



REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JA 72 /13

In the matter between:

MVELATRANS (PTY) LTD T/A BOJANALA BUS SERVICES Appellant

and

JACKSON PULE AND OTHERS Respondents

Heard: 19 August 2014

Delivered: 23 October 2014

Summary: Employee embarking on an unprotected strike- Employer obtaining court interdict- employer issuing ultimatum for employees to return to work – some employees failing to return to work and dismissed- Labour Court finding ultimatum too short to enable employees to return to work and that dismissal substantively unfair. Appeal- evidence showing that some employees had time to report to work after ultimatum was read- some dismissed employees’ evidence as to why they did not report to work not plausible thereby rendering their dismissal substantively fair. Employees whose evidence found plausible for not reporting to work reinstated. Appeal partly upheld.

Coram: Waglay JP, Musi JA et Dlodlo AJA

JUDGMENT

MUSI JA

- [1] This is an unopposed appeal against the judgment and order of the Labour Court to the effect that the dismissal of the respondents was substantively unfair. The appellant also appeals against the order re-instating Mr Jackson Pule, in the event this Court finds that his dismissal was substantively unfair.
- [2] The respondents embarked on an unprotected strike from 11am on 17 November 2009 to 20 November 2009. On 20 November 2009, the Labour Court declared the strike an unprotected strike and interdicted the respondents from participating in it. During the afternoon of 20 November 2009, the appellant issued an ultimatum requesting the respondents to return to their work-stations by 15h00. According to the appellant, the respondents failed or refused to do so and they were subsequently issued with notices to attend a disciplinary hearing to face the following charges:
- i) Failure to comply with a court order, and
 - ii) Failure to adhere to an ultimatum.
- [3] On the date of the disciplinary hearing, the respondents attended with their attorney. An unsuccessful application was made to have them represented by him. The respondents thereafter successfully applied for a postponement of their hearing to 03 December 2009. On 03 December 2009, after skirmishes with the chairman of the disciplinary enquiry, the respondents, represented by their co-workers, applied for the chairman's recusal. The application was refused. The respondents refused to take part in the hearing. The hearing proceeded in their absence and they were subsequently found guilty and dismissed.
- [4] The respondents referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). The CCMA ruled that it had no jurisdiction to adjudicate

the dispute because the parties to the dispute were parties to the South African Road Passenger Bargaining Council (SARPBAC). The CCMA referred the dispute to the SARPBAC. Conciliation failed at the SARPBAC. The SARPBAC issued a certificate to the effect that the dispute was unresolved and that it may be referred to the Labour Court. The respondents referred the dispute to the Labour Court.

- [5] At the Labour Court, some of the respondents were represented by Mr Modisakeng and the others by Mr Mooki instructed by Wright Rose Innes Inc. Two pre-trial minutes were filed, because, *inter alia*, the different group of respondents put different issues in dispute. More about this later. Now to the factual matrix.
- [6] The appellant conducts a commuter bus service for and on behalf of the Northwest Provincial Government (NPG). It had been a parastatal until it was bought by Unitrans passenger (Pty) Limited (Unitrans). The sale agreement provided that 15% of the shares of the appellant had to be held in trust for the benefit of its employees. The Bojanala employee share trust was formed which held 15% of the issued shares in Mvelatrans (Pty) Ltd. Following complaints that this was not benefiting employees, the 15% shares were bought by the appellant in a deal that was sanctioned by the National Government, the NPG, SATAWU and TAWUSA and the employees were, according to the appellant, paid out the full value of their shares. The employees were of the view that they were not paid out what was due to them.
- [7] It is common cause that approximately 85% of the appellant's employees were members of the South African Transport and Allied Workers union (SATAWU) and 5% were members of the Transport and Allied Workers Union (TAWUSA). Both trade unions were recognised as collective bargaining agents. Bargaining in respect of terms and conditions of employment occurred centrally, at the SARPBAC.

[8] The appellant conducted its business from two depots, to wit Tlhabane and Mogwase. It employed approximately 640 employees. The contract between the appellant and the NPG, *inter alia*, provided for penalties to be imposed by the NPG in respect of trips not completed or provided by the appellant. The appellant was paid per kilometre driven and it also earned revenue from the sale of tickets to commuters. Depending on how late the service ran, the penalty could be between 25% and 40% of what would have been paid for the trip. The respondents were aware that the appellant would suffer penalties in the event of cancelled trips.

[9] On 11 November 2009, at the instance of the unions, a meeting was held between the unions and the appellant, represented by its Operations Manager Mr Simon Motitsoe. The appellant was given a written list of complaints. The complaints were the following:

- i) Salary adjustment
- ii) 15% shares
- iii) Printout of offer statement (on notice board)
- iv) Damage on moving hazard (refunds)
- v) Adjustment on subsistence and travel allowance.

Motitsoe informed the unions' delegations that he would revert to them.

[10] On 17 November 2009 at approximately 11h00, the bus drivers at Tlhabane stopped working. They demanded feedback from Motitsoe. He informed them that some of their complaints related to substantive issues that could not be addressed at plant level.

[11] With regard to the 15% shares, he informed them that the issue should be pursued via a High Court order because the appellant was of the view that the

workers had been paid what was due to them. The printout related to the workers' demand that a printout relating to payments made should be placed on notice boards. Motitsoe informed them that the documents relating to the payments to each employee would not be placed on the notice boards, due to their size but that the documents may be perused and inspected at the Human Resources Department.

- [12] After lunch time, the drivers were joined by workers from other departments. They all congregated within the depot and refused to go back to work. The next day, employees at the Mogwase depot also congregated within the depot and refused to work.
- [13] The workers presented another set of demands setting out the amount of money they sought by way of salary and subsistence and travel allowance adjustments.
- [14] At approximately 18h00, Grant Fleetwood, the Group Human Resources Manager of Unitrans arrived at the Tlhabane depot. Another set of demands were given to him relating to cell phone, housing and car allowances, bonuses, refund on leave days and a complaint on outsourcing security guards. The last complaint related to a decision by the appellant to outsource its security section and allocating other duties to its in-house security personnel. The erstwhile in-house security personnel demanded a severance package although they were not retrenched but were allocated new jobs within the appellant at the same or better terms and conditions.
- [15] The unions were contacted. They spoke to their members but they would not listen to them. The unions agreed with the appellant that the actions of the workers were unacceptable. The workers indicated that they did not wish to be represented by their respective unions anymore. The unions distanced themselves from the actions of the striking employees. On 19 November 2009, more than 300 employees terminated their union membership. They indicated

that they have appointed Rocky Modisakeng Attorneys as their legal representatives and that all further correspondence should be addressed to their attorneys.

[16] On 20 November 2009, Cele J issued a rule *nisi* returnable on 11 November 2010 in the following terms:

‘1.1. The withholding of their services by the individual respondents with effect from 11h00 on 17 November 2009 to be an unprotected strike as contemplated in Section 68 of the Labour Relations Act (sic)

1.2. Interdicting and restraining the individual respondents from participating in such an unprotected strike...

1.4. Interdicting and restraining the individual respondents from interfering with the business operations of the applicant...

2 The relief set out in prayers 1.1 to 1.5 above operate as an interim order with immediate effect pending the finalization of this application...’

[17] The learned Judge also ordered that the order be served by facsimile to the unions and upon the individual respondents by the sheriff of the High Court alternatively a duly authorised employee of the appellant reading out the terms and conditions of the order to such of the individual respondents who may be present at the appellant’s premises and handing a copy to such of the respondents who may request such a copy and by affixing a copy of the order to a notice board in a prominent place at the appellant’s premises.

[18] Mr Modisakeng was present at court when the order was granted. Mr Fleetwood took a copy of the court order, drafted an ultimatum at his offices and sent both the order and the ultimatum to Tlhabane and Mogwase. The ultimatum reads as follows:

‘1. In terms of the Labour Court order dated 20 November 2009 the court has

ordered that the industrial action by the employees is unprotected and illegal.

2. The company has requested immediate intervention of (sic) the unions SATAWU and TAWUSA both union have to date failed to intervene and distanced themselves to (sic) the industrial action by employees.

3. Employees are hereby instructed to return work for the afternoon shift of 20 November 2009.

4. Participating in illegal or unprotected industrial action is a serious misconduct and the company will take disciplinary action against those engaged in said (sic) misconduct. This will lead to the dismissal of employees.

5. The company will also take disciplinary steps against those who failed to adhere to this ultimatum and if failed (sic) to return to work by 15h00 on 20 November 2009 this will lead to the dismissal of employees.'

[19] The ultimatum was read at both depots and the majority of the employees adhered to it and returned to work. The appellant alleged that the respondents did not adhere to the ultimatum. As stated above, a disciplinary hearing was held and the respondents were dismissed. Employees who had been on strike but returned to work by 15h00 were issued with final written warnings. Some employees who did not return to work at 15h00 provided the appellant with reasons why they had not done so and they too were issued with final written warnings.

[20] In the court *a quo*, the respondents who were represented by Mr Modisakeng admitted, that the ultimatum was communicated to them at approximately 13h00 along with the fact that an interdict had been granted against the unprotected strike. They also agreed that the court order and ultimatum were read out to the striking employees at both depots, by members of the SAPS who also translated the documents, and that copies of the ultimatum were also handed out to the employees. These admissions were recorded in the pre-trial minutes. They also did not challenge the fairness of the ultimatum. They

proffered various reasons why some of the individual employees did not adhere to the ultimatum and that the others did adhere to the ultimatum, and returned to their workplaces after it was read out. They also contended that some adhered to the ultimatum but were locked out thereby making it impossible for them to report to their respective workstations.

[21] They alleged that their dismissal was substantively unfair because there was no valid basis for the appellant to selectively dismiss them when other employees who participated in the strike were not dismissed. They further alleged that their dismissal was procedurally unfair because they were denied representation of their choice.

[22] The respondents who were represented by Mr Mooki alleged that the ultimatum was read out just before 15h00 at the Tlhabane depot and after 15h00 at the Mogwase depot and not at approximately 13h00 as contended by the appellant. These respondents contended that their dismissals were substantively unfair because:

- i) Those who were aware of the ultimatum returned to work
- ii) Some of them were not at work when the ultimatum was read
- iii) Those who were aware of the ultimatum were not given sufficient time to reflect on the ultimatum
- iv) Not all striking employees were dismissed
- (v) Some employees recorded as dismissed remained employed.

[23] They contended that their dismissal was procedurally unfair because they were not allowed a representative of their own choice, despite the terms of the notice of the disciplinary hearing. They further contended that they were not advised of their right to appeal their dismissal.

[24] The allegations of compliance and the reasons for non-compliance with the ultimatum necessitated the calling of numerous witnesses to testify on behalf of the respondents and the appellant. On 12 September 2011, Van Niekerk J issued the following order:

‘The application for postponement is refused and the matter will resume on Thursday, and 15 September 2011 at 10h00.

1. In respect of the applicants represented by Rocky Modisakeng Attorneys, these applicants are to provide the attorney of the respondent with affidavits setting out their challenge to the substantive fairness of the dismissal, by no later than 13h00 on Wednesday 14 February 2011.

2. Those applicants who are not represented by Rocky Modisakeng Attorneys, are to report at the SASLAW pro-bono office tomorrow, 13 September 2011 at 10h00.

3. On resumption of the matter, the correspondent will cross-examine the applicants, in so far as it deems necessary, and lead rebutting evidence, in so far it deems necessary

4. On conclusion of the evidence, the parties will argue both on procedural and substantive issues.’

[25] The parties complied with Van Niekerk J’s order. Mr Modisakeng, for convenience it seems, lumped the respondents with the same or similar reason for non-compliance or alleged compliance, together and requested one of them to depose to an affidavit. Mr Mooki on the other hand called all the respondents that he represented. The appellant called witnesses to rebut most of the respondents’ evidence.

[26] Mr Joseph Nokwane deposed to an affidavit to the effect that he and his colleagues went home early (before the ultimatum was read) because it was raining and they were locked out of the premises. They did not know anything

about the ultimatum and reported for duty on the next working day. The fellow workers the referred to were Willy Motshegoa, Markus Sekete, Moirapula Nechodemus, Lucky Molatlhegi, Shapie (Thomas) Mathabathe, Modisakeng and Mngomane Bornwise.

- [27] He testified that it was raining on 20 November 2009. He has high blood pressure and takes medication for hypertension. Due to the strike he slept at the Tlhabane depot and did not go home. As a result, he had not taken his medication for four days. On 20 November 2009, he felt dizzy and he went home to take his medication. He was not at the depot when the ultimatum was read. During cross-examination he testified that only Lucky Molatlhegi and Skapie Mathabathe were with him on 20 November 2009. According to Mr Nokwane, Lucky Molatlhegi and Mr Skapie Mathabathe left the depot before the ultimatum was read. No rebutting evidence was led in respect of Nokwane's evidence.
- [28] Bertha Mfulwane deposed to an affidavit wherein she stated that the "ultimatum was read and we all went to work immediately. We then went home and reported back on the following work date." She also stated that Lipkin Lamola, Titus Modibedi, Kenneth Kwen, Pinky Matome, Lizzy Khuonou and Lucky Mpipi also went to work immediately. In her evidence -in- chief, she testified that the only knowledge she had of the other workers', whom she mentioned in her affidavit, version is what she heard at their attorney's offices. During cross-examination she confirmed that she and Pinky Matome are supervised by Mr R T Pretorius. When it was put to her that Pretorius will testify that Pinky Matome did not report to him after the ultimatum was read she responded by saying that Pinky will testify on her own behalf. She further testified that she did not know who the supervisors of the other employees were or in which department(s) they were employed.
- [29] Pretorius testified that Ms Mfulwane and Ms Matome did not comply with the ultimatum but arrived at 16h00 at the depot with a spar plastic bags which

contained groceries.

- [30] Mr Paul Malekutu deposed to an affidavit wherein he stated that he and his colleagues, Joseph Phalale, Mathews Makgwana, Godfrey Ntsoe, Piet Kgaswane, Isaac (Ike) Malungane and Ephraim Molefe, returned to work at 16h00 on 20 November 2009 and found that it was knock off time at 16h00. During cross-examination, he contended that the ultimatum was read at 16h00. He then said that they returned to the workshop before 16h00. He then conceded that the ultimatum might have been read at 15h00. He could not say what time he was at the gate and what time he was at the workshop. It was put to him that drivers who adhered to the ultimatum signed on from 14h15 at Mogwase indicating that the ultimatum was read before then. Ultimately he testified that when he went to the workshop, it was after they had knocked off and they went there to fetch their personal things. He also testified that when he returned to work a foreman by the name of Barney told him to return on Monday. No mention was made of Barney in his affidavit. No rebutting evidence was led in respect of this group.
- [31] Mr Thabo Molefe stated, in his affidavit, that he was on strike but that he did not report for duty on 20 November 2009. During cross-examination, he confirmed that he is stationed at Mogwase and that he did not report for duty due to transport problems. He also stated that taxis only operate from 12h00 between Rustenburg and Mogwase.
- [32] Mr Kenneth Matuwe stated, in his affidavit, that he was at the Tlhabane depot when the ultimatum was read instead of the Mogwase depot where he is stationed. He could not go to work when the ultimatum was read because it was already late. During cross-examination, he could not explain why he did not report for duty at Tlhabane. No rebutting evidence was led in respect of Mr Matuwe. That completed the evidence of the respondents who were represented by Mr Modisakeng.

- [33] Mr Jackson Pule deposed to an affidavit wherein he stated that on 20 November 2009, he was at the Tlhabane depot although he is ordinarily stationed at the Mogwase depot. One of the appellant's managers gave him a copy of the court order and ultimatum to read to the striking employees at the Tlhabane depot. He read the documents at approximately 14h45. The employees then went back to work. He went to Mr Sefanyetsa's office where he tried to call Mr Stuurman at the Mogwase depot to inform him that he will not make it in time because the Tlhabane depot is 48km from Mogwase depot. He could not get hold of Stuurman and spoke to Chief Letanke, who is an assistant route controller, and requested him to stand in for him because he was not in a position to make it to Mogwase on time. Mr Letanke agreed. He then called Stuurman and informed him about the arrangement with Letanke and the former agreed. On 21 November 2009, he reported at Mogwase.
- [34] In his evidence –in-chief, he stated that Mr Modisakeng called him at 13h20 to inform him that the appellant got the interdict and that he should wait for Mr Niemandt. During his cross-examination, he conceded that the majority of employees at Tlhabane complied with the ultimatum. At first he said at 15h00. Later he stated that it was at 15h45. When he was asked why he was at Tlhabane instead of Mogwase he stated that he lived near the Tlhabane depot and did not have transport to travel to Mogwase. He further stated that he was not on strike but was affected by the strike in the sense that he could not work when there was a strike. He could not control the running of the busses because they were not operating. Although he went to Tlhabane instead of Mogwase, he did not report to anyone but was amongst the striking workers. He conceded that he attended a meeting between the appellant and the striking workers at Tlhabane on the 17th November 2009 when the workers at Mogwase were not yet on strike.
- [35] Mr Fleetwood testified that during the meeting of the 17th November 2009, it was clear that Mr Pule was representing the employees. Mr Stuurman also denied

that he reached an agreement with Mr Pule to the effect that Mr Letanke may stand-in for him.

[36] Mr Johannes Itumeleng Leshi deposed to an affidavit wherein he stated that he was employed at Mogwase as a diesel mechanic. According to him, the court order and ultimatum were read at 15h45 at the Mogwase depot. At approximately 16h00 he reported for duty and worked until 16h15 because they knock off at 16h15 on Fridays. During cross-examination, the bus control register was showed to him. According to the said register buses were leaving the depot at 15h11, 15h12 and 15h13. He could not explain why the buses were leaving the depot at 15h11 when the ultimatum was only read at 15h45. He testified that he clocked out at 16h30. When he was confronted with the clock records he changed his version and testified that he did not clock in or out on 20 November 2009. He ultimately testified that he clocked out at 16h15.

[37] Mr Dingaen Ngobeneni deposed to an affidavit wherein he stated that he was present at the Mogwase depot when the ultimatum was read at approximately 15h30. After hearing the ultimatum, he returned to work. He clocked in at approximately 15h45 and clocked out at approximately 16h15. During cross-examination, he stated that the ultimatum was read at 15h45 and at approximately 16h30 Mr Silas Mfikwe finished reading the ultimatum. It was also put to him that the ultimatum could not have been read at 15h45 when the buses of drivers who were also on strike already left the depot at 15h11. He further testified that he went back to work at 16h15 and worked overtime and clocked out at 18h18. No rebutting evidence was led in respect of Mr Ngobeneni.

[37] Ms Nthabeleng Esther Matinke testified that she faxed a sick note on 19 November 2009 which *inter alia* stated that she will not be fit for work on 20 November 2009. On 23 November 2009, she submitted the original certificate. The appellant made her an offer on reinstatement without back pay which she refused.

- [38] Mpho Gift Mothoagae deposed to an affidavit wherein she stated that she worked at the Tlhabane depot as a cleaner. She further stated that she was present when Mr Pule read the ultimatum at approximately 14h45. She clocked in at 15h00. When she got to the offices to start working, the offices were locked and she was unable to perform her duties. She then clocked out and went home. On 24 November 2009, she was given a final written warning by Mr Motitsoe to the effect that should she participate in unprotected strike action again, she would be dismissed with immediate effect. It was put to her in cross-examination that her version is improbable because the employer would not request her to return to work and then lock her out. Mr Simon Motitsoe who is Ms Mothoagae's supervisor disputed her evidence that she returned to work. He testified that the offices were not locked.
- [39] Mr Jeffrey Tsheko Sepotokele stated, in his affidavit, that at about 14h30 he left the Tlhabane depot to go and buy food. When he returned at 15h30 Mr Sibeko, his foreman informed him that an ultimatum was read and he failed to comply with the ultimatum. During cross-examination, he stated that when he spoke to Sibeko his colleagues were already gone. Later he testified that Sibeko did not tell him to go home but because his colleagues had left he also left. He stated that knock-off time is 15h45. When asked why he left at 15h30 he responded by saying that because the people with whom he worked had already left. He testified that he and Mr Setshedi left together to buy food and returned together. He confirmed that they both spoke to Mr Sibeko. According to him, there was no caravan outside the depot.
- [40] Mr Lesego Collins Setshedi stated in his affidavit that on 20 November 2009 at approximately 14h30, he left the Tlhabane depot to go and buy food. He returned at approximately 15h45. During cross-examination, he stated that the caravan outside the depot did not sell food. He did not see Sibeko when they returned. The offices were closed when they returned. According to him, he returned to the depot in order to work. He could not explain why he would return

to work when he knew that they were on strike or when he did not know about the ultimatum.

- [41] Mr Michael Ndlovu declared in his affidavit that, on 16 November 2009, he informed Mr Motitsoe, his supervisor that he would request leave for the afternoon of 20 November 2009 in order to take his son to hospital. Motitsoe gave him permission. On 20 November 2009, he participated in the strike from 07h30 to 13h00 after which he left to take his son to the hospital. During cross-examination, he testified that his wife informed him on 16 November 2009 about the child's illness. He decided to take the child to the hospital on 20 November 2009 because he was not going to work during that weekend. He offered to submit proof of the fact that he was at a hospital in Johannesburg. The appellant accepted that he was at the hospital and did not insist on proof.
- [42] Mr Johannes Motitsoe denied that he had a conversation with Mr Ndlovu with regard to his son or that he gave him permission not to be at work on 20 November 2009.
- [43] Mr Hlapelang Khunou's version was that he was at the clinic on 20 November 2009 to fetch his TB medication. He testified that he had Corrie Viljoen's permission to go to the clinic. During cross-examination, he testified that he arrived at the clinic at 7 and left 12. He could not report for duty due to transport difficulties.
- [44] Viljoen denied that he gave Khunou permission to be absent from work on 20 November 2009.
- [45] Mr Simon Niemandt, the appellant's regional manager overseeing both depots testified that on 20 November 2009, he was at Tlhabane. According to him, the court order and the ultimatum were read at approximately 13h00. He also requested section leaders or department heads to conduct a roll call to see whether the workers returned to work. A list was compiled of all the employees

who did not report for duty. On 21 January 2010, he deposed to an affidavit wherein he stated that on 20 November 2009 at approximately 15h00 he made copies of the court order and read out its contents to those workers who were present at the Tlhabane depot at the time. He could not explain why Mpho Motwagae received two sanctions for the same misconduct. He further testified that Mr Moalosi was at work and that in as far as the list indicated that he was dismissed, it was a mistake.

- [46] Mr Simon Motitsoe testified that he was the operations manager at the Tlhabane depot. On 20 November 2009, he worked from 06h30 to 18h00. He compiled a list of all the employees who were not at work at 15h00 and gave it to Niemandt.
- [47] Mr Hendrick Jansen confirmed that Mr Moalosi reported at 15h00 and was allocated work. He further confirmed that Moalosi was not suspended.
- [48] Mr Albert Snyders testified that he was the depot Manager at Mogwase and that the ultimatum was read out between 13h00 and 14h00. He, like Niemandt, deposed to an affidavit on 21 January 2010 wherein he stated that the ultimatum was read at 15h00.
- [49] The court *a quo* rejected the respondents' argument to the effect that their dismissal was procedurally unfair. This finding of the court *a quo* is unchallenged.
- [50] On the issue of the substantive unfairness of the dismissals, the court *a quo* found that the respondents were unfairly dismissed. The court *a quo* pointed out that Niemandt and Snyders deposed to affidavits wherein they stated that the ultimatum was read at 15h00 and the respondents who were represented by Mr Mooki testified that the ultimatum was read later than 13h00. Therefore, so reasoned the court *a quo*, the ultimatum was in fact read at 15h00. It found that the time of reading the ultimatum and the time of returning to work coincided and therefore there was insufficient time for the workers to return to work.

[51] The court *a quo* also found that even on the appellant's version – that the ultimatum was read at approximately 13h00 – the dismissals were still unfair. The court *a quo* was of the view that two hours to return to work was insufficient because the respondents were not given proper opportunity to consider whether they should return to work and what the consequences of a failure to return to work would be. According to the court *a quo*, the fact that the respondents were no longer union members required of the appellant to give them time to consult with their families. The court *a quo* put it thus:

‘ In these circumstances, it seems to me that fairness required the respondents to have afforded the applicant's (sic) the opportunity to go back home and discuss with their families the implications of refusing to obey the ultimatum. Put differently the individual applicants needed assistance also from their families in weighing their options in as far as compliance with the ultimatum was concerned.

[52] The court *a quo* also found that the roll call was made in an inconsistent manner and that the appellant's evidence, relating to the roll call, was not persuasive. The appellant was also criticised for not producing the roll call list.

[53] Lastly, the court *a quo* found that irrespective of the weak explanation tendered by some of the respondents for their absence at the time the ultimatum was read, none of them deliberately absented themselves to “avoid listening to or avoided compliance with the ultimatum (sic)”

[54] Mr Orr on behalf of the appellant challenged the court *a quo*'s findings before us. He argued that there is other objective evidence that support the appellant's contention that the ultimatum was read at approximately 13h00. He further argued that none of the respondents testified that they had insufficient time to consider their options. He submitted that the court *a quo* was wrong in as far as it expected the appellant to show that some of the respondents deliberately absented themselves in orders to avoid hearing the ultimatum being read.

- [55] It is beyond cavil that the purpose of an ultimatum is to get workers who are participating in unlawful industrial action back to work. Although the participation in an unprotected strike remains a serious misconduct, workers can avoid the ultimate sentence, which is dismissal, by complying with an ultimatum. Those who comply with the ultimatum may not be dismissed, because compliance is an act of atonement. Those who do not comply may be dismissed, after being heard, because non-compliance is an unacceptable act of defiance, especially where the employer had obtained a court order declaring the strike illegal and therefore unprotected. It has been said that an ultimatum is as much a means of avoiding a dismissal as a prerequisite to affecting one. *See Modise and Others v Steve's Spar Blackheath* [2000] 5 BLLR 496 (LAC) at para 149 and 150.
- [56] The ultimatum must be fair and geared at achieving its primary purpose of getting the workers back to work. Whether an ultimatum was fair will depend on the facts of the particular case.
- [57] All the employees who were represented by Mr Modisakeng admitted that the ultimatum was read at 13h00. This was recorded in the pre-trial minute. Those who were represented by Mr Mooki disputed that fact. Those who were represented by Mr Mooki gave different times when the ultimatum was read and contradicted each other in this regard. Mr Pule and Ms Mothwagae testified that the ultimatum was read at 14h45 at the Tlhabane depot. Both of them testified that the workers had no difficulty complying with the ultimatum. Ms Mothoagae expressly stated that she had no difficulty complying with the ultimatum. On the other hand, Mr Sepotokele and Ms Setshedi testified that they left the Tlhabane depot at 14h30 to buy food. Mr Sepotokele stated that they returned at 15h30 whilst Mr Setshedi stated that they returned at 15h45. Both testified that on their return the other workers were already working. It is clear on their evidence that at 15h45 (latest) the workers were already back at work. This can only mean that the ultimatum was read before 15h45 at Tlhabane.

- [58] Mr Leshi and Mr Ngobeni testified that the ultimatum was read at 15h45 and 15h30 respectively. They could not explain why the bus control register showed that buses were leaving the Mogwase depot from 15h11. They could also not explain why the bus drivers who were also on strike signed in at 14h15 at Mogwase if the ultimatum was only read at 15h30 or 15h45. It is clear that the ultimatum must have been read at least before 14h15.
- [59] It seems to me that Niemandt and Snyders made *bona fide* mistakes when they stated in their “service affidavit” that the ultimatum was read at 15h00. Their evidence was that it was read at 13h00 at Tlhabane and between 13h00 and 14h00 at Mogwase. The objective evidence, the admission by the respondents represented by Mr Modisakeng and the evidence of those workers who testified that they were at their workplaces at 15h00 in my view corroborates their respective versions that the ultimatum was read before 15h00 at the respective depots. Approximately 600 workers were on strike. 560 were at their workplaces at 15h00. This shows that the overwhelming majority adhered timeously to the ultimatum. There is in any event no evidence from any of the parties – except for the mistake in the affidavits of Niemandt and Snyders – that the ultimatum was read at 15h00. The court *a quo*’s finding that the ultimatum was read at 15h00 is, with respect, incorrect.
- [60] Only eight out of the 600 employees contended in the pleadings, that the ultimatum was unfair because they did not have sufficient time to consider their options. None of them testified about this. None of them testified that they needed more time to consider their options or discuss their situation with their families –assuming that this would be a justified or legitimate request. There is no evidence that the time given to comply with the ultimatum was too short. On the contrary, even those who contended that the ultimatum was unfair testified that they had no problem to comply with it. In my view, the court *a quo*’s finding that the respondents had insufficient time to consider their options is without factual foundation.

- [61] Mr Orr submitted that the court *a quo*'s finding that where individual respondents were not at either of the depots when the ultimatum was read, the appellant was required to demonstrate that those respondents had deliberately absented themselves, to avoid compliance with the ultimatum is too onerous. A proper reading of the court *a quo*'s judgment in this regard does not bear out Mr Orr's contention. The court *a quo* did not place any burden on the appellant neither did it state that the appellant bears the *onus* to prove that they deliberately absented themselves in order to avoid being present when the ultimatum was read. What the court *a quo* did was to state, as a fact, that there is no evidence before it that any of the respondents deliberately absented themselves in order to avoid being there when the ultimatum was read. It did not say that, that was a requirement. I find no fault in the court *a quo*'s exposition of the facts.
- [62] In any event, in circumstances like these, where the employees were not represented by a union and where there was no strike committee or discernible communication channels between and amongst the employees there must be some indication that the employees were aware of the ultimatum. The employer must therefore prove that the employees were aware of the ultimatum or that they would reasonably or in all likelihood have been aware thereof and that they did not comply therewith. Knowledge of the ultimatum is important for a finding that there was no compliance therewith. It would then be incumbent on the individual respondent to tender an explanation as to why s/he was not aware thereof and why s/he did not comply therewith. Where the employees are represented by a union other considerations, which are not relevant for purposes of this judgment, will apply. I now turn to evaluate the evidence of the individual respondents.
- [63] Although Mr Nokwane gave different reasons as to why he left the depot on 20 November 2009 before the ultimatum was read, his evidence that he was not there when the ultimatum was read cannot be rejected. There was no rebutting evidence to the effect that he was there when the ultimatum was read. Likewise

his evidence that Lucky Molatlhegi and Shapie Mathabathe were also not at the depot when the ultimatum was read cannot be gainsaid. There is therefore no evidence that they were aware of the ultimatum.

- [64] There is no explanation as to why the following employees did not comply with the ultimatum: Willy Motshegoa, Martinus Sekete, Nechodemus Moirapula, SR Modisakeng and Bornwise Mngomane. Their dismissal was therefore fair. Ms Bertha Mfulwane also purportedly testified on behalf of a group. It later transpired that she did not know whether the others complied with the ultimatum or not. No explanations were given by them or on their behalf, as to why they did not comply with the ultimatum. They are Lipkin Lamola, Titus Modibedi, Kenneth Kwena, Pinky Matome, Lizzy Khunou and Lucky Mpipi. Their dismissal was also fair.
- [65] Mr Mfulwane's version is improbable because she would not be singled out as a person who did not adhere to the ultimatum for no apparent reason. Mr Pretorius' version is more probable and credible. It is clear that his evidence that he saw Mfulwane and Matome at 16h00 with Spar plastic bags should be accepted. I find that Ms Mfulwane's version that she adhered to the ultimatum is not only improbable but untruthful. Her dismissal was fair.
- [66] Mr Paul Malekutu testified on behalf of Joseph Phalale, Mathews Malungwana, Godfrey Ntsoe, Piet Kgaswane, Isaac Malungane and Ephraim Molefe. It was clear that Mr Malekutu was not a credible witness. According to him, the ultimatum was read at 16h00 at Mogwase. He could not explain why other workers returned to work at approximately 14h15. He in any event conceded that the ultimatum could have been read out at 15h00. If this is so then why did he only return at 16h00? No explanation was given. According to him a certain Barney told him to return to work on Monday but he makes no mention of this in his affidavit. In my view, this group must all stand or fall on the credibility of Mr Malekutu's evidence. Mr Malekutu's mendacity as a witness having been shown,

they must all fall by his evidence. Their dismissal was fair.

- [67] In my view, Mr Pule's evidence must also be rejected. It is clear that he was an untruthful witness. All indications are that he was one of the leaders of the striking worker. His evidence that he was not on strike is nonsensical. He works at Mogwase but was at Tlhabane when the ultimatum was read. He assisted with the reading thereof. He knew at 13h20 that the strike was declared illegal by the Labour Court. He did not tender his services then neither did he do so after the ultimatum was read. If he wanted to, he could have tendered his labour at Tlhabane or asked that they take him to Mogwase to report for duty. He went to Tlhabane on 17 November 2009 with his private vehicle before the workers at Mogwase joined the strike. The strike commenced on 18 November 2009 at Mogwase. His evidence that he made arrangements with Letanki to stand-in for him also falls to be rejected. I also accept Stuurman's evidence that Pule did not make any arrangements with him. There is therefore no legitimate reason why he did not comply with the ultimatum. His dismissal was fair.
- [68] Mr Lashie's evidence that the ultimatum was only read at 15h45 is rejected. Likewise his evidence that he only got to the workshops at 16h00 is also false. He therefore tendered no justification for his failure to comply with the ultimatum.
- [69] Although Ms Mothoagae's explanation is improbable, the evidence is that she was given a final written warning and dismissed for the same offence. The appellant could not give an explanation as to how and why this happened. It is unfair to punish an employee twice for the same offence. In my view, the lesser sentence which was imposed first must, in the absence of any explanation, stand. Her dismissal was unfair.
- [70] Mr Sepotokele and Mr Setshedi clearly fabricated their versions. Initially it seemed as if their versions are in sync. After cross-examination, it was clear that their version were contrived. Their versions differ as to the time they returned, whether they saw or spoke to Sibeko and whether there was a caravan selling

food outside the appellant's premises. Mr Setshedi testified that he returned after buying food because he wanted to work. This cannot be because when he left the workers were on strike. According to him, he did not hear the ultimatum being read. How could he then want to return to work when he did not know what was happening? Their explanation ought to be rejected.

[71] Although Mr Ndlovu did not complete a leave a form, the appellant accepted for expediency, that he took his son to hospital on 20 November 2009. His evidence is improbable. His wife informed him on 16 November 2009 that his son is sick. He did nothing about it. On 20 November 2009, he participated in the strike until 13h00 and then left the Northwest Province to take his son, who resides in Gauteng, to hospital. He proffered no reason why his wife could not take the child to hospital between 16 November 2009 and 20 November 2009. No reason is given as to why he left so late given that he had no appointment with any doctor. He also lied when he testified that Motitsoe gave him permission to take the afternoon off. Motitsoe denied giving such permission. It is in any event improbable that he would have requested permission whilst they were on an unprotected strike. It is further improbable that he would have been given the afternoon off without signing a leave form. Motitsoe's evidence is clear in this regard. Mr Ndlovu's explanation ought to be rejected.

[78] Mr Khunou's evidence that he got permission from Mr Viljoen to be absent on 20 November 2009 was untruthful. Mr Viljoen's evidence that he was not Mr Khunou's supervisor at the time but Barney Du Preez was unchallenged. In his affidavit, Mr Khunou stated that he spoke to Viljoen. In his statement, he stated that he asked for permission on the 17th November 2009 but he testified that he did so on 19 November 2009. He stated that he went to the clinic from 07h00 to 12h00 and could not report for duty due to transport problems. He however submitted a medical certificate from the Sunrise Park Clinic to the effect that he attended the clinic on 20 November 2009. It is also clear on his appointments card that he attended on 30 October 2009 on which date the appointment for 20

November 2009 was made. His explanation that he was not aware of the ultimatum is reasonable and acceptable.

- [79] Mr Ngobeni's evidence relating to the time the ultimatum was read is clearly false. He contradicts himself with regard to the time he clocked in and out. He even stated that he worked overtime on 20 November 2009 a fact that he did not mention in his statement. His version is far-fetched and nonsensical. It ought to be rejected.
- [80] Mr Kenneth Matuwe like Mr Pule could not explain why he did not offer his service at Tlhabane although he works at Mogwase. He was aware of the ultimatum.
- [81] The situation of Ms Matinke has become moot. We were informed that she was reinstated with full back pay.
- [82] Mr Thabo Molefe's evidence was that he had transport problems and did not report for duty on 20 November 2009. He was not aware of the ultimatum. Although most employees reported for duty there is no evidence to gainsay Mr Molefe's evidence. His explanation cannot be rejected as false or improbable because it is not clear how the other employees went to work. His dismissal was unfair.
- [83] The court *a quo* ordered the reinstatement of the respondents from 23 October 2012 after considering the fairness of reinstatement from date of dismissal. It is not clear from the judgment how the court *a quo* settled on that date. Mr Orr did not request us to interfere with that date if we should order the reinstatement of the respondents. I am of the view that the decision as to whether the reinstated employees should now, after so much water has flown under the bridge, be issued with final written warnings is best left for the employer to take.
- [84] I accordingly make the following order:

84.1. The appeal is upheld to the extent set out below.

84.2. The order of the court *a quo* is set aside and replaced with the following order:

“(i) The dismissals of Joseph Nokwane, Skapie Mathebula, Lucky Molatlhegi, Mpho Mothoagae, Thabo Molefe and Scotch Khunou were substantively unfair. The appellant is ordered to reinstate them with effect from 23 October 2012 with full salary and benefits.

(ii) The dismissal of all the other respondents was substantively and procedurally fair.

(iii) There is no order as to costs.”

84.3. No order is made as to costs of the appeal.

C J MUSI JA

Waglay JP and Dlodlo AJA concur with Musi JA

APPEARANCES:

FOR THE APPELLANT:

Advocate Orr

Instructed by Bowman Gilfillan Inc (sandton)

FOR THE RESPONDENTS:

No appearance.