IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA65/18

In the matter between:

MOQHAKA LOCAL MUNICIPALITY **Appellant**

and

IMATU OBO EM THEBE & 13 OTHERS **Respondent**

Delivered: 22 May 2020

Coram: Jappie, Musi *et* Coppin JJA

JUDGMENT

COPPIN JA

[1] On 17 February 2014 the appellant dismissed a number of its employees, including the 14 that are represented in this matter by the respondent union ("IMATU"), on the grounds, inter alia, that they were participants in an illegal strike. As a consequence, IMATU brought a claim in terms of section 191 of the Labour Relations Act[1] on behalf of those employees in the Labour court, seeking their reinstatement.

[2] The Labour court (per Moshoana J), in a judgement dated 26 April 2018, found that the dismissal of the employees was procedurally and substantively unfair and ordered the appellant to reinstate them without any loss of benefits, effectively, from the date of the dismissal. Each party was ordered to pay its own costs. This is an appeal against that decision, leave to appeal having been granted on petition to this court. IMATU is opposing this appeal on behalf the employees.

[1] Act 66 of 1995.

[3] In addition to contesting the merits of the appeal the respondent has raised two legal points, only one of which it persisted with at the hearing. I shall first set out a brief background and then deal with the legal point.

The background facts

[4] It is common cause that on or about 13 December 2013 a group of the appellant's employees stormed into the office of the appellant's Director of Corporate Services, Mr Eric Mtwalo and forcefully removed him from the premises.

[5] On 6 January 2014 employees of the appellant engaged in an illegal strike. A group that styled themselves "The Progressive Moqhaka Municipality Employees" ("Progressive Group") consisting of employees who were members of the South African Municipal Workers Union (SAMWU) and of IMATU called a meeting at the local town hall where a letter, addressed to the Municipal Manager and certain Directors of the appellant, was read out. One of the demands, in essence, was that those officials should resign voluntarily or be forced by the group to do so. One of the employees represented by IMATU in this matter, Mr EM Thebe, was the elected spokesperson for the Progressive group at the meeting and he read the letter to the audience.

[6] The appellant alleges that the employees engaged in an illegal strike from 6 January, which was not limited to the withdrawal of their labour, but also included widespread acts of intimidation, threats of violence and interruptions of service delivery. According to the appellant, the striking employees had from time to time entered the offices of the Directors and had removed them and threatened them with violence and other grievous consequences, if they were to come back. The strikers also blocked the entrance to the appellant's offices. Out of concern for the safety of the Municipal Manager and the affected Directors, arrangements were made for those officials to work from a guesthouse in Kroonstad.

[7] On 17 January 2014 the appellant obtained an interim interdict from the High Court against certain of the employees involved in the strike, which included four of the employees in this matter, namely, Mr Thebe, Ms Selebogo (the

Human Resources Manager), Ms Motsamai and Ms S Stokkie. The order was returnable on 13 February 2014.

[8] According to the appellant, from 17 January 2014 up to the date of the dismissals, the High Court order was breached. On 11 February 2014 it issued an ultimatum (the first ultimatum) calling upon those employees on strike to return to work within an hour, failing which they would be issued with letters of dismissal. On 12 February 2014 a second and final ultimatum was issued calling upon the employees who were on strike to return to work by 11h00 on that day, failing which they would be issued with letters of dismissal.

[9] On 14 February 2014 letters of dismissal were drafted in respect of those employees, who did not comply with the last ultimatum, and they were served by the Sheriff on the affected employees who were present on the appellant's premises. The others collected their letters of dismissal on 17 February 2014. The employees were dismissed for two reasons, namely, for being in breach of the High Court order and/or for continued participation in an illegal strike, despite the ultimatums.

[10] In the Labour court the appellant, who bears the onus to prove that the dismissal of the employees was both procedurally and substantively fair, called several witnesses. They were, Mr JeremiahTshibulane (a constable of the SAPS), who made a video recording of the activities inside and outside the appellant's premises during the strike; Mr Mtwalo, the Director of Corporate Services, Ms Connie Mazibuko, a security officer at the appellant's premises who was stationed at the main office and Cash Hall, and who was responsible for opening the appellant's gates and for the safety and security of its buildings, Mr Andre Kotze, the Records and Administration manager, Mr Godfrey Mogorosi, the Resort Manager, Mr Nicholas Van Zyl, the appellant's Chief of Security Services, who was responsible for the protection of the appellant's employees and Councillors, and Ms Portia Tshabalala, the Director of Community and Social Services. For the respondent each of the employees represented in this matter by IMATU also testified.

Labour Court's Findings

[11] The Labour Court found, in essence, that the appellant had failed to prove that any of the employees in this matter had committed misconduct. It found that "[t]he difficulty with the [appellant's] evidence is that since it was common cause that during the period there was an ongoing strike it cannot [in the Labour court's] view, follow that the dismissed individual [employees] participated in that strike action. By doing so this court would simply be assuming that [the employee's] were guilty of misconduct, without making a determination on whether the applicants were indeed guilty of misconduct."

[12] According to the Labour Court, it was confronted with two conflicting versions, i.e. the appellant's version that some of the employees represented herein were in breach of the High Court order, and that all of them continued to engage or participate in the strike despite the ultimatums that were issued, and the versions of the individual employees denying such a breach or participation. Having briefly considered the evidence the Labour Court rejected the version of the appellant's witnesses as being improbable and accepted the respondent's version that they were at work, as the most probable version. It concluded that the appellant had failed to discharge its onus.

[13] Notwithstanding that conclusion, the Labour Court went on to further fortify its findings – being especially critical of the appellant's allegation that all the employees breached the High Court order for a period of a month after it had been obtained. The Labour Court found that improbable, especially since nothing had been done by the appellant concerning such contravention. The Labour court was also critical of the fact that not all the employees had been cited as respondents in the High Court proceedings, and that there was no evidence about the Progressive group's membership and whether it continued to exist beyond 6 January 2014. It was even more critical of the fact that there was no evidence that the High Court order had been served on each of the employees.

[14] The Labour Court hence concluded: "For all the reasons set out above, I am not satisfied that the dismissal of the [employees] was for a fair reason. In relation to procedure I'm not convinced that this is a matter where a hearing

should not have been held. Since there was no hearing, the dismissal was effected without following a fair procedure." The Labour court then went on to make an order reinstating the employees.

Point of law: authority to appeal

[15] The respondent did not proceed with a point in limine relating to the date of the filing of the notice of appeal, but persisted with a point that the Municipal Manager, Mr Mncedisi Simon Mqwathi, did not have the necessary power to act on behalf of the appellant in appealing the matter.

[16] It is not disputed that the Municipal Manager signed a special power of attorney, dated 30 April 2018, in terms of which he warranted that he was duly authorised by the appellant to institute the appeal proceedings, to nominate and appoint Lebea & Associates Attorneys ("the appellant's attorneys") as the attorneys and empowering them to appeal against the whole of the Labour Court's judgement and to do everything necessary to finalise this appeal.

[17] It was contended that the Municipal Manager had the necessary power to do so by virtue of the appellant's written "Delegation of Powers, Policy and Principles of Delegation" and the incidental powers delegated to him. According to the appellant's (i.e. Council's) minute, dated 13 October 2009, it was resolved that the delegation of powers as contained in the said document was approved. It is also common cause that the Council that approved that delegation ceased to exist on 3 August 2016, and that a new (i.e. the current) Council of the appellant was elected into office and installed on 4 August 2016.

[18] The essence of the legal point is the following: (a) Section 11(1) of the Local Government: Municipal Systems Act[2] ("the Systems Act") provides that the executive and legislative authority of a municipality is exercised by the Council of the municipality and the Council's decisions are taken subject to section 59; (b) Section 59(2)(b) of the Systems Act requires delegations to be in writing; (c) Section 59(2)(f) requires the delegations, or instructions, contemplated in

[2] Act 32 of 2000.

that section to be reviewed when a new Council is elected; (d) The delegation relied upon by the appellant in these proceedings (thus) elapsed when the previous Council ceased to exist and a new Council was elected; (e) No review as contemplated in section 59(2)(f) had ever taken place; (f) Accordingly, the delegation relied upon by the Municipal Manager was not valid or of any lawful effect, and the Municipal Manager, therefore, lacked the necessary standing to represent the appellant in the current proceedings and to instruct attorneys on its behalf.

[19] This point has no merit for the simple reason that the Systems Act does not provide that the delegation approved by the previous Council lapses when a new Council is elected. The view that it does lapse is an unjustified inference drawn by the respondent from section 59(2)(f) of the Systems Act which provides that the delegation or instruction, contemplated in that section, "must be reviewed when a new Council is elected or, if it is a district council, elected and appointed." The interpretation contended for by the respondents could result in confusion and chaos if, for example, the delegation of the previous council is not reviewed in time, or if the review itself would take time to finalise. It would essentially mean that the business of the municipality would be hamstrung thereby, not to speak of the uncertainty that may result therefrom.

[21] The whole system of delegation is to ensure maximum administrative and operational efficiency and to provide for adequate checks and balances. If the failure to review the delegation of the previous Council automatically resulted in the lapse of that delegation, the consequence would not be maximum administrative and operational efficiency, but the exact opposite.

[22] In any event, in terms of section 59(3)(a) a Council is to review any decision taken by, inter-alia, an office bearer or staff member, in consequence of a delegation or instruction and may either confirm, vary or revoke that decision. There is no suggestion that the new Council of the appellant revoked or varied the decision to appeal the decision of the Labour Court. And it is unlikely that the present Council would be unaware of the current appeal, or is not supportive of it. For all of the above reasons the point is dismissed.

Regarding the merits

[23] The dismissal of the employees in this matter was not in issue and it was therefore incumbent upon the appellant to commence and, ultimately, prove on a balance of probabilities that their dismissal was both procedurally and substantively fair.

[24] It is indeed so that in the letters of dismissal the appellant stated that each of the employees were dismissed for participating in the strike, particularly on 11 and 12 February 2014, and for being in breach of the High Court order. But the second ground of dismissal could not fairly and validly apply to those employees who were not cited in the High Court order. Nevertheless, this ground of dismissal must be understood in the context of the appellant's case that the employees participated in the strike on 11 and 12 February 2014 and would not have been dismissed if they complied with the ultimatums issued on 11 February or 12 February.

[25] The evidence that there was a strike at the appellant from about 6 January 2014 until about 17 February 2014, when the dismissal letters was served on employees, is overwhelming. It is further incontestable that the strike was not peaceful and that acts of violence were perpetrated against officials, property and other employees of the appellant. There were threats of physical violence made by some of those who participated in the strike, acts of arson were perpetrated and there were acts of bullying by some strikers and general disrespect shown for officials of the appellant. There is also no question that the strike was unprotected and that it was necessary for the appellant to seek an interdict which was granted by the High Court against particular individuals on 17 January 2014.

[26] Ultimately the appellant wants this Court to overturn the Labour court's findings of fact concerning the employee's participation in the strike. It is trite that an appeal court's powers in reviewing such findings is limited to some extent, because findings of fact depend on the credibility of witnesses and is not confined to what is on record. The appeal court does not have the same benefit as the trial court of seeing and hearing the witnesses as they testified.

[27] However, where the findings do not depend on credibility, but on inferences from other facts, the appeal court may be somewhat better placed than the trial court, not only because the facts are recorded, but because of the further sifting and refinement of issues brought about by the process of appeal, which may cause the appeal court to see facts, previously overlooked or undervalued, in a completely new light[3].

[28] Consequently, while the appeal court will generally respect and not interfere with the trial court's factual findings, it may interfere with those findings and replace them with its own where the trial court has misdirected itself, or if the appeal court is of the view that the inferences it is able to draw are more apposite and that the trial court was clearly wrong[4].

The Evidence

[29] It is therefore necessary to consider the employer's evidence implicating the fourteen employees in the misconduct alleged by the appellant, and the exculpatory evidence of those employees, in order to determine whether the appellant had discharged its onus.

[30] Mr Mtwalo testified, inter alia, that on 13 December 2013, prior to the commencement of the strike, he was forcefully evicted from his office by a group of employees who stormed into his office; he was insulted and told that he was no longer wanted at the municipality; in addition, the employees threatened to shoot and stab him. He identified Ms Selebogo, Ms BC Malema, Ms MW Khau Khau, Ms S Stokkie and Mr P Gaje as having been part of that group of employees. He also testified that a Ms Otloa was part of the group but later confirmed that that was an error. He further identified the following persons as part of those that were one strike between the period 6 January to 17 February 2014: Ms Khau Khau, Mr Tshisane, Ms BC Malema, Ms Bhape, Ms Utla (or "Otloa"), DC Moleofi, Ms MS Ramabope (or "Ms Sekonela"), Ms PE Ntlokotsi, Ms S Stokkie, and Mr Gaje (or "Kgaje"or "Mr Masita"). Under

[3] See: inter alia, *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 697 – 706; DT Zeffert and AP Paizes *The South African Law of Evidence* (2003) 782 – 783.
[4] See the authorities cited above and *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) at 120 – 122, paras 105 and 106.

cross-examination he also testified that Ms Mokemane was also on strike during the period 12 to 14 February 2014. His evidence was detailed concerning the misconduct of each of those employees.

[31] Ms Mazibuko, who worked in the Cash-hall of the appellant, which is located on the ground floor at the entrance, also identified specific employees who participated in the strike. Her work hours were from 6h00 to 18h00 and she was particularly well-placed to identify those who entered and left the building during the period. She testified, inter alia, that the following respondent employees participated in the strike over the crucial period namely Mr Tshisane, Ms Selebogo, Ms Motsamai, Ms Bhape, Ms Utla or Otloa, Ms Mokemane, Ms Moleofi, Ms Ramabope (or "Ms Sekonela"), Ms Khau Khau, Ms Ntlokotsi, Ms Stokkie, Mr Gaje (or "Kgaje" or "Mr Masita") and Mr Thebe. She testified that the latter was one of the leaders of the strike.

[32] They would assemble outside the cash office and move towards the entrance; they would remove managers from the building and chase away members of the public who came to pay their accounts, as well as other employees who were willing to work; they would enter the building at times and threaten to assault (i.e. 'sjambok') employees that were working, unless they left. They shouted and screamed at officials and tried to force them to leave the premises and would at times even accompany them to their vehicles, forcing them to take their belongings with them. They would even use pepper spray to get other working employees out of the building.

[33] Mr Kotze was able to identify the voices of certain employees who participated in the strike and identified Ms Motsamai and Ms Stokkie, as having been amongst those who came to remove him from his office on 22 January 2014. He testified that he also saw the following employees participating in the strike on different occasions: Mr Thebe, Ms Selebogo, Ms Malema, Ms Motsamai, Ms Ramabope (or "Ms Sekonela"), Ms Khau Khau, Ms Ntlokotsi, and Ms Stokkie.

[34] Mr Mogorosi and Ms Tshabalala also testified about the nature of the strike. As they feared for their lives they did not identify particular individuals. Mr Van

Zyl also testified about the nature of the strike. He confirmed that it was marked by violence and threats of violence. He identified the following employees as having participated in the strike Mr Thebe, Ms Stokkie, Ms Khau Khau, Ms Selebogo, Ms Ramabope (or "Ms Sekonela"), Ms Motsamai, Ms Malema, Ms Bhape, Ms Ntlokotsi and Mr Tshisane.

[35] Mr Mtwalo testified that the ultimatums were emailed to staff and were placed on notice boards at entrances to the municipal building and at individual workstations. Mr Thebe even responded to the email, according to Mr Mtwalo. All of these employees knew of the ultimatums because they would also enter the building, sign the attendance register, access their emails and then leave. The ultimatums were also served on IMATU, which, in response, addressed a letter to its members calling on them to cease participating in the strike. According to Mr Mtwalo the respondent employees did not cease from striking, and their summary dismissal was therefore justified.

[36] Each of the employees testified in person and a union representative, Ms De Bruyn, was also called. Surprisingly, these employees falsely testified that there was no strike, even though it that was otherwise a common cause fact. They denied ever being on strike and alleged, essentially, that they were at work performing their duties as normal. Some, such as, for example Ms Moleofe, admitted that there was a strike, but testified that she was not part of it and was at work during work hours, performing her work as normal. Most, if not all of them, denied receiving the first and second ultimatums, or ever seeing them. While some acknowledged attending the COGTA meeting on 11 February 2014, others feigned ignorance about its purpose. Some alleged that the meeting they attended was approved by the municipal manager, while the IMATU representative and shop steward, Ms De Bruyn, conceded that such approval had never been obtained, and that the meeting was held during working hours.

[37] Some, for example Ms Bhape and Ms Moleofe testified that they were locked out of the municipal building after they returned from the meeting. The defences of the employees were essentially a denial of any misconduct, i.e. of

participating in the strike, even though they were implicated as participants in the strike.

Conflicting Versions

[38] Confronted with these conflicting versions the Labour Court was required to analyse the evidence of all the witnesses of the employer and of the individual employees in order to determine, in each instance, what the true version was. It is necessary to consider the approach of the Labour Court and to determine whether interference with the factual finding of that court, that the individual employees (i.e. in this matter) were not on strike, is justified.

[39] It is apparent from the record that the evidence of each of the employees was relatively lengthy and must have taken up a number of days. All of their evidence takes up about ten volumes of the seventeen volume record. Notwithstanding, the judgement of the Labour Court only relates the evidence of the witnesses of the appellant, and deals with the evidence of the employees in one paragraph, being of the view that it was not necessary to repeat the evidence, although some aspects of Ms De Bruyn's evidence was repeated. One of the grounds of appeal relied upon by the appellant is that the Labour Court "erred in not dealing with, analysing and assessing the evidence of each of the individual" employees in relation to the evidence proffered by the employer.

[40] The Labour Court seems to have accepted as a basic tenet that "participation is the act of sharing activities with a group" and that this implied that "on – lookers are not participants". For it, to be "participants" they had to be "a condition of sharing in common with others". Therefore, according to the Labour Court "it cannot be said that if an employee is spotted amongst the strikers, he or she is participating in the strike".

[41] The Labour Court also accepted as another basic tenet that if an employee "does not have a grievance or dispute he or she cannot be said to be on strike". This was so, according to the Labour Court, because "strike action was a power-play" resorted to with the aim of achieving a purpose, such as compelling an employer to yield to a demand or grievance.

[42] The Labour Court then went on to select specific factors as being indicative of the employer's version being improbable, namely, the following: (a) the fact that the employer only issued an ultimatum for the first time more than a month from the time the alleged strike commenced (according to the Labour Court this fact indicates that there was no continuous strike and it also lends credence to the employees' version that they did not participate in the strike); (b) the supervisor, who was not shown to be in cahoots with the relevant employees, endorsed a register indicating that workers were present and that this supports the employees' version that they were not on strike; (c) an employee, i.e. Ms Selebogo, could not have applied for leave of absence for the period 10 February 2014 to 10 March 2014 if she had "withdrawn her labour" (According to the Labour Court that would have been "futile"); (d) In the Labour Court's view, the evidence of the employer's witnesses "[are] wholly unsatisfactory when it comes to the alleged participation". The Labour Court cited as an example the fact that Mr Thebe was not seen by Mr Mtwalo, and that Mr Van Zyl found Mr Thebe sitting behind his desk on 7 January 2014.

[43] The Labour Court reasoned that these observations were sufficient to cause it to conclude that the version of the employer's witnesses was improbable and to, consequently, reject it and accept the employees' version, that they were at work and not on strike, as the more probable version. The Labour Court, nevertheless, went on to reason as follows: that if any of the employees who were cited in the High Court order had breached it, they would have been arrested; and reasoned that the fact that they were not arrested lent credence to their version that they did not contravene the order. The Labour Court also went to find that there was no evidence that any of the employees before it were members of the Progressive Group; or that the Group continued to exist beyond 6 January 2014, or that the employees before it had been served with the High Court order. It resultantly concluded that the appellant had failed to discharge its onus and that its failure to hold a hearing was not justified.

<u>The Correct Approach</u>

[44] Of significance, the Labour Court ordered reinstatement and did not at all consider whether the employment relationship had been rendered intolerable – clearly because of its finding that the employees were not on strike and had not contravened the High Court order.

[45] It is apparent that in determining whether to accept the version of the relevant witnesses of the appellant, i.e. where it contradicted the version of the employees, the Labour Court confined itself to the assessment of the probabilities and overlooked the aspect of credibility and taking into account all the evidence. It is trite that the approach to be adopted when confronted with conflicting versions involves an assessment of both the probabilities and credibility. In certain instances the credibility findings may point in one direction while the evaluation of the probabilities point in another direction. The more convincing the credibility findings, the less convincing the evaluation of the general probabilities will be. It is only if they are equipoised that the probabilities will prevail. It is also a trite principle that the assessment of probabilities requires a consideration of all the evidence and does not occur in a vacuum, or by only taking into account selected facts[5].

Misdirection

[46] The Labour Court's failure to assess, or adequately assess credibility, to weigh up credibility findings against its evaluation of the general probabilities, and in respect of the latter, to take all the evidence into account, is a misdirection that justifies intervention by this Court.

[47] The tenets of the Labour court are not necessarily correct. Strikers for a particular cause are generally intolerant of their colleagues, who do not participate, but also stand to benefit from that strike. So the idea of colleagues being among strikers as mere onlookers could be a bit far – fetched. It is more probable that they would be participants rather than mere onlookers.

[48] It is so that to constitute a lawful strike for the purposes of the LRA the agreed, concerted refusal to work must be "for the purposes of remedying a

[5] See inter alia, *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Kie SA and Others* 2003 (1) SA 11 (SCA) at 14I-15E.

grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee"[6]. The strike the employees went on in this matter was not lawful, or protected. The employees formulated or shared the grievances contained in the letter of 6 January 2014 that were read at the meeting of that date by Mr Thebe, and attended a subsequent follow-up meeting on 11 February 2014. They, inter alia, withheld their labour to force compliance with their demands, but also engaged in other acts in conjunction with such withholding, to try and achieve their objectives. The letter of 6 January specifically threatens that if the managers and directors of the appellant did not want to resign voluntarily then "phase 2" of the action would kick in. It then goes on to clearly imply that there would be a forceful removal of those persons, and other action in order to force them to leave. The workers mentioned in the letter (which would have included Mr Thebe and others of the 14 in this matter) agreed with those demands and the follow-up action that was to be adopted to obtain the stated goal of removing those officials. It is significant that the employees in this matter were very evasive about what action was envisaged in "phase 2".

[49] Furthermore, as mentioned, in order to assess the probability of a particular version all the (relevant) evidence needs to be considered. Concluding that the strike could not have been continuous because the first ultimatum was only issued on 11 February 2014, ignores the direct evidence, which was not discredited, to the effect that the strike commenced on 6 January 2017 and endured until the dismissal letters were served on 17 February 2014. It is possible that the intensity (and dimensions) of the strike action fluctuated over this period, but that does not mean that the strike was not continuous.

[50] It is perhaps presumptuous to conclude that if those who were alleged to have breached the High Court order, indeed did so, they would have been arrested. That is not what happens in reality. The appellant would have had to bring another application to the High Court in which it made out a case of contempt by those persons. It may have taken a long period before a decision on that matter could be made, depending on whether it was opposed, et cetera. But

[6] See: Section 213 of the Labour Relations Act 65 of 1995 which defines a strike.

ultimately, if the High Court found that a case of contempt had been proved – it would have had a wide discretion in imposing an appropriate sanction, and the sanction may never have required those persons to be arrested. So the fact that those persons were never arrested cannot serve to prove their version that they did no wrong.

[51] It was not necessary to establish that any of the 14 employees were members of the Progressive Group or that the group continued to exist beyond 6 January 2014. The evidence was, however, overwhelming that the employees in this matter (as individuals) identified with the grievances in the letter of 6 January and also attended the alleged report back, or COGTA, meeting of 11 February 2014. Mr Thebe not only acted as spokesperson of the meeting on the 6 January 2014, but some of the employees in this matter played a major role in the formulation of the grievances that were contained in the letter. The four employees in this matter, who were cited in the High Court interdict proceedings, were aware of that application, but did not oppose it. Neither did the union, IMATU. The order was obtained on an unopposed basis, meaning that averments of the appellant, including those concerning the conduct of those four employees, which necessitated the interdict, was taken as accepted or admitted, and the order was binding on them. There was no attempt made by them to challenge those averments, suggesting that they possibly could not dispute engaging in the conduct sought to be interdicted.

[52] The futile attempts of the employees in this matter to deny that there was strike, undermines their credibility profoundly. The claim of those that played a leading role, not only in formulating the grievances (or some of the grievances) in the letter of 6 January, but that they continued with their work as normal, notwithstanding the strike, cannot possibly be true. Witnesses of the appellant that identified them as participants in the strike knew them as individuals, and there was no suggestion that there was a possibility of a mistake in their identification. The appellant's identifying witnesses were also senior employees, in responsible positions and it is very unlikely that they would have made up versions about particular individuals, and falsely implicate them in the strike. In fact, it was not put to any of those witnesses

that they had a motive to falsely implicate the employees that were identified as participants in the strike. Instead, there was evidence from some of the employees of a good relationship between them and those officials who implicated them.

[53] One does not expect all of the identifying witnesses to have seen the same persons. It is not strange or improbable that they could have seen them from different perspectives and at different times. In fact, the slight differences which the Labour court alluded to, but treated as reflecting negatively on their credibility, such as what Mr Mtwalo and Mr Van Zyl saw Mr Thebe do, may, in fact, be indicative of the fact that these officials never colluded in the implication of Mr Thebe and that they were honest about their observations. If Mr Mtwalo was intent on falsely implicating Mr Thebe he could easily have done so, but he was honest about what he saw.

The employees' evidence

[54] Mr Thebe's evidence is marked by prevarication, a lack of candour and material contradictions. His evidence, that he was not on strike and inter-alia worked on 11 and 12 February 2014, is not probable viewed in light of all the evidence. He was one of the leaders of the strike, having been chosen to be spokesperson with the responsibility of reading the letter of 6 January. For him to have been allotted such an important task he must have been, or otherwise portrayed himself to the others of the Progressive Group as one who aligned himself with the demands and threats contained in the letter and would have been a prime instigator of the action threatened in the letter. Yet he also craftily pretended not to be strike. He initially denied that there was a strike at all, even though its occurrence was a common cause fact. He also claimed that he only got to know of the strike when he received the ultimatum on 11 February 2014, but this cannot be true given the dimensions and intensity of the strike and his involvement from the outset.

[55] Mr Thebe also denied attending the meeting of 11 February 2014, but elsewhere testified that the minutes of that meeting were recorded in a book that he personally kept since 2013. There is also evidence that he was one of

the convenors of that meeting. Beside his verbal assurances, Mr Thebe could not produce any evidence objectively showing that he was engaged in doing his work as normal during the period of the strike, including the period 11 to 14 February 2014. The occurrence book he relied on is not objective evidence and false entries therein cannot be excluded. His contention that he could only receive emails in his office, even though he had 3G connectivity, is not probable. In his evidence he also gives the impression that he was concerned about informing the Municipal Manager of his whereabouts, such as of the fact that he was going on sick leave (the bulk of which would have been over the weekend preceding 17 February 2014), but it is not convincing, especially in light of the fact that he did not consult the Manager, who had to consent, about holding the meeting of 11 February during working hours, and also attended that meeting even though it was not authorised by the Municipal Manager.

[56] Mr Thebe, like the other employees in this matter, must have realised that his participation in the unprotected strike may have serious implications for him, especially after IMATU did not condone it, and caused him to fabricate a version. Nevertheless, the denial of the strike, an objectively confirmed fact, undermines the veracity of his entire version.

[57] Mrs De Bruyn, who testified on behalf of the employees, is an IMATU shop steward, and not one of the 14 employees. She could not say who was, and who was not at work, but what is more evident from her testimony is that she did not want to implicate any of the employees as participants in the strike. Her evidence that the unauthorised meeting of 11 February did not take place, is not supported by the evidence of other employees. They also contradict her concerning the purpose of the meeting. Mrs De Bruyn was principally called to testify that on 12, 13 and 14 February she attended a conference was Mr Tshisane and Ms Ntlokotsi. She tried to convince the Labour Court that IMATU members were not on strike, but that version is undermined by the letter of IMATU calling upon its members not to participate in the unprotected strike, and also by her evidence that a Mr Kgaje (Mr Masita) had refused to distribute a letter informing the employees to return to work, because he was

afraid of the strikers as they could get violent. She prevaricated and was evasive when asked why Mr Kgaje could not identify IMATU members amongst the strikers, but what is more strange is why she gave him the task in the first place, if there were no IMATU members on strike.

[58] Further, Mrs De Bruyn sought to give the impression that Ms Ntlokotsi and Mr Tshisane were at work before going to the conference, including on 12 February, but she also testified that she collected Ms Ntlokotsi from her home on 12 February, i.e. Ms Ntlokotsi was not at work. She could also not have known whether Mr Tshisane was at work on 12 February. She testified initially that he left work at 16h00 on 12 February, but almost in the same breath, testified that on 12 February they left for the conference before or not later than lunchtime. Conventionally lunchtime would be at midday, or at about 13h00. In any event, she could not know whether, either Ms Ntlokotsi or Mr Tshisane had permission to leave work early on that date. It is also strange that those persons were not locked out as, inter-alios, Ms Selebogo testified she was.

[59] Ms Selebogo also aligned herself with the demands and threats contained in the letter of 6 January. She also attended that meeting and testified that Mr Thebe spoke on behalf of everyone that was present there. However, her evidence is also marked by evasion and obfuscation. She was cited in and was served with the High Court application but chose not to oppose it, even though she was implicated in serious conduct perpetrated in pursuit of the strike. In light of all the evidence, her version that she never participated in the strike and was at work, as normal, is not credible. Her version that she was to go on leave on 10 February seems to be opportunistically concocted. As Human Resources Manager she worked with the leave forms and would not have had any difficulty in obtaining them. She testified that she applied for leave, but the form is not dated to indicate when this occurred. The leave was also never approved. It was also coincidental for her intended leave to have started just before 11 February and for it to straddle the dates when the first and second ultimatums were served.

[60] Ms Selebogo also contradicted the other employee witnesses and Mrs De Bruyn in material respects about what happened over the period 11 to 14 February 2014, the purpose of the meeting of 11 February, and whether it was authorised. She testified that it was authorised and that she attended it, but the evidence of both Mr Thebe and Mrs De Bruyn was that it was not authorised. She also testified that on 12, 13 and 14 February she went to work as usual but was locked out; that she sat outside and never received the ultimatum because she had no laptop. If she was indeed at work on 11 February there is no reason why she would not have known about it otherwise, because of her position. In any event, on 12 February, on her own version, her laptop was brought back at about 11h00 or 12h00, but she never used it. How could she, having been at work and given her position, have been ignorant of the ultimatums, and be surprised by the letters of dismissal, unless she was really not at work and did not know what was happening at the very place where she worked. As Human Resources Manager one would have expected her to have been at work and to have assisted with the management of the crisis brought about by the strike, including monitoring the register and providing advice regarding disciplinary hearings, but she absented herself from work during that very crucial time, and participated in the strike, according to witnesses.

[61] Ms Khau Khau also worked in the Labour Relations Department of the appellant. Her duties included the processing of documentation and typing. Her absence must therefore also have been conspicuous. In her evidence she tried to extricate and distance herself from the actions of the strikers. She confirmed that during December 2013 fellow employees had been to Mr Mtwalo's office and had demanded that he leave and that they accompanied him to his motor vehicle, but denied that she was part of that group and gave the impression that she was merely a spectator who had been called by his secretary and told that Mr Mtwalo wanted to see them. But Mr Mtwalo identified her as being part of that group; a co-perpetrator of those misdeeds. This is also confirmed by other witnesses. Her evidence that she was never involved in any kind of strike, in light of all of the evidence, is false. She too was conveniently outside on 11, and 12 February, (allegedly) because of

being locked out. She also attempted to deny the fact of the strike on 11 and 12 February, stating that she never saw any strikers outside, only persons (about 200) standing in groups. She never considered it necessary to ask those people why they were standing there.

[62] Ms Khau Khau did not give any reason why Mr Mtwalo and Ms Mazibuko would falsely implicate her in the unprotected strike. Mr Mazibuko identified her as one of the persons gathered at the front of the main building, who sang and shouted slogans and would, from time to time, enter the premises, to remove directors, other officials and non-striking employees. On her own version, she contributed to the contents of the letter that was read on 6 January, but she was evasive about what was meant in the letter by the statement that it was decided to "force" the municipal manager and his directors to resign, and particularly, what was meant by "phase 2" if the directors did not heed the first request.

[63] Ms Miratwe Ramabope Sekonela (also referred to as "Ms Ramabope") was an internal auditor who reported (administratively) to the Municipal Manager and (functionally) to the Audit Committee. She testified that she was at work and performed her duties as normal on 11 and 12 February, but on the latter date left at 14h00. She left, on her version, after being pepper sprayed. She also left early on 13 February because of pepper spray and testified that there was also pepper spray on 14 February. Notwithstanding, on her evidence she was not locked out, but on 17 February 2014, during lunchtime, she was phoned by a fellow employee Ms Motsamai who told her to come outside to collect her dismissal letter. She went out, but never signed out. She also admitted receiving the first ultimatum through her computer. The evidence against her was, inter alia, that she was one of those who participated in the strike, who would enter the office, sign the register and then join in the strike. She was seen amongst the strikers. There was no reason suggested why she would be falsely implicated as having participated in the strike.

[64] Ms Motsamai was employed as senior payroll clerk. Her supervisor was Ms Bhape, who was also implicated in the strike. She was identified by Mr Mtwalo as one of those who stormed into his office on 13 December 2030 and

threatened him with violence unless he left. She was also cited as one of the respondents in the High Court interdict proceedings and the order was also made against her. She testified that she went to work as normal on 11 February and attended the COGTA meeting, which on the evidence of, inter-alia, Mrs De Bruyn, while not authorised, was held during working hours. She left the meeting at about 12h00 and found the door closed but managed to gain access to her workplace. She denied ever receiving the first ultimatum or of seeing the ultimatum posted on the notice board in the building, even though she was inside the building on her version. According to her testimony on 12 February she arrived for work only to find the doors closed. She stood outside and when her manager phoned to find out where she was she informed him that she was outside because the doors to the building were locked. On 13 February she again returned to work but remained outside because the access gate was locked. According to her, the gates were still closed on 17 February when the Sheriff served her with the dismissal letter.

[65] Even though Ms Motsamai conceded that she made an input to the letter of grievances that was read on 6 January, and that she played a role in organising the meeting, she tried to play down her contribution, giving the impression that her grievance only related to phones. Although she testified that she agreed with the contents of the letter of 6 January, including the statement that the Progressive Group had decided to force the municipal manager and all his directors to resign with immediate effect, and including the statement threatening “phase 2 action” if that did not happen, she was evasive about what that meant. She denied knowledge of an incident where the municipal manager and his directors were forcibly removed from the appellant’s premises, and denied that that was what was meant by “phase 2”. She also denied being on strike, despite the fact that she had been identified as one of the strikers by Mr Mtwalo, Ms Mazibuko, and Mr Kotze.

[66] She denied testimony to the effect that on the evening of 11 February she was part of a group which went to remove Mr Mtwalo from his office. She dismissed this evidence, alleging that Ms Mazibuko only testified on things that she was told, and she also alleged that the testimonies of Mr Van Zyl and

Ms Mazibuko "was all lies". Notwithstanding, she could not provide any reason why any of these witnesses would have falsely implicated her. When Mr Van Zyl testified that she (and Ms Bhape) did not process salaries for January and February 2014, because she was on strike, and that other people had to be enlisted to do so, his evidence was not challenged. Her evidence that she knew nothing about the strike and did not see any of the strikers, considered in light of all the evidence, is false.

[67] Mr Santje Selwyn Paul Kgaje Masita (also referred to as "Mr Gaje" or "Kgaje" or "Mr Masita") was senior clerical assistant in the Human Resources Department of the appellant. On his own version he did not perform his official duties during the time he attended the meeting of 11 February and thereafter, on 12 and 13 February, and he ascribed this to having been locked out. He testified that on 13 December 2013 he witnessed persons telling Mr Mtwalo to leave and then removing him from his office, but gave the impression that he was a mere spectator. He went further and said that he had actually encouraged Mr Mtwalo to return to work. He denied participating in the strike, but it is palpably clear from his own version that he participated. He testified, inter-alia, that on 13 February he was summoned to go and see Mr Mtwalo who instructed him to hand over his office keys to a secretary and that when he, on the instructions of Mr Mtwalo's secretary, Elmarie, attended at his office to collect the files of Mr Thebe, he found someone else there doing his work.

[68] According to Mr Masita he was in Bloemfontein on 17 February after getting a call that the sister died. He testified that he informed Ms Selebogo. According to him he was absent for the rest of that week, having obtained permission from Mr Mtwalo's office to attend his sister's funeral –but this was never put to Mr Mtwalo. When he returned to work on about 23 or 24 February he attempted to get access to his office but was told by the security that he was not allowed as he was one of the persons who were dismissed. The material part of this version was never put to Mr Mtwalo (the appellant's legal representative indicated that Mr Mtwalo would have denied that version if it had been put to him). The material part of his version was clearly a fabrication

which had not been shared with his legal advisor, otherwise it would have been put to Mr Mtwalo.

[69] Mr Masita did not suggest any reason why Mr Mtwalo or Ms Mazibuko would falsely implicate him, and why it was necessary for someone else to perform his duties if he was not on strike. His fabricated version was, nevertheless, imperfect, in that he does not state that he told Mr Mtwalo and Elmarie that he was locked-out. It would have been the logical thing to do. On his version he voluntarily went outside and his explanation for remaining outside with the group of strikers was because he could not go inside to do his work, but this rings hollow in light of his evidence that when he was summoned by Mr Mtwalo he managed to gain access to his workplace through the motor vehicle entrance. His suggestion, that his inability to enter on other occasions was due to security denying him access, was a further false adaptation of his version.

[70] Mr Tshisane was employed as a cashier at the appellant's Head Office in town. He was implicated as a participant in the strike by Mr Mtwalo, Ms Mazibuko and Mr Van Zyl. He denied participating in the strike and testified, in essence, that when he entered the workplace he never came out, and that he signed the attendance register every morning up until 12 February. He testified that on 10 and 11 February he was at work and did not see doors that were locked. On his version, on 12 February he also went to work without difficulty. This is contradicted by the evidence of those who say that they were locked out on 11 and 12 February. According to his evidence, on 12 February there is no signature indicating that he clocked out, because he left after 11h00, after "they" finished cashing-up for him, because he was going to a union meeting of IMATU in Christiana. This essentially contradicted Ms Du Bruyn's evidence that Mr Tshisane was at work on 12 February until 16h00.

[71] Mr Tshisane also testified that his annual leave was to commence on 17 February, so he was at home on that day when he was phoned by Ms Seleboge who informed him to collect his dismissal letter from the office. His response to her, on his own version, is rather peculiar. He never expressed any surprise or ask Ms Seleboge what the reason for his dismissal was – but

told her that he could not go then because he was busy preparing for his birthday and would only fetch the letter on 18 February. Mr Tshisane also relied on an attendance register to prove that he was at work during the crucial period, but there was no evidence, but for his say so, authenticating the entries. There was uncontested evidence that strikers managed to gain access to the premises where they would sign the attendance register and then go outside to join the other strikers. He could not produce proof that his leave had been approved. His attempts at distancing himself from the strikers are not convincing. On the probabilities he was on strike.

[72] Ms Ntlokotsi was a general worker employed in the appellant's Public Works section and she was stationed approximately 4 to 5 minutes away from the appellant's Head Office. Her version, in essence, was that she did attend the meeting of 6 January where Mr Thebe spoke on her behalf; that she reported to the municipal manager, with whom she had a good relationship (although in the same breath she testified that she never came into contact with him at all); she attended a COGTA meeting around 20 or 22 January with other shop stewards. She was chairperson of the Shop Stewards' Committee of IMATU. She attended the meeting of 11 February, but surprisingly attempts to ascribe this to her supervisor, whom she says, said that he was going to close the office where she worked because all of them were going to attend a meeting at the appellant's main office. According to her testimony on 12 February she was not at work at all and later that day she attended a conference in Christiana with Mrs De Bruyn; and they were there until lunchtime on 14 February, whereafter they returned home. According to her, on 17 February when she returned to work she was told by security, as she was changing into her overalls, that she would not be allowed to enter and was then driven by a supervisor in his vehicle to the appellant's main office where she was given a dismissal letter.

[73] Ms Ntlokotsi was not frank. She feigned ignorance concerning the meaning of the content of the letter of 6 January, in particular where it states (in essence) that the employees have decided "to shut – down all municipal services". As a shop steward, and more particularly Chairperson of the Shop Stewards

Committee of IMATU she ought to have known exactly what that meant. At some point she testified that she aligned herself with the contents of the letter and that she had contributed to it. The impression she sought to create, that she was merely following her supervisor's instructions, are not convincing. Essential aspects of her version were not put to the appellant's witnesses, and she was evasive concerning her knowledge about the proper procedures that had to be followed in dealing with a grievance. She testified that she knew what the procedure was, but almost simultaneously testified that she did not know what it was, and ascribed her (feigned) ignorance to forgetfulness.

[74] Ms Ntlokotsi testified that her workplace, where she cleaned offices, was about a 45 minute drive from the main office. She initially conceded that during the period 6 January 2014 to 17 February 2014 (with the exception of 10 January) the Public Works Department was closed and that its service delivery had come to a standstill, including at the offices where she was employed. She also conceded that she was one of those that gathered in front of the main building in that period. However, she then denied those very same facts, stating "it is not how it is." Her denial of knowledge of the ultimatums is not convincing and the reason for not going to work at all on 12 February is spurious. She produced no proof that her absence was authorised by the management of the appellant. Remarkably, she tried to convince the court that even though she was a general worker, cleaning offices, she had a secretary, one, who, according to her, had to complete leave forms for her. She was unable to answer a question put to her by the appellant's representative to the effect that there was no record of her having applied for leave for the period of her absence and that she was in fact on strike and participated in the strike during that period. Subsequently she testified, in response to a statement put to her, that she participated in an illegal strike and that her dismissal was due to her fault, as follows: "I do not remember having participated in the strike." She gave no reason why several witnesses of the appellant would have implicated her falsely as a participant in the strike.

[75] Ms Mokimane stated that she was a street sweeper. She testified, inter-alia, that she was not a member of the Progressive Group and did not even know

that she was a member of IMATU. She recalls being fetched on 6 January 2014 by her supervisor and taken to a meeting. According to her, he told them that they must attend. Accordingly, her version was mainly that she did not remember, or did not know, or merely acted on the advice or instructions of her supervisor. She, for example, testified that she did not know if she ever received the High Court interdict and could not remember having intimidated her managers. She testified that she could not even remember when exactly she went to the office. Ironically though, she remembers going to work on 11 February and sweeping the streets as she normally does, although this is also contradicted by evidence that there was no cleaning of streets during the period 6 January to 17 February, somewhat confirming Ms Tshabalala's testimony, which was to the effect that it was even necessary to get private contractors to clean the streets.

[76] Ms Mokimane testified that he does not know whether she received the first ultimatum, and that on 12 February she did not go to work because her mother was ill. Her version is that the doctor gave her family responsibility leave until 14 February and that she only returned to work on Monday 17 February. There is no evidence that she applied for family responsibility leave, and in any event, how could a doctor give her such leave. She testified that he does not know whether she received the second ultimatum and that she could not remember any strike. She testified as if Ms Tshabalala had absolved her, which is clearly not the case. Ms Tshabalala did not do so. Ms Mazibuko and Mr Mtwalo identified her as one of those that were on strike. Her version was a poorly made up story and could not be accepted as probable, let alone as the truth.

[77] Ms Sara Utla (or "Otloa") was working as a clerical assistant in the Registry Division of the Department of Corporate Services. She was to go on pension in December 2014. She was implicated in the strike by Mr Mazibuko and Mr Mtwalo. The latter testified that Ms Utloa was responsible for the keeping of records, but did not do her work and was on strike. On her version she reported for duty on 11 February and attended a meeting with her colleagues, but after the meeting she found that the access door to the office had been

locked and as a result sat outside until she was let in by security at 14h00. On 12 February she found that the excess doors were locked but managed to gain access through a back entrance that was manned by security. Her version, essentially, was that she worked as normal on those dates up to and including 14 February. On 17 February, however, after having the reported for duty as usual (according to her) she was told that she was one of those who were dismissed and she thereafter left. She denies ever participating in a strike but could furnish no reasons for having been falsely implicated by Mr Mtwalo and Ms Mazibuko. She could not remember attending the meeting of 6 January. Material parts of her evidence, including the fact that she managed to gain access through back entrances, was never put to Mr Mtwalo, or to Ms Mazibuko, or to Mr Van Zyl. In light of all the evidence, her version, i.e. that she was not on strike, is not probable.

[78] Ms Bhape worked in the account and payroll section of the appellant. She was implicated in the strike by Mr Mtwalo, Ms Mazibuko and Mr Van Zyl. Though she denied participating in the strike she could not suggest what motive those witnesses would have had for falsely implicating her. She testified that on 11 February she went out with Ms Moleofe after having obtained permission from her supervisor Mr Muller, and upon their return had to use a back entrance as the doors were locked. On 12 February, according to her, at about 10h00 or 11h00 she and Ms Moleofe took party items to her child's crèche after having obtained permission from Mr Muller. They returned after lunch and again found the doors locked, but managed to enter through the back and worked for the rest of the day as normal. She testified that on 13 February she reported for work but was not allowed into the building and that the same happened on 14 February. She could not remember whether she was able to get to the office on that day, although she testified that she had told Mr Van Zyl that if she was not allowed entry salaries were not going to be paid. Her version was that she ensured that salaries were paid for January 2014, but this version was never put to the witnesses that implicated her in the strike. Mr Van Zyl had testified that Ms Bhape did not process salaries for January and February 2014 and that a retired manager, Ms Flora Kgopane, had to be called in to process those salaries. Ms Kgopane was assisted by a

Ms van Eck of the IT department, as well as a payroll company contracted to the appellant. Ms Bhape was unable to produce any evidence, other than her say so, that she and Ms Motsamai processed salaries for January.

[79] Ms Bhape could not say whether she attended the meeting of 6 January, or whether she identified with the aims and objectives of the Progressive Group. At one point she was adamant that Ms Moleofe did not participate in the strike, but under cross-examination, when it was put to her that one of the appellant's witnesses had testified that Ms Moleofe was one of those that entered the building and forcibly removed officials and others who were not on strike, she testified that she did not know. She however persisted with the version that they were working during that period. She admitted receiving emails, but had no comment to make when it was put to her that she would have received the ultimatums through that medium, unless she was not in her office and reading emails. Viewed in light of all the evidence her version, that she did not participate in the strike over the relevant period, is not probable.

[80] Ms Malema worked in corporate services. She reported to her supervisor, who reported to a Mr Kotze, and who, in turn, reported to Mr Mtwalo. She was implicated by Mr Mtwalo, who testified that he was not only strike during the period January 17 February, but was one of those actively involved in removing officials from their offices. She was also part of the group who stormed into his office on 13 December 2013, demanded that he leave and threatened to stab or shoot him if he did not do so. Mr Mtwalo also testified that she was the appointed switchboard operator and that during the period of the strike she did not perform her assigned duty on the switchboard, but absented herself and actively participated in the strike. She was also cited as one of the respondents in the High Court interdict and was also implicated in the strike by Ms Mazibuko, Mr Kotze and Mr Van Zyl.

[81] Ms Malema denied being part of the Progressive Group but admitted attending the meeting of 6 January. She tried to create the impression that her attendance was coincidental after she had been informed of it by her supervisor. She denied knowledge of the High Court order and of ever interfering, obstructing, threatening, or intimidating officials or management.

She attended the meeting of 11 February and claimed that after the meeting she could not gain entry to her workplace because the door was locked and that she then left. According to her, on 12 February she also found the door locked and stood outside for the rest of the day. She also denied having had access to the emails and denied knowledge of the first and second ultimatums. According to her evidence, on 13 February she again found that they were locked out of the premises of the appellant and as a result she remained outside the premises until it was time to knock off. On 17 February she again found that gates locked, but during the course of that day a dismissal letter, signed by the municipal manager, was given to her.

[82] Ms Malema's version is palpably false. She never suggested any possible motive on the part of the relevant witnesses of the appellant for falsely implicating her as one of the participants in the strike. On her own version, she did not render services at work, including during the crucial period of 11 to 17 February, but remained outside the premises with those who were on strike and made no effort to actually gain access to the appellant's premises for the purpose of doing her work. She played a prominent role in the strike.

[83] Ms Stokkie was senior clerical assistant in the Logistics Section. She conceded that she was part of the Progressive Group meeting of 6 January 2014 and that she contributed to the contents of the letter of that date. She was implicated by Mr Mtwalo, Mr Mazibuko, Mr Kotze and Mr Van Zyl. Mr Mtwalo testified that she was one of those came to his office to evict him on 13 December 2013; she was also cited in the High Court interdict, which she admitted receiving. She never opposed the matter, or challenged it, but denied in her evidence ever interfering with, or intimidating any of the officials or staff of the appellant. She claimed that Mr Van Zyl's testimony was a lie that she and Ms Motsamai had contravened the court order in that they had smashed his office door in order to open it and had attempted to remove him from his office. She also claimed that Mr Van Zyl's evidence was a lie which was to the effect that on 11 February 2014 at about 21h00 she, together with Ms Motsamai had gone to the Head Office and attempted to eject Mr Mtwalo from his office.

[84] Ms Stokkie claims to have performed her duties as normal on 11 February. Although she would have had access to emails in her workplace she claimed not to have knowledge of the first ultimatum. Her evidence to the effect that she was not on strike and worked normally on 11 to 14 February is not probable viewed in the light of all of the evidence. She claimed that she reported for work as usual and was busy with her work on 17 February when she was told that she was required at the main office and upon her attendance a letter of dismissal was given to her by the Sheriff. Even though Ms Stokkie (on her own evidence) appears to have played an important part in the organisation of the meeting of 6 January and concerning the contents of the letter that was read there by Mr Thebe, she unconvincingly tried to downplay her role in that regard. Her attempts at distancing herself from the contents of that letter were not very successful.

[85] Even though she was forced to concede that she agreed with the other demands in the letter, including the demand that the Municipal Manager and his directors should resign voluntarily, Ms Stokkie denied that the group forced anyone to resign, (that is despite the fact that she had agreed with the contents of the letter stating that the Group decided to force the Municipal Manager to resign with immediate effect) she refused to state what she understood the letter meant by its reference to “phase 2” and feigned ignorance, claiming that she did not have the power to “shut down” the municipality.

[86] Ms Stokkie also performed poorly under cross-examination and could not give any explanation why she would have been falsely implicated. It is improbable that Ms Stokkie, who played a leading role in the organisation of the meetings of 6 January and 10 February and who actively participated in removing officials and others from their offices, was not part of the strikers and on strike. She tried by all means to distance herself from the main office, where according to the witnesses of the appellant, she perpetrated the misconduct she was accused of. Her version is clearly not credible.

[87] Ms Moleofe was employed as a supply chain procurement officer. Mr Mtwalo and Mr Mazibuko testified that she participated in the strike action. Her

version was more or less the same as that of Ms Bhape. She denied participating in the strike and gave the impression of been falsely implicated, but was unable to suggest what would have prompted such false implication and how it was that both Mr M and Ms Mazibuko came to (falsely) implicate her. There was no suggestion that they colluded. Her version that she worked during the time, compiling tender documents and reports, makes no sense, because during the strike no tenders were dealt with. She admitted to attending the meetings of 6 January, and 11 February and her denial of receiving the ultimatums is not credible, in particular, as her version is that she was not locked out and did not know whether any other IMATU members were locked out.

Conclusion

[88] On the appellant's version, which is the more probable and credible version and the one that ought to have been accepted, the dismissal of the 14 employees in this matter was substantially fair. The appellant also established that the dismissal was procedurally fair. The circumstances in which the dismissal occurred were exceptional. The strike was violent and ongoing and marked by total disregard for the authority and position of the Municipal Manager and Officials, who were in management, and in fact had as its main objective their forceful removal from office. The dismissal was necessary in circumstances where, inter alia, the two ultimatums and the letter addressed by the appellant to IMATU failed to bring an end to the strike. Key members of staff who would have played an important role in the arrangement of hearings were themselves on strike.[7] The employees also chose not to exercise their rights in terms of the SALGBC Disciplinary Procedure collective agreement to appeal against their dismissals.

[89] The contention that the appellant acted inconsistently in applying its discipline is unfounded. Not only was there evidence that other employees were also

[7] See: inter alia, *Coin Security Group (Pty) Ltd v Adams and Others* (2000) 21 ILJ 925 (LAC) at 933,935; and *National Union of Metal Workers of SA & others v Malcomess Toyota, A Division of Malbak Consumer Products (Pty) Ltd* (1999) 20 ILJ 1867 (LC) at 1883B-F.

dismissed for participating in the strike, but there was no evidence of a specific individual who had participated, but was not dismissed.

[90] In the circumstances the appeal must succeed. Notwithstanding this result, taking all the circumstances, the law and fairness into account, I am of the view that no costs order should be made in the circumstances.

[91] In the result, the following order is made:

1. The appeal is upheld.

2. The order of the Labour Court is set aside, and is replaced with the following order: "The dismissal of the 14 employees in this matter was, both, procedurally and substantively, fair and accordingly, the applicant's claims are dismissed."

3. No order is made in respect of the costs of the appeal.

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P Coppin

Judge of the Labour Appeal Court

Jappie and Musi JJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:	N Cassim SC and T Govender
	Instructed by Lebea & Associates
FOR THE RESPONDENT:	R M Schmidt
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