

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 739/18

In the matter between:

MONDRY NGOBENI AND 51 OTHERS

Applicant

and

INTERSPRAY DURBAN CC

Respondent

Heard: 17 – 19, 24 and 28 October 2022

Delivered: 21 February 2024

Summary: Trial proceedings – dismissal for participating in unprotected strike action – employees dismissed without a hearing, but subsequently rejected the opportunity of an appeal hearing – some employees not forming part of the referral to conciliation.

JUDGMENT

MKWIBISO, AJ

Introduction

[1] In this matter the applicants allege that their dismissal by the respondent for allegedly participating in an unprotected strike was substantively and procedurally unfair. The applicants initially sought reinstatement with retrospective effect, but after the trial they now each seek twelve months' compensation.

[2] The respondent contends that the dismissal was substantively fair because the applicants participated in an unprotected strike, and was procedurally fair

because they rejected the opportunity of an appeal hearing that was offered to them after their dismissal.

[3] The respondent alleges that the referral to this Court is defective in that some of the employees who appear in the list that forms part of the referral were not part of the conciliation process. Furthermore, the respondent alleges that some of the applicants had their disputes resolved in that they agreed to return to work and accept warnings, and it denies that those employees mandated the applicants' legal representatives to act on their behalf. The respondent also alleges that one of the individuals listed in the referral is unknown to it as he does not appear on its payroll records.

[4] Several issues arise. First, whether all the individuals listed in the referral to this Court are properly before Court. Second, whether the employees who are properly before Court committed the misconduct of participating in an unprotected strike and whether their dismissal for doing so was substantively fair. Third, whether the dismissal of the said employees without a hearing renders their dismissal procedurally unfair, and if so whether they are entitled to any compensation.

Relevant facts and evidence

[5] The respondent conducts business as a painting contractor, mainly in large building projects including malls. Its office is in Durban, but it operates in Johannesburg and had employees who were based in Johannesburg.

[6] In November 2017, the respondent issued a letter to its employees regarding their contemplated dismissals as a result of a decline in the amount of work it was receiving from its clients.

[7] The respondent explored alternatives to dismissal, and it determined that placing the employees on short time or implementing a lay-off system would be an adequate alternative to dismissal. The employees in Johannesburg were divided into two groups, with work being rotated among the two groups by having one group working four weeks with remuneration while the other group was not working and not

being remunerated. This arrangement seems to have been implemented for some time, during 2018.

[8] The employees were not happy with the short time arrangements and opted for retrenchment packages. However, they did not have written employment contracts setting out their length of service and they required the issue of such employment contracts to be resolved in order for them to determine the amount of severance packages they would receive upon being retrenched. They also complained about their hourly rate. Some of the employees refused to work until their demands were met, including demands of written employment contracts and the wage demands. They engaged the assistance of a representative from the Economic Freedom Fighters (EFF), namely Ms Fikile Mafuyela.

[9] On 25 July 2018, the respondent issued to its employees a letter in the following terms:

“ISSUES DISCUSSED DURING THE REFUSAL OF EMPLOYEES TO COMMENCE WORK FROM 24 JULY 2018 INCLUDING MEETING WITH MS FIKILE MAFUYERA FROM THE EFF POLITICAL PARTY

Employees refused to commence working until some processes relating to short time working and possible retrenchment had been addressed and administrative processes agreed to and a basic wage of R20-00 per hour is agreed to.

Management now agrees as follows:

SHORT TIME WORKING - RETRENCHMENTS.

All employees can be redeployed to the relevant construction sites and recommence work as soon as possible but no later than 26 July 2018.

The arrangements for short time will cease forthwith.

On a last-in-first- out basis employees affected will be consulted and retrenched – The Human Resources Department will visit all relevant sites and workplaces to effect same.

A severance package based in employment Law of 1 weeks for every completed year of service will apply.

CONFIRMATION CONTRACTS OF EMPLOYMENT

A draft contract of employment is being developed and the company will draw up detail of all employees and submit to individual employees based on the draft. All

current service conditions and wage levels and original starting dates of employment will be provided no later than 10 July 2018.

MINIMUM BASIC WAGE IMPLEMENTATION

The management agree to implement a basic minimum wage rate of R20-00 per hour effective fortnight 30 July 2018 onwards. No person will earn less than this amount.

RETURN TO WORK

All employees can return to work no later than start of shift 26 July 2018" [sic].

[10] On Friday 27 July 2018, being the day on which the respondent intended to distribute amended employment contracts to employees at their different work sites, the employees refused to work until their demands were met. As a result, the respondent sought the intervention of Ms Mafuyela by sending her the following text message:

"Good morning Fikile the interspray employees are again on strike please urge them to recommence work as agree i am in meeting then handing out contracts to employees. I am seriously concerned with work sites cancelled = irreparable harm please intercede employees must also comply with their side of agreement".

[11] Later that day, the respondent issued draft contracts to the employees. They were not happy with the drafts and the respondent agreed to further work on the drafts in order to address their concerns.

[12] Ms Mafuyela responded to the text message on Monday 30 July 2018 by saying "*i wil addres it*".

[13] On Tuesday 31 July 2018, the respondent sent another text message to Ms Mafuyela in the following terms:

"Good morning Fikile sorry to bother you contracts to workers ready – again our employees refuse to keep to their obligation to attend work. They are apparently waiting for you?? Why must our company be placed on risk -please urgently get sustainable return to work as per your and workers undertakings this is untenable".

[14] On 08 August 2018, the respondent sent further text messages to Ms Mafuyela in the following terms:

“Good morning Fikile again illegal work stoppage by INTERSPRAY employees?? Want you????”.

And:

“1 contract cancelled”.

[15] On 09 August 2018 at 15h58, the respondent issued an ultimatum to the employees in the following terms:

“Notice and ultimatum to all Interspray employees – illegal and unprotected strike action

Employees have now on several occasions embarked on illegal strike action with serious disruptive effect on customer sites. This had now resulted in cancellation of some contracts.

Despite all concessions by management employees are not honouring a consistent return to work and service provision to customer sites.

Employees totally disregard management authority and aggressively frustrate any form of communication thereby causing chaos to reign.

Accordingly employees are given a final ultimatum to report for duty directly at respective construction sites and workplaces no later than 07:00 on 10 August 2018.

Due to employees refusing to board transport and placing the companies management and vehicles at risk there will be no assistance with transportation.

All employees will be expected to accept and sign a return to work agreement on the following terms:

Undertaking to work consistently and follow due legal processes as outlined in the Labour Relations Act in relation to grievances, negotiations and disputes.

And acceptance of a final written warning for the illegal (unprotected) strike action.

Failure to report to individual sites at 07:00 on 10 August 2018 and to sign the above terms will result in the immediate summary termination of your services with the company”.

[16] The employees whom the respondent believed had not complied with the ultimatum were dismissed summarily on 10 August 2018 without having conducted a disciplinary hearing, in terms of the following text message that was sent to them:

"TO ALL STRIKING EMPLOYEES

FAILURE TO ABIDE BY ULTIMATUM AND REPORT FOR WORK – SUMMARY
DISMISSAL – MISCONDUCT

As a result of your consistent disregard of management instructions, failure to accept any communications, ongoing aggressive disruptive illegal strike action and failure to comply with ultimatum your services are summarily terminated for such gross misconduct

Your last salary for time worked will be paid within 7 days.

You can appeal against this decision in writing addressed to our offices or can refer the matter to the CCMA".

[17] The respondent contends that the situation had become volatile and it was not appropriate to hold disciplinary hearings regarding the misconduct of participating in unprotected strike action.

[18] In terms of the pre-trial minute signed by the parties, it was common cause that the applicants were dismissed on 10 August 2018 at 07h30 by WhatsApp message, following an ultimatum sent to them also via WhatsApp on 09 August 2018 at 16h00.

[19] Some of the dismissed employees honoured the invitation to lodge an internal appeal and they were reinstated after the respondent considered their submissions.

[20] Unsatisfied with the dismissal, an unfair dismissal dispute was referred to the Commission for Conciliation Mediation and Arbitration (CCMA) for conciliation on 15 August 2018. The referral to the CCMA contained a list of 56 applicants.

[21] When conciliation failed to resolve the dispute, a statement of claim was filed before this Court in terms of rule 6 of the Rules of this Court, incorporating a new list of 62 applicants.

[22] The list of applicants contained in the statement of claim listed 39 of the applicants whose names were contained in the list submitted at the CCMA. Some of the employees whose names appeared in the list submitted to the CCMA did not

appear in the list accompanying the statement of claim, including one Mr Gazu who was a witness for the applicants at the trial.

[23] The 39 employees who appeared in both lists were the following: the first to eighth applicants; the nineteenth applicant; the twenty-first to twenty-seventh applicants; the twenty-ninth and thirtieth applicants; the thirty-second to thirty-fourth applicants; the fortieth to forty-second applicants; the forty-fourth applicant; the forty-sixth and forty-seventh applicants; the forty-ninths to fifty-second applicants; the fifty-fourth to sixtieth applicants; and the sixty-second applicant.

[24] In the statement of claim, the applicants contended that they wanted to be retrenched because the short time that the respondent was implementing was unsustainable. However, the problem was the calculation of severance packages in the absence of written employment contracts setting out their length of employment. The applicants alleged that draft contracts were issued to them on Friday 27 July 2018 and the respondent agreed to remedy certain discrepancies that were identified in those draft contracts during the following week. Despite this agreement, so the applicants alleged, the respondent did not return with amended contracts, but they reported diligently for duty. The applicants allege that by 08 August 2018, the respondent had not issued them with amended contracts and the respondent did not collect those of them who were normally collected from a designated collection point. They allege that on 08 August 2018 the applicants who expected to be fetched from the collection point sat there from 07h00 to 17h00, waiting to be fetched by the respondent. The following day, they were again not fetched from the collection point and they waited until 15h30, when they received the ultimatum.

[25] The applicants alleged that the decision to summarily dismiss them was communicated to them on 10 August 2018 despite the fact that all employees had reported for duty at the collection point.

[26] The respondent's response to the statement of claim raised preliminary issues and dealt with the merits. The respondent alleged that not all the applicants were party to the CCMA referral. Further, the respondent alleged that applicants nine, eighteen, twenty-seven and sixty-one were among the employees who had made

representations in response to the respondent's invitation to lodge an internal appeal against the dismissal and those applicants had resolved their issues with the respondent by returning to work and accepting settlement agreements. Furthermore, the respondent alleged that applicant forty-three was not its employee. The respondent also alleged that applicant number twenty had not been dismissed together with the other employees on 10 August 2018 as he had absconded on 23 July 2018.

[27] On the merits, the respondent stated that it would operate several sites at a time and it would provide transport to employees who needed it, which transport was provided from the collection point. Not all employees made use of the transport it provided and approximately twenty percent of the employees would go directly to the sites where they were stationed. The respondent alleged that on or about 31 March 2018 an agreement was reached that employees would work short time, as an alternative to retrenchments. The employees submitted to the respondent an undated document setting out a number of grievances and thereafter informed the respondent that they preferred a retrenchment. A meeting took place on 24 July 2018 to discuss the issues of short time and retrenchments. After the meeting, which was attended by the majority of the respondent's employees, the employees refused to go to their sites and a full day's work was lost. On 25 July 2018, another meeting was held between the respondent and its employees at the collection point where further grievances were discussed, and much of the day's work was lost as the employees again refused to go to their sites. As a result of the employees' failure to attend to the relevant sites, some of those sites had to be handed over to other contractors in order to meet deadlines. On 27 July 2018, the respondent commenced the process of distributing employment contracts and most of the employees were gathered at the collection site. On this day, approximately half a day's work was lost, and some of the employees prevented the respondent's representative from distributing the contracts as they were acting in a threatening and intimidating manner. On 31 July 2018, a further attempt was made to distribute employment contracts to the employees, most of whom were gathered at the collection site. Most of the day's work was lost on this day as the employees arrived at their sites at around 12h00.

[28] The respondent alleged that despite the strained relationship between it and its employees and a large backlog of work, matters proceeded without incident after 31 July 2018, until 08 August 2018 when the employees again gathered at the collection site and no work was done on this day as they refused to go to their sites. On 09 August 2018, the employees again gathered at the collection site and refused to go to their sites. Due to a fear that the respondent's vehicles would be damaged, the respondent caused its vehicles to leave the collection site. By this time, the respondent had lost a number of sites and was at risk of losing its biggest client. Upon the dismissal of the employees, approximately twenty of them made representations to the respondent and were taken back into the respondent's employ, whilst the others did not make representations.

[29] During the trial, the respondent presented its case through the testimony of two witnesses, namely Messrs Johan Ludwig Bouwer and Paul Lutchman. The applicants, on the other hand, presented their case through the testimony of three witnesses, namely Mr Khulekani Thandakanjani Gazu, Mr Geraldo Franciso Luiz, and Ms Fikile Nomvula Mafuyela.

[30] Mr Bouwer testified that he was the Human Resources Manager of the respondent. He said the respondent conducted the business of a painting contractor in the building industry, and it mainly handled large contracts such as shopping centres, with its main client being WBHO. The respondent was based in Durban and did not have an office in Johannesburg. Work secured in Johannesburg was managed by the respondent's Operations Director, Mr Paul Lutchman, who operated online in liaison with the Durban office officials. Mr Lutchman oversaw operations on the sites that were allocated to the respondent in Johannesburg, and he had a team of Supervisors and Foremen who assisted him depending on the needs of each project.

[31] Mr Bouwer referred to a letter dated 06 November 2017, which was issued to all employees regarding a contemplated dismissal due to operational requirements. He said that retrenchment process was put in abeyance and a decision was made to place employees on short-time. The workers in Johannesburg were divided into two groups, with one group working while the other group was not working in an

alternating manner. He referred to a letter dated 05 April 2018, informing the employees of the decision to implement lay-offs and short-time, due to projects coming to an end and the absence of other work.

[32] Mr Bouwer referred to a letter dated 25 July 2018 with the heading "ISSUES DISCUSSED DURING THE REFUSAL OF EMPLOYEES TO COMMENCE WORK FROM 24 July 2018 INCLUDING MEETING WITH MS FIKILE MAFUYERA FROM THE EFF POLITICAL PARTY", which he had drafted in order to confirm what had transpired at the meeting of 24 July 2018. The events that preceded the letter were that three or four days prior to it the respondent had received an unsigned and undated fax in its Durban office setting out a number of complaints, which fax was followed by the employees in Johannesburg refusing to attend to their respective construction sites on 24 July 2018 until their demands were dealt with. On 24 July 2018 he was summoned to the collection point and when he arrived, he was informed that the workers would not engage with him until their representative arrived. Ms Mafuyela was their representative and she arrived late at the collection site, at around 10h00. There were approximately 86 employees at the collection site and they were all talking at the same time, making it difficult to discuss their concerns. Some of the concerns raised by the employees were that they wanted everyone to be employed permanently and they wanted the short-time arrangement to be stopped as they preferred to be retrenched instead of working short-time. He agreed that all temporary workers would be converted into permanent employees and he agreed to produce a new employment contract for the employees, and he drafted the letter dated 25 July 2018 containing these agreements of 24 July 2018. On 25 July 2018, he met with the employees again at the collection point and distributed the letter dated 25 July 2018 to them. On both 24 and 25 July 2018, the employees did not go to their allocated sites due to their complaints being discussed in the meetings of 24 and 25 July 2018.

[33] Mr Bouwer testified that on 27 July 2018 the employees in Johannesburg only attended some of the sites allocated to them. He had undertaken to make amendments to the employment contracts and deliver the amended drafts to the employees at their respective sites on 27 July 2018. When he arrived at the sites, most of the employees were not there. Those who were present at the sites were not

working but sat in the storerooms. The majority of the employees were at the collection point and refused to use the transport provided by the respondent to go to their allocated sites. Under these circumstances, he communicated with Ms Mafuyela and he referred to the cell phone text messages he exchanged with her at the end of July 2018, which I have referred to above.

[34] Mr Bouwer testified that the employees in Johannesburg only reported for duty in early August 2018. In other words, from 24 July 2018 until the end of July 2018 they did not report for duty in the sense of performing their functions at the sites allocated to them. As a result of their conduct, two of the respondent's contracts with WBHO were cancelled, namely the Orion contract and a contract in Eastgate. In this regard, he referred to a letter dated 30 July 2018 from WHBO, which read as follows:

"EASTGATE SITE: INABILITY TO CONSISTENTLY PERFORM TO CONTRACTUAL OBLIGATIONS"

Further to our various communications and messages to operational staff we hereby with regret are compelled to inform you as follows:

The erratic attendance of your staff on site and failure to provide any consistent service have compelled us to engage another painting supplier to complete the work on this site.

As you are aware this is a critical site which is operating on tight financial margins and a tight time schedule. We cannot allow the continuing disruptive effect to continue as it has presents a severe operation risk in terms of penalties and it disrupts the progress of the entire project.

The contract management team and quantity surveyors will liaise with your Mr Paul Lutchman on measuring and billing for work done. Kindly facilitate a seamless transfer in relation to pain supplies.

For future work kindly advise what remedial steps have been taken to ensure a comprehensive service provision in future".

[35] Mr Bouwer testified that the Eastgate project was midstream when it was cancelled and the cancellation constituted a loss of R1.9 million to the respondent. There were also reputational consequences as the overwhelming majority of the respondent's work came from WHBO.

[36] Mr Bouwer was referred to paragraph 17 of the statement of claim, which alleged that on 08 August 2018 the employees in Johannesburg sat at the collection site from 07h00 until 17h00 and no-one came to collect them. He said this was not true as it was the employees who refused to use the respondent's transport to go to the sites allocated to them. Further, he testified that even if there was no transport, it was incumbent upon the employees to find their way to the sites allocated to them. He said there were no reasons why the transport would not be available on 08 and 09 August 2018, but they had received messages from some of the Supervisors regarding plans to set the respondent's vehicles alight on 09 August 2018 and the situation had become volatile. He referred to the ultimatum issued to the employees to return to work and he stated that the employees did not return to work on 10 August 2018.

[37] When asked why a right of appeal was provided in the notice of dismissal issued to the employees as opposed to a disciplinary hearing prior to dismissal, he said it was provided because "*physically we could not communicate with them in any other manner in order to get some form of representation for them in a hearing format*" and "*you can't deal with a leaderless massive people in any other way*". Further, he said the atmosphere was hugely volatile and the employees were disregarding every attempt of management to engage, which rendered a disciplinary hearing infeasible. He stated that some employees made representations in line with the invitation to do so in an appeal process, and based on those representations they were allowed to return back to work. The applicants, on the other hand, did not make any representations.

[38] Mr Bouwer testified that an award of twenty-four months' compensation for each applicant would mean that the respondent would cease to exist. Further, he said the COVID-19 pandemic had negatively impacted the construction industry.

[39] When Mr Bouwer was cross-examined, it was put to him that the real reason why employees did not go to work was because the respondent's vehicles used to transport them from the collection point to their allocated sites were taken away. He denied this version and stated that many of the employees could go to the site

directly. He said the service directives clearly required employees to get themselves to work, for example if they missed the respondent's transportation due to being late. The cross-examiner did not dispute this response but simply retorted that this does not change the fact that the reason they did not go to work was because the vehicles were taken away.

[40] On the one hand, it was put to Mr Bouwer that the employees' Committee ceased to negotiate with him because he used legal jargon that they did not understand. It was further put to him that he was introduced to the employees as a legal representative and they did not want to engage with him because they had no legal background. On the other hand, it was put to him that he was the one who refused to engage with the employees' Committee. He disputed both versions.

[41] It was put to Mr Bouwer that he did not have evidence, in the form of attendance registers, of the employees who attended work and those who did not attend work. He disputed this version and stated that he had accurate records. It was put to him that the Supervisors doubled-up as Drivers and the reason why they stopped keeping attendance registers was because the respondent took its vehicles away, which he denied. He further denied that the respondent's vehicles were taken away prior to 08 August 2018.

[42] It was put to Mr Bouwer that had there been a strike, the respondent would have approached the Court to interdict the strike. In response, he confirmed that there was a strike and he said it was not practical to interdict.

[43] Mr Bouwer was referred to paragraph 86 of the respondent's response to the statement of claim and asked whether he knew Dubile Ncube. In response, he stated that he did not know a person by that name and there was no person by that name in the respondent's records. This line of questioning was not pursued any further.

[44] It was put to Mr Bouwer that his testimony that on one of the days when the employees were on strike some of them arrived at a site at 11h00 demonstrated that they were willing to work. He disputed this version and stated that their arrival on site

had no practical impact as those employees sat in the storerooms and did not perform any work.

[45] No version was put to Mr Bouwer about whether all the applicants were properly before Court. It was never put to him that the employees had attended the collection point and waited for vehicles to take them to their allocated work sites from 07h00 to 17h00 on any day from 24 July 2018 to 09 August 2018, as alleged in the statement of claim. Further, his testimony regarding the cell phone text messages between him and Ms Mafuyela concerning the striking employees, and his evidence regarding the cancellation of the respondent's contracts by WHBO as a result of employees being on strike, was not dealt with under cross-examination. His testimony that employees were required to make their way to their allocated sites even when there was no transportation provided by the respondent was also not challenged under cross-examination.

[46] The respondent's second witness, Mr Lutchman, testified that the respondent had lost two contracts as a result of the applicants' conduct that led to their dismissal. He said the applicants' conduct affected the respondent's reputation in that its biggest client, WHBO, dropped contracts from ninety percent to around fifty percent. He said the business was running on overdraft. He said the respondent could not afford to pay the applicants retrenchment packages and the respondent would cease to conduct business if it had to pay compensation or retrenchment packages to the applicants. Under cross-examination, he stated that the respondent only has vehicles and no immovable assets. He said in Johannesburg the respondent was working on seven sites and was making R200 000.00 from each site. When it was put to him that he had no documents to prove the financial state of the respondent, he said he did not bring those documents with him but he could make the documents available.

[47] It was not put to Mr Lutchman that at any stage between 24 July 2018 to 10 August 2018 the employees had not reported to their allocated work sites because they were waiting for him to return from Durban to go sign contracts.

[48] The applicants' first witness, Mr Gazu, testified that he had been employed by the respondent from 1991 until his dismissal on 09 August 2018. He was a driver and a Supervisor, he had a vehicle allocated to him and he would collect employees from the collection point to the site where he worked. He had never signed an employment contract in his twenty-eight years of service. The respondent did not give employees any benefits. Employees worked long hours during the week without being paid overtime, and only received overtime pay for work done on weekends.

[49] Mr Gazu said there was not one day when the employees refused to go on site. He said the employees were the ones looking for retrenchment because they did not want to work short-time. They engaged Ms Mafuyela to assist them because she was educated and would be able to assist them with their workplace issues. However, when they were supposed to sign their contracts at her office in Kempton Park, Mr Lutchman did not show up.

[50] Mr Gazu testified that meetings between employees and management would happen regularly at the collection point, and after meetings the employees would get into the respondent's vehicles and go to their allocated sites. The only time employees did not go to work was when the respondent took away its vehicles. He said there was no strike and the employees did not refuse to get into the respondent's vehicles to go to their allocated sites. The employees were dismissed through messages sent to their cell phones. He was dismissed on 09 August 2018 and he did not receive any message notifying him to report for duty on 10 August 2018. After receiving the dismissal messages, they informed Ms Mafuyela and they referred a dispute to the CCMA. There was never a threat of violence at the collection point.

[51] Under cross-examination, it was put to Mr Gazu that he had signed an employment contract in 2017 and he was not being truthful when he said he had never signed an employment contract. He conceded that he had signed that contract, and he did not dispute the respondent's version that he had been dishonest when he said he had never signed a contract with the respondent. He agreed that clause 8 of that contract stated that it was his responsibility to report for duty and the respondent would assist where possible.

[52] It was put to Mr Gazu that he was incorrect when he said the respondent had provided no benefits to its employees, and an example was given of a provident fund that existed until the end of 2017. He conceded that there was such a provident fund, which was stopped as a result of the employees' request.

[53] When asked when the vehicle that was allocated to him was taken away from him by the respondent, Mr Gazu said he did not recall. When asked where the employees were on 25 July 2018, he said they were at the collection point the whole day. He subsequently changed his story and said they were at their allocated sites and they only stopped working some time in August 2018 when Mr Lutchman refused to sign. He said Mr Lutchman had gone to Durban and was supposed to meet them and sign the contracts upon his return from Durban.

[54] When asked where he was on 31 July 2018, Mr Gazu said he did not recall. When it was put to him that on that day Mr Bouwer had sent a cell phone text message to Ms Mafuyela seeking her assistance because the employees were not at work, he said it was all lies because he did not know anything about that.

[55] When asked when he stopped going to work, he said he believed it was on Monday 06 August 2018, when they were waiting for Mr Lutchman. The agreement reached on the Friday preceding that Monday was that the employees would wait for Mr Lutchman to arrive, so that they could go to Ms Mafuyela's office in Kempton Park to sign the contracts. When asked whether the employees went to work on the Tuesday, 07 August 2018, he said the employees were still waiting for Mr Lutchman to arrive. He subsequently stated that he could not recall whether they went to the sites that were allocated to them on that Tuesday. When asked whether the employees went to work on the Wednesday, 08 August 2018, he said the employee were still waiting for Mr Lutchman and a message was sent that Mr Lutchman was not coming to the meeting. The following day, 09 August 2018, the employees received messages.

[56] When asked whether the employees went to work on 09 August 2018, Mr Gazu said they were already dismissed and as a result they did not go to the sites

allocated to them. He insisted that he did not receive an ultimatum on 09 August 2018 and he insisted that he was dismissed on 09 August 2018, despite being shown the applicants' statement of claim which alleged that the employees received an ultimatum on 09 August 2018 and received dismissal notices at 07h00 on 10 August 2018. He said the cell phone text message he received on 09 August 2018 informed him that if he did not report for duty, he was dismissed.

[57] Mr Gazu did not dispute that the respondent lost two contracts in Eastgate and Orion. When asked whether it was fair for the respondent to lose such contracts as a result of the employees' conduct, he said it was not fair, but added that it was also not fair for the respondent to not do right by the employees. When it was put to him that the employees were not going to work if the respondent did not give them what they wanted, he agreed. He, however, disputed that this conduct fell within the definition of a strike.

[58] The applicants' second witness, Mr Luiz, testified that he had been employed by the respondent for fourteen years. Immediately prior to his dismissal, he held many positions, including Supervisor, Driver and Chairperson of the Workers' Committee. As a Driver, he drove one of the respondent's vehicles, used the vehicle to transport some of the employees to work, and parked it at his place of residence. He admitted that the respondent's letter of 06 November 2017 was received by the employees, and the letter caused disturbance amongst the employees as they did not know whether they were going to receive all monies that were due to them. The Workers' Committee had to plead with the employees to be calm.

[59] Mr Luiz stated that the employees had a meeting with the respondent's representative around 28 March 2018, where the issue of working short-time was introduced. The employees were surprised because there was no prior warning of the issue of short-time. There were no discussions, but the respondent's representative simply instructed the employees to work short-time and provided them with schedules regarding the short-time. He admitted that the respondent's letter of 05 April 2018 was read to the employees. He said the rotation did not last long as it occurred over a few months, but his team worked normally and did not rotate like the others throughout that period.

[60] When asked about the cell phone text messages between Mr Bouwer and Ms Mafuyela, Mr Luiz testified that the employees had never refused to attend work, and he said there was never a strike. He said none of the employees' grievances were resolved by the respondent. He subsequently stated that Mr Bouwer had informed the employees that if they did not resume their duties, they were going to suffer. He further stated that the employees began to suspect that the Workers' Committee was colluding with the respondent and they demanded that Mr Lutchman be present at meetings with them otherwise they would not leave the collection site.

[61] Mr Luiz testified that at a meeting on a Tuesday wherein Mr Lutchman was supposed to give feedback to the employees, Mr Lutchman did not attend the meeting and Mr Bouwer was in attendance on behalf of the respondent. The employees were angry and displayed their dissatisfaction at Mr Lutchman's absence, to the extent that Mr Bouwer noticed that the situation was becoming tense. Mr Luiz then witnessed Mr Bouwer making a telephone call to Mr Lutchman, informing Mr Lutchman that the employees would not resume their duties until Mr Lutchman had attended the collection site to address them. However, the employees boarded the respondent's vehicles to their respective allocated sites after Mr Lutchman undertook to meet with them at the collection site the following day, being a Wednesday. On that Wednesday, Mr Lutchman arrived at the collection site early at 06h30, but the respondent's vehicles did not fetch the employees to bring them to the collection site. The employees who were present were only those who were able to walk to the site. Mr Luiz did not clarify why there was a requirement that employees be collected from their areas of residence to the collection site, when the general understanding was that the employees were to make their way to the collection point where they would be transported to their respective sites. Mr Lutchman informed the employees who were there that short-time was being terminated with immediate effect, the hourly remuneration rate would increase to R20 per hour and he handed out employment contracts. Mr Luiz stated that this was the first time when he learned that his position was Foreman. Ms Mafuyela then assisted the employees to interpret their employment contracts, and she identified parts of the contracts that were not in order. Mr Lutchman undertook to rectify the errors but gave no specific date when he would do so. Mr Lutchman requested the employees to in the meantime report to the

sites allocated to them and they boarded the respondent's vehicles. In this regard, Mr Luiz did not clarify which vehicles the employees boarded when on his own version the vehicles had not collected the employees from their areas of residence and only those who could walk had made it to the meeting at the collection site.

[62] According to Mr Luiz, during the week that followed, presumably on the Monday, the employees decided that they would not go to their respective sites until Mr Lutchman met with them. Mr Lutchman arrived an hour late, but said he had to fetch one Kevin from the airport, who would deal with their issues. At around 10h30 that day, Mr Lutchman had not returned and when the witness telephoned Mr Lutchman he requested the employees to go to their sites and advised them that the meeting would resume once Kevin had arrived. When Mr Luiz arrived at the site in Eastgate, he found Mr Lutchman and Kevin present at the site. There was an agreement that the meeting would occur the following day. However, later that evening Mr Lutchman telephoned Mr Luiz and advised that he would no longer be able to meet the following day due to the need to meet a potential client in Cape Town. Mr Lutchman further requested Mr Luiz to lend him the vehicle he was using as the vehicle being used by Mr Lutchman's cousin had broken down. The vehicle was not returned to him.

[63] The following morning, according to Mr Luiz, he was informed that the vehicle was on its way, but the vehicle never made it to him. He then made his way to the collection point and he discovered that the vehicles that fetched employees from Pretoria and Alexandra were also not there and had not fetched the employees. In a telephone discussion between Messrs Lutchman and Luiz, Mr Lutchman indicated that the vehicles would not be made available that day. Mr Luiz did not explain whether the employees went to their work sites thereafter.

[64] Mr Luiz testified that the following day, which was 08 August 2018, the employees proceeded to Ms Mafuyela's office in Kempton Park, for the purpose of signing their employment contracts. When they arrived, Mr Lutchman was not there. Mr Bouwer, however, was present and he required employees to sign their contracts. The employees from the Rosebank site refused to go to Kempton Park to sign their contracts and Mr Bouwer informed Ms Mafuyela that those employees who refused

to sign their contracts were dismissed with immediate effect. Ms Mafuyela then had a telephone discussion with Mr Lutchman in which she informed Mr Lutchman that he was playing games because he had undertaken to be present in Kempton Park. In that telephone discussion, Mr Lutchman informed Ms Mafuyela that the employees had been dismissed and he would make sure that the employees suffer. Thereafter, the employees who had been to Kempton Park met with the employees who were based at the Rosebank work site, at the collection point, and the employees who work in Rosebank were informed that they had been dismissed due to their refusal to go to Kempton Park to sign the contracts. The employees who work in Rosebank were so shocked by this news, they remained at the collection site until 17h00.

[65] Mr Luiz stated that on 09 August 2018, he was in Johannesburg CBD, around Carlton Centre. He received a message from Mr Lutchman's cousin stating that he had been dismissed. He then had a telephone call with Mr Lutchman in which Mr Lutchman informed him that he was going to suffer because he had been dismissed. After that telephone call, Mr Luiz decided to go to the collection point and he arrived there at around 14h00. Upon his arrival, the other employees informed him that they had received messages dismissing them. The employees were concerned that the messages were not sent by the employer but by someone who was not their employer.

[66] On 10 August 2018, according to Mr Luiz, the employees again convened at the collection point. Discussions were held amongst them about the confiscation of the respondent's vehicles and the fact that they had been dismissed. They then resolved to approach the CCMA. Mr Luiz stated that he had not received the cell phone text messages appearing as annexures to the statement of claim. After the employees' dismissal, Mr Lutchman approached Mr Luiz and advised him to dissociate himself from the other employees so he could return to work. He informed Mr Lutchman that he stayed in the same community as the other employees and if he turned against them, they would kill him.

[67] Under cross-examination, Mr Luiz confirmed that he had informed his legal representatives of his version several times and they knew the version of events he had relayed in his testimony. He stated that the statement of claim accurately

reflected the instructions he had given to his legal representatives. He did not dispute that his evidence was inconsistent with the statement of claim, which referred to all employees having received a cell phone text message on 09 August 2018 communicating an ultimatum instructing them to return to work, and referred to all employees having received another cell phone text message on 10 August 2018 communicating the fact that they had been dismissed. He also did not dispute that his version of being dismissed verbally on 08 August 2018 was at odds with the statement of claim in terms of which all employees were dismissed in writing on 10 August 2018.

[68] When asked which cell phone message he had received regarding his dismissal, he said he had lost his cell phone in which that message was contained and he no longer had that message. He had not taken any steps to secure the message because he did not anticipate that the message would be required.

[69] When asked what time he had met his other colleagues on 09 August 2018, he said in the morning, which was inconsistent with his prior statement (in chief) that he had met them at around 14h00 when he arrived at the collection point from Carlton Centre in the Johannesburg CBD.

[70] When it was put to Mr Luiz that Mr Bouwer testified that he only met with Ms Mafuyela twice on 23 and 24 July 2018, Mr Luiz stated that if Counsel for the respondent was going to lie to the Court, then the applicants must be informed so that they could excuse themselves and go home. He further stated that he was disgusted that an old man like Mr Bouwer would tell such lies. When it was put to Mr Luiz that his version was never put to Mr Bouwer, he said he was not going to respond to that proposition. When it was put to Mr Luiz that working short-time was better than being retrenched, he said he had no response. Mr Luiz was at times highly emotional, sometimes pointing forcefully at the respondent's witnesses who were sitting in Court after they had given their testimony.

[71] When it was put to Mr Luiz that according to the respondent's letter dated 25 July 2018 the concerns of the employees relating to being made permanent were resolved, he responded that at some point Mr Lutchman had to flee because the employees' concerns were not being resolved. He further indicated that they needed

someone to interpret the letter for them, and when that person (Ms Mafuyela) perused the letter it turned out that there was no indication in the letter as to how the employees would be made permanent.

[72] When it was put to Mr Luiz that from 31 July 2018 to 06 August 2018 the employees did not report for duty due to not having vehicles, he said he could not be certain about the days when they did not report for duty, but he knew that they did not report for duty during the days when they did not have vehicles. When asked to provide the date when the vehicle that was in his possession was taken away from him, he responded that Messrs Bouwer and Lutchman were the ones who took the vehicles away. He then said his vehicle was actually not taken away as he was informed that Mr Lutchman's cousin needed the vehicle due to his own vehicle having broken down. When clarity was sought by the Court as to when he was told that Mr Lutchman's cousin needed the vehicle, he said the vehicle was taken during the week and he did not remember which week. He further said that when he was in possession of the vehicle he went to the site, but when he did not have the vehicle he did not go to the site.

[73] It was put to Mr Luiz that of the employees who returned to work after they used the opportunity to make representations appealing their dismissals, none of them were killed. He responded by saying from the members of the Workers' Committee no one returned to work. When it was put to him that he knew he could appeal, he responded by asking where he would appeal.

[74] The applicants' third and last witness, Ms Mafuyela, testified that the applicants had approached the EFF for assistance and the administrators at the office of the EFF had allocated the matter to her, based on her location in relation to the employees and the nature of the matter. She was a Councillor and her role was to assist members of the community. She confirmed that on 24 July 2018 there had been a meeting between the respondents and its employees, at which meeting she was present. There were resolutions that came out of that meeting, including the employment of employees on a permanent basis. The employees did not refuse to go to their sites, instead there was an agreement that they would only return to their sites after he had given them feedback on 25 July 2018. The meeting of 25 July

2018 was of short duration as it did not last more than one hour, and it finished in the morning, after which the employees got into the respondent's vehicles and went to their respective sites.

[75] When asked why she did not respond to Mr Bouwer's cell phone text message of 27 July 2018 on the same day, she said it was because the employees had informed her that they were at their respective sites. She did not indicate when the employees gave her this information. And she did not explain what she meant when she said she would deal with it, in her cell phone text message of 31 July 2018, in response to Mr Bouwer's message of 27 July 2018. She said she was in contact with the employees on a daily basis.

[76] Ms Mafuyela confirmed that one of the employees had forwarded to her the "ultimatum" message that was sent by way of a cell phone text message on 09 August 2018. She also confirmed that one of the employees had forwarded to her the "*dismissal with immediate effect*" message that was sent by way of a cell phone text message on 10 August 2018. She did not explain whether she had advised the employees to comply with the ultimatum, when it was forwarded to her.

[77] Ms Mafuyela testified that the employees who were dismissed referred an unfair dismissal dispute to the CCMA. She said there were two groups, with one group going to the CCMA office in Johannesburg and the other group going to the CCMA office in Pretoria. Importantly, she testified that "*they said some should go to Pretoria because the company was based in Pretoria*". She said she was not in a position to identify the employees who went to Johannesburg and those who went to Pretoria.

[78] Under cross-examination, Ms Mafuyela stated that she had met with the employees on 08 and 09 August 2018, at which meetings there were discussions about the cell phone text messages they had received from the respondent. However, she did not explain whether she had advised the employees to comply with the ultimatum that had been issued to them on 09 August 2018. She confirmed that she had advised the dismissed employees to refer an unfair dismissal dispute to

the CCMA, but she did not advise them to appeal their dismissals internally despite the contents of the “*dismissal with immediate effect*” message.

[79] Ms Mafuyela confirmed that she was not on the work sites on 30 and 31 July 2018. She was at the collection point on 27 July 2018 and some of the contracts were handed out.

[80] Ms Mafuyela confirmed that she had not seen a certificate of outcome from the CCMA’s office in Pretoria relating to this matter.

Analysis

[81] Section 191(5)(b) of the Labour Relations Act 66 of 1995 (“the LRA”) provides that where an unfair dismissal dispute relates to the participation in an unprotected strike as a reason for dismissal, the dismissed employee may refer the dispute to the Labour Court for adjudication if the CCMA has certified that the dispute remains unresolved by conciliation or if thirty days have elapsed since the dispute was referred to the CCMA and it remains unresolved. This means that the dismissed employee must refer the unfair dismissal dispute to the CCMA for conciliation before referring it to the Labour Court for adjudication. The Labour Court lacks jurisdiction to entertain such a dispute in the absence of a referral to conciliation and a certificate of non-resolution or the lapsing of thirty days from the date of the referral to the CCMA.¹

[82] In the current matter, and as stated above, the list of applicants in the referral to the CCMA for conciliation contained fifty-six names, whereas the referral to this Court contained a new list of sixty-two names. Out of the sixty-two names appearing in the list of applicants before this Court, only thirty-nine formed part of the list of applicants before the CCMA. Further, the respondent’s evidence that six other applicants had to be excluded from this matter (four having had their internal appeals had succeed, one not being an employee of the respondent, and another having absconded prior to 10 August 2018) was not disputed. As such, only thirty-three

¹ *Feni v Pan South African Language Board* (2011) 32 ILJ 2136 (LC).

applicants are properly before Court in this matter, and the rest of the applicants are not affected by the order made in this matter.

[83] This matter involves material disputes of fact. The applicants were dismissed by the respondent for having participated in an unprotected strike action. On the one hand, the applicants contend that they did not participate in any strike action. On the other hand, the respondent contends that they did participate in an unprotected strike action. It is trite that factual disputes in trial proceedings are resolved ultimately on the probabilities. In *Stellenbosch Farmers' Winery Group and Another v Martell & Cei SA*,² the Supreme Court of Appeal held the following:

“[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case,

² *Stellenbosch Farmers' Winery Group and Another v Martell & Cei SA* 2003 (1) SA 11 (SCA), paragraph [5].

which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail".

[84] In the current matter, the credibility findings and the probabilities are in favour of the respondent's case, on the issue whether the applicants were engaged in an unprotected strike action. It is clear from the evidence that the applicants were not happy with the conditions of their employment and they complained to the respondent. The respondent entertained the applicants' complaints and undertook to meet some of their demands, including the demand to be permanently employed and the demand that job titles be contained in payslips, despite the latter demand requiring a change to its software. The applicants allege that their demands were not met, including the demand that they be made permanent. They allege that despite the respondent's letter of 25 July 2018 specifically agreeing that they would all be permanently employed, there was nothing in writing to back it up, which is in my view unacceptable.

[85] The perception of the applicants that their demands were not being met led them to refuse to tender their services for the respondent, on the probabilities. On their own version, the applicants communicated to the respondent that they would not go to their designated work sites unless Mr Bouwer attended a meeting at which their complaints would be addressed. The applicants confirmed having received the respondent's letter of 25 July 2018, which had a detailed section dedicated to the unprotected strike action they were engaged in. Ms Mafuyela who testified on their behalf acknowledged that this letter had come to her attention. The applicants did not lead any evidence of having refuted the allegations contained in this letter regarding them being engaged in an unprotected strike action.

[86] Further, the applicants did not dispute that Mr Bouwer had sent a cell phone text message to Ms Mafuyela on 27 July 2018 indicating that the employees were again on strike, and Ms Mafuyela had responded on 31 July 2018 that she would address it. There is no evidence of how or when Ms Mafuyela addressed the

message from Mr Bouwer, despite her evidence that she met with the employees on a daily basis.

[87] Mr Luiz confirmed that when the vehicles were taken away from the applicants, they did not go to work. The applicants' version that they had waited for the respondent's vehicles to collect them at the collection point from the morning until around 17h00 on more than one occasion is wholly improbable.

[88] As demonstrated above, the applicants failed to put material aspects of their case to the respondent's witnesses. In this regard, it is trite that a failure to put one's version to opposing witnesses means such a version cannot be accepted. In *Masilela v Leonard Dingler (Pty) Ltd*,³ the Court held the following:

"[28] ... It is trite that if a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the facts that he intends to prove in contradiction, to give the witness an opportunity for explanation. Similarly, if the court is to be asked to disbelieve a witness, he should be cross-examined upon the matters that it will be alleged make his evidence unworthy of credit. In *Small v Smith* 1954 (3) SA 434 (SWA) Claassen J said at 438:

"... It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved".'

[89] In *President of the Republic of South Africa and Others v SARFU and Others*,⁴ the Constitutional Court held that:

"[61] ... If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts".

[90] The Labour Appeal Court, in *Ekurhuleni Metropolitan Municipality v SA Local Government Bargaining Council & others*,⁵ recently confirmed the need to put one's

³ *Masilela v Leonard Dingler (Pty) Ltd* [2004] 4 BLLR 381 (LC); (2004) 25 ILJ 544 (LC) at para 28.

⁴ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 11999 (10) BCLR 1059 (CC), 2000 (1) SA 1 at para 61.

⁵ *Ekurhuleni Metropolitan Municipality v South African Local Government Bargaining Council and Others* (2022) 43 ILJ 825 (LAC); [2022] 4 BLLR 324 (LAC) at para 26.

version when cross-examining and rejected the defence of the employee in that case on the following basis:

“[26] The third respondent failed to make it clear to the complainant in cross-examination the precise nature of the imputation raised, in the sense not only that her evidence was to be challenged but how this was to be done. It was not put to her that her version was false or that it was denied by the third respondent. The result was that she was not given the opportunity to respond to such a challenge, including to deny any suggestion as to the falsity of her version”.

[91] Based on the above, I find that the applicants were guilty of participating in an unprotected strike action. It was not in dispute that the respondent's business suffered as a result of this misconduct, with it losing contracts from its biggest client. The seriousness of the misconduct can, thus, not be gainsaid. The fact that the applicants persisted with their denial of the misconduct demonstrated that they showed no remorse, which meant that there was a possibility that they could do it again and dismissal was a reasonable operational response to the risk of them repeating the misconduct.⁶

[92] The applicants' claim that their dismissal without a hearing constitutes procedural unfairness lacks merit. They were provided with an opportunity to make representations on appeal as to why their dismissals should not stand. They did not make use of that opportunity, in circumstances where it was common cause that others who made use of that opportunity were reinstated. The principles relating to the *audi alteram partem* rule in circumstances where a hearing is provided after a decision to dismiss were set out by the Labour Appeal Court in *Semenya SC and Others v CCMA and Others*.⁷ In that case, the employee contended that the opportunity to be heard was granted to her after a decision was made to dismiss her, which was not good enough. The Court held the following:

“[21] ... Although generally speaking such an opportunity should be given before the decision can be taken, there are circumstances where an opportunity to be heard that is given after the decision has been taken is acceptable. Where the opportunity

⁶ *De Beers Consolidated Mines Ltd v CCMA and Others* (2000) 21 ILJ 1051 (LAC); [2000] 9 BLLR 995 (LAC), paragraph [25].

⁷ *Semenya SC and Others v CCMA and Others* (2006) 27 ILJ 1627 (LAC), [2006] 6 BLLR 521 (LAC).

to be heard is given after the decision has been taken and it is one of those situations where it is acceptable and the person concerned spurns that offer or does not make use of it, it cannot lie in such person's mouth to say that he was not given an opportunity to be heard. In such a case an opportunity to be heard has been given and rejected. The *audi alteram partem* rule has been complied with in such a case".

And:

"[22] ... However, it seems to me that, where it can be said that the opportunity to be heard that is given after the decision has been taken is no less fair than the opportunity that should have been given before the decision could be taken, it ought not to make a difference that it was offered after the event".

[93] The fact that the employees who utilised the opportunity to make representations in the appeal process were reinstated demonstrates that the appeal process was not less fair than any hearing that would have been conducted prior to the dismissal. The applicants did not present any facts that demonstrated any unfairness of the appeal process. There was, thus, no procedural unfairness.

[94] Under all the circumstances, I find that the applicants' dismissals were substantively and procedurally fair.

Costs

[95] The general approach in this Court is to not award costs. I see no compelling reason to depart from that approach in this matter.

[96] In the premises, I make the following order:

Order

1. The applicants' unfair dismissal referral is dismissed.
2. No order as to costs.

V.G. Mkwibiso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Adv T. Matlhoane
Instructed by:	Thembekile Graham Attorneys Inc
For the Respondent:	Adv M. A. Loxton
Instructed by:	Hinrichsen Attorneys