that all five employees carried out some work, the Labour Appeal Court erred when it upheld the appeal.

[15] The applicant submits that the sanction was disproportionate, in that the alleged seriousness of the risk was exaggerated during the dispute resolution proceedings as it was evident that compliance with the verbal instruction would not have led to the misconduct charge. Lastly, the Labour Appeal Court failed to take into account the personal circumstances of the dismissed employees and did not afford them the protection of section 23(1) of the Constitution.

[6] *National Union of Metalworkers of South Africa obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* [2019] ZACC 25; 2019 (5) SA 354 (CC); 2019 (8) BCLR 966 (CC) (*Dunlop Mixing and Technical Services*).

*First respondent's submissions*

[16] The first respondent submits that the application does not raise a matter of public importance and the Labour Appeal Court applied well-established principles of law. The first respondent submits that the Labour Appeal Court noted that the arbitrator had found the misconduct proven, and having considered the issue itself, also found that the dismissed employees had failed to adhere to the instructions. It notes that this issue is not challenged by the applicant before this Court.

[17] The first respondent submits that the derivative misconduct argument was not raised in the Labour Appeal Court and the argument lacks substance. It submits that the individual members who were dismissed were part of a 'gang of employees' working together in a section of the mine without making it safe as required. They continued to do so despite an instruction to the contrary. The distinction that some were onlookers is not justified, as they were all required to stop working and make the area safe and they failed to do so. The first respondent further submits that *Dunlop Mixing and Technical Services* has no bearing on this matter, as it sets out the employees' fiduciary responsibility to account to the employer in the context of a protected strike.

[18] The first respondent submits that the Labour Appeal Court held that there was no factual basis for finding that the employer had failed to comply with the parity principle. It submits that the applicant has failed to show that Ms Maseko had been found guilty or should have been found guilty of the same infractions. It submits that the applicant has failed to demonstrate that the Labour Appeal Court was wrong in its articulation of the principles relating to consistent discipline. Furthermore, the applicant has failed to raise any issue of principle relevant to the Labour Appeal Court's evaluation and assessment of the seriousness of the misconduct.

[19] Regarding the sanction, the first respondent notes that the personal circumstances of the employees were not canvassed in the Labour Appeal Court and there is no suggestion that, had they been considered, they would have been material to a decision

to uphold the dismissal. Consequently, there is no basis to conclude that this was not considered.

*Issues*

[20] This Court has to determine the following issues:

(a) Whether condonation should be granted;

(b) Whether this matter engages this Court's jurisdiction;

(c) Whether it is in the interests of justice to grant leave to appeal;

(d) Whether the dismissal was procedurally and substantively fair; and

(e) What is an appropriate remedy in the circumstances?

*Condonation*

[21] The application is out of time by approximately 20 days. The applicant submits that it was not informed of the date of hand down of the Labour Appeal Court judgment. It discovered on 22 June 2020 that the judgment had been delivered on 18 May 2020. It received the judgment on 23 June 2020. Upon considering the judgment, it instructed its attorneys to file an application for leave to appeal and briefed a senior counsel experienced in constitutional litigation. The applicant submits that the delay was not out of disregard for the rules of this Court, nor was it wilful. The delay should be compensated for by the reasonable prospects of success on appeal, the importance of the matter and the constitutional issues implicated. The first respondent opposes the application on the basis that the delay is excessive, the explanation does not cover the entire period and the application has no prospects of success.

[22] In my view, the delay is minimal and the explanation is satisfactory. Furthermore, there will be no significant prejudice to the first respondent. Therefore, condonation should be granted.

*Jurisdiction*

[23] This matter implicates the employees' rights to fair labour practices, a fair hearing and access to justice. Therefore, constitutional issues have been raised. Thus, this Court's jurisdiction is engaged. This is specifically with regard to the question whether the employees' dismissal was unfair. Second, whether the Labour Appeal Court was correct in mulcting the applicant in costs. This Court has the requisite jurisdiction to deal with both issues.

*Leave to appeal*

[24] Having established jurisdiction, the question remaining is whether it is in the interests of justice for leave to appeal to be granted. This Court's decision in *NEHAWU* is instructive in this regard.[7] In *NEHAWU*, this Court stated that determining whether it is in the interests of justice to grant leave to appeal requires – among other considerations – an assessment of whether there are reasonable prospects of success in the application.[8] In essence, whether there are reasonable prospects that an appeal court will reverse or materially alter the decision of the court a quo.

[25] With regard to the merits, there are no reasonable prospects of success. I expand more on this below. However, the issue of costs is on a different footing in respect of which there are reasonable prospects of success. What follows is a discussion of each aspect, that is, the merits and costs, in the determination whether leave to appeal should be granted.

*Merits*

[26] While Ms Maseko was charged, this was not completely on the same grounds as the dismissed employees, as she was not present when the supervisor arrived at the site and had not participated during the drilling exercise. The other employee,

[7] *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*).

[8] Id at paras 14 and 25.

Mr Motlhabing, had been charged for failing to install the safety net properly. It was found that the safety net and camlocks had been installed, but there were insufficient S- hooks. Therefore, his case can be distinguished from the circumstances of the dismissed employees. The Labour Appeal Court was correct in concluding that there was no basis for a finding of inconsistency of discipline. The Labour Appeal Court considered the evidence and held that the employees had been correctly found guilty of working in conditions that breached health and safety standards. That conclusion is unassailable.

[27] What remains is the issue of the sanction. The employees were employed in the mining industry. They were performing underground work and drilling in unsafe conditions.[9] They disregarded their supervisor's verbal and written instructions meant to ensure that adequate safety measures were in place. By doing so, they undermined their supervisor. The misconduct is serious because it placed their lives, and those of the other workers, at risk. The sanction of dismissal was thus justified. Therefore, the Labour Appeal Court was correct in setting aside the arbitration award and confirming the dismissal of the five employees. It follows that the application for leave to appeal on the merits lacks reasonable prospects of success and must be dismissed.

*Costs*

[28] Lastly, the question of costs. The applicant submits that the costs orders are unjustified. The Labour Appeal Court did not apply the principle set out in *Dorkin*[10]

[9] *Impala Platinum* above n 4 is apposite in these circumstances.

[10] *Member of the Executive Council for Finance: KwaZulu-Natal v Dorkin N.O.* [2007] ZALAC 34; [2008] 29 ILJ 1707 (LAC) (*Dorkin*) at para 19, in which the Labour Appeal Court stated the reasons why costs orders in labour matters would ordinarily be unjustified, as follows:

> "[T]he norm ought to be that cost orders are not made unless those requirements are met. In making decisions on cost orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court. That is a balance that is not always easy to strike but, if the Court is to err, it should err on the side of not discouraging parties to approach these Courts with their disputes. In that way these Courts will contribute to those parties not resorting to industrial action on disputes that should properly be referred to either arbitral bodies for arbitration or to the Courts for adjudication."

and *Zungu*,[11] and thus did not exercise its discretion judicially. The first respondent submits that the principles applicable to the awarding of costs are well-known and there is no principle for this Court to engage with or provide guidance on. Further, the matter does not raise a constitutional or a legal issue of general public importance.

[29] I agree with the applicant that the Labour Appeal Court did not have regard to this Court's decision in *Zungu*. In *Zungu*, this Court held that "the rule of practice that costs follow the result does not apply in labour court matters".[12] The Court also quoted *Dorkin* with approval where it was held that it is crucial not to discourage employees, unions and employers' organisations from approaching the Labour Court and Labour Appeal Court by mulcting unsuccessful litigants in costs.[13] This Court further said that reasons must be provided where a costs order is issued.[14]

[30] In this matter, the Labour Appeal Court mulcted the applicant in costs without furnishing reasons for doing so. It appears that the Labour Appeal Court simply adopted the rule that costs follow the result. There is nothing to indicate why the applicant was ordered to pay the costs in both Courts. This is compounded by the fact that the Labour

[11] *Zungu* above n 5 at para 26. In *Zungu*, this Court endorsed and applied the principle set out in *Dorkin*, which was that in the ordinary course of a labour matter, the applicant ought not to be mulcted in costs should they fail in their claim unless circumstances render it just to do so.

[12] Id at para 24.

[13] Id.

[14] Id at paras 24-5. The reasons a court may have for a costs order against a party ought to have regard to the factors set out in section 162 of the Labour Relations Act 66 of 1995 which read as follows:

> "(1) The Labour Appeal Court may make an order for the payment of costs, according to the requirements of the law and fairness.
>
> (2) When deciding whether or not to order the payment of costs, the Labour Appeal Court may take into account—
>
> (a) whether the matter referred to the Court should have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and
>
> (b) the conduct of the parties—
>
> (i) in proceeding with or defending the matter before the Court; and
>
> (ii) during the proceedings before the Court.
>
> (3) The Labour Appeal Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court."

Court had made no order as to costs in its judgment. In this regard, the Labour Appeal Court substituted the Labour Court's order as follows: (a) the arbitration award was reviewed and set aside; (b) the dismissal of the employees was declared procedurally and substantively fair; and (c) the third respondent (the applicant in this Court) was ordered to pay the costs of the application. There is no explanation for order number three, which had the effect of overturning the Labour Court's finding that there should be no order as to costs.

[31] The applicant's role is to defend the rights of its members. It cannot be argued that challenging a dismissal alone justifies a costs order. Mulcting the applicant in costs in a labour matter where there is no finding of any untoward conduct on the part of the applicant is intolerable. The costs orders will have a chilling effect on the applicant and may deter it from fulfilling its duty to represent its members without fear of reprisal. This may affect its members' right to access justice and thus, may infringe sections 23 and 34 of the Constitution. However, there may be instances where a costs order is warranted and in that case, reasons must be provided. Therefore, it is in the interests of justice that leave to appeal against the costs orders issued by the Labour Appeal Court be granted.

[32] It is a trite principle of our law that a court considering an order of costs exercises a discretion. This discretion is to be exercised judicially and in accordance with the correct principles of law. Where this is not so, an appeal court is enjoined to interfere.

[33] In this matter, the Labour Appeal Court did not provide reasons for its costs orders. The costs orders are at odds with this Court's decision in *Zungu*, and fly in the face of what was said in *Dorkin*. In this regard, it erred in departing from the general rule that losing parties in labour matters should not be ordered to pay the successful parties' costs, unless there are reasons warranting the imposition of a costs order. Therefore, the Labour Appeal Court did not exercise its discretion judicially. This Court is thus entitled to interfere with the costs order. It follows that the appeal on costs should be upheld and the costs orders set aside.

*Order*

[34] The following order is made:

1. Condonation is granted.
2. Leave to appeal on the merits is refused.
3. Leave to appeal against the costs orders of the Labour Appeal Court is granted.
4. The appeal against the costs orders of the Labour Appeal Court is upheld.
5. The costs orders granted by the Labour Appeal Court are set aside.
6. No order as to costs is made in relation to the proceedings in this Court.

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| For the Applicant: | Cheadle Thompson and Haysom Incorporated |
| For the First Respondent: | CE Watt-Pringle SC instructed by Lebea & Associates Attorneys |