



REPUBLIC OF SOUTH AFRICA

Reportable

**THE LABOUR COURT OF SOUTH AFRICA
IN JOHANNESBURG
JUDGMENT**

Case no: JS 960/09

JS 1017/09

In the matter between:

JACKSON MNDEBELE & OTHERS

1st to 51st Applicants

(JS 960/09)

TOGETHERNESS AMALAGAMATED
WORKERS UNION OF SOUTH AFRICA
("TAWUSA") obo MNDEBELE & 137
OTHERS

52nd to 106th Applicants

(JS 1017/09)

and

XTRATA SOUTH AFRICA (PTY) LTD
T/A XTRATA ALLOYS (RUSTENBURG
PLANT)

Respondent

Heard: 5 – 16 September 2011

Delivered: 21 August 2012

Summary: (Unfair dismissal claim – unprotected strike action – boycott of

compulsory wellness day launch function – what constitutes ‘work’ for the purposes of a strike – procedural fairness - sanction)

VARIATION OF JUDGMENT

LAGRANGE, J

Introduction

- 1] On closer perusal of the varied judgment, it is apparent that some abbreviations and names were not properly reflected as well as other typographical errors, necessitating a further variation of the judgment, as set out below.
- 2] Wherever the letters “WAC” or “RC” appear these should be substituted with the word “Cilliers”.
- 3] Wherever the letters “WS” appear these should be replaced by “Sengani”.
- 4] Wherever the letters “JN” appear these should be substituted with the word “John Nutu”.
- 5] Wherever the letters “BM” appear these should be substituted with the word “Bernard Mchochwa”.
- 6] Replace all references to “Mohlaba Mogale Inc.” with “Mohlaba Moshwana Inc.”
- 7] Delete “was” from the phrase “she responded was that there” in paragraphs [25].
- 8] Delete “Emmanuel Dzanibe, the production manager” and replace with “Dzanibe” in paragraph [42].
- 9] Delete “were any questions, there were none.” and replace with “were any questions: there were none.” In paragraph [43].

- 10] Replace “VCT” with “voluntary counselling and testing” in paragraph [48].
- 11] Delete “in” from the phrase “after he had addressed in the workers” in paragraph [54].
- 12] Replace “However, later seemed to agree” with “However, he later seemed to agree” in paragraph [66].
- 13] Replace “time to do it being busy with her duties” with “time to do it as she was busy with her duties” and “that day refused to attend” with “that day, they refused to attend” , in paragraph [67].
- 14] Replace insisted on one hearing with “insisted on holding one hearing” in paragraph [76].
- 15] For clarity, replace “There had been protest action at the plant and a demand for management to meet Mr Masemene of TAWUSA to discuss the short pay received since December.” With “There had been protest action at the plant and a demand for management to meet Mr Masemene of TAWUSA to discuss the short pay received since December, which he was attending to.” in paragraph [85].
- 16] Replace “0730 hours” with “07h30 hours in paragraph [86].
- 17] Replace “before day of the launch” with “before the day of the launch” in paragraph [114].



A handwritten signature in black ink, consisting of a stylized, cursive script. The signature is positioned above two horizontal lines that extend to the left and right.

R LAGRANGE, J

Judge of the labour court

27 August 2012



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JUDGMENT ¹

LAGRANGE, J

Introduction

18] The applicants in this matter, who consist of two separately represented groups, claim that they were unfairly dismissed for allegedly participating in unprotected strike action at the respondent's plant on 3 March 2009.

19] An incidental issue that arose was which of the individual applicants were represented by the union (‘TAWUSA’) and who was being represented by Mohlababa & Moshokane Inc (‘the non-union group’). This is a matter which was unresolved when the matter came to trial. There is no dispute that the individual applicants were represented by either the union or the attorneys, and for the purposes of this judgment nothing turns on it, as the result is the same for all the applicants. Should it be necessary to determine this at a later stage, additional evidence will be required and the matter may be set down to determine this. When the dismissal dispute was first referred to the bargaining council it concerned 138 employees. The first referral

to this court of a statement of claim was made under case number JS960/09 by the attorneys' firm mentioned above on 16 September 2009, claiming to act on behalf of all 137 applicants. Shortly thereafter in early October 2009 the union made its referral under case JS1017/09, purporting to act on behalf of 57 of the applicants. Separate pre-trial minutes were concluded between the parties in respect of the two cases. The respondent then brought an application to consolidate the two cases which was done on 5 August 2011 following an agreement between the union and the respondent that the matters could be consolidated. Initially, the union opposed the consolidation application. At that stage, the respondent acknowledged that the first group of applicants represented by Mohlaba Moshwana Inc. were 52 in number and the second group represented by the union consisted of 55 applicants in total.

The central issues

Issues to be decided

20] The key issues which the court is required to decide are whether or not:

20.1 the applicants did participate in strike action leading to their dismissal on 9 March 2009;

20.2 the termination of employment was procedurally and substantively unfair;

20.3 dismissal was an appropriate sanction in the circumstances,

20.4 an attempt was made with the union to discuss the course of action which the company intended to adopt, and

20.5 if there was any ultimatum issued to the employees.

21] Before dealing with the events leading to the dismissals, it is useful to

consider the pleaded versions in the matter to highlight the main differences between the parties.

The pleaded versions of the parties

- 22] The pleaded versions of the two groups of applicants differed in some important respects, as did the two pre-trial minutes which were concluded between each group of applicants and the respondent, respectively. No consolidated pre-trial minute was concluded, so an odd situation arises in which the non-union group had agreed with the respondent on a number of factual issues, whereas the union had not agreed and accordingly were matters that still had to be established in evidence even though two parties agreed on them. *The non-union group*
- 23] The non-union group of applicants claimed that the dismissal was procedurally unfair because they were not afforded an opportunity to state their side of the story and the dismissal was decided in their absence. Further, they claim that no contact was made with the union to discuss the course of action which the employer intended to adopt and the ultimatum which was issued.
- 24] They also pleaded that the reason they did not attend the launch of the wellness campaign on 3 March 2009 was that they wanted the General Works manager to address them on the fact that testing for HIV and AIDS was compulsory that day, that he failed to tell them why it was compulsory and they decided to go back to their workstations.
- 25] On the conduct of the disciplinary hearings, they maintained that they attended the disciplinary hearing in terms of the notices which they received on 6 March 2009, but the hearing could not proceed because the employer insisted on conducting the hearing with 10 groups of employees at a time. Management eventually called security guards who told the workers to go back to work. According to them, management did postpone the hearing to 9 March 2009, but

when 10 employees went to the hearing as proposed, they were told they had already been dismissed. No mention was made in their pleadings of an appeal being lodged.

The union group

- 26] The union pleaded a version in considerably more detail. It said that about three weeks before the wellness campaign launch workers had been advised by Mr M Molefe that testing for HIV would be compulsory and he referred them to the General Works manager when they complained about this. That was why, on 3 March 2009, they asked to be addressed on the question, but when the General Works Manager came he simply told them the furnaces were off so they either had to attend the launch where they would be tested or he was going to take their names and deal with them. They said compulsory testing was contrary to what had happened in the past when such testing was voluntary. Rather than attending the launch and subjecting themselves to forced testing they decided to return to their workplaces and continue with their normal duties.
- 27] Contrary to the version of the other group, they pleaded that the union's head office had been contacted by management to say that there was a strike in progress, and the union in turn had contacted one of the applicants about this who had reported that everyone was performing their normal duties. Their pleaded version of what happened on the date of the first disciplinary hearing is the same as the non-union grouping, save that they claimed not all of the applicants received notices of the enquiry. They also conceded that at the toolbox meeting of 6 March 2009 the applicants were advised that everyone should attend the disciplinary enquiries, despite not having received notices to that effect, and consequently they all did.
- 28] They further pleaded that they were not informed of the date and time of the next scheduled hearing on 9 March 2009, but nevertheless learnt from the HR Manager, Ms F Suliman, that the hearings were to have taken place at 07h30 that morning and they

would receive dismissal letters on 10 March 2009. The union claims that a collective appeal was lodged by it on 12 March 2009 but it never materialised.

Employer's version

- 29] The respondent's statement of case was set out in some detail. For introductory purposes, it is not necessary to repeat the version except to highlight essential differences between the applicants' accounts and its own. In this regard, it claimed that no production work had taken place after the plant's furnaces had been shut down the previous December. The non-union group agreed in the pre-trial minute that operations had ceased in December 2008 and that from January to July 2009 employees only worked on a normal day shift and did not work any overtime or night shift. Accordingly they did not qualify for the related allowances. They also agreed that if they were not in their usual departments they would be requested to assist with certain designated duties in other departments of the plant.
- 30] The respondent also claimed that a meeting took place on 26 February 2009 between management, union and unofficial shopfloor representatives to discuss various employees' queries. The queries related, amongst other things, to annual leave, overtime pay, night shift allowances and remuneration. At the end of the meeting individual pay queries had not been resolved. This was also conceded by the non-union group in the pre-trial minute. It must be mentioned that the union representatives at the meeting were from the National Union of Metalworkers ('NUMSA') and not TAWUSA, which was not formally recognised by the respondent at that time.
- 31] As regards the interaction between the applicants and management on the day of the launch, the respondent's version was that when management representatives approached the employees who had gathered at the administration building instead of proceeding to the launch, the workers told them they were not interested in attending the launch until the respondent resolved their pay issues. The

managers responded that the pay issues had nothing to do with the wellness launch and that if they did not attend the launch they would be disciplined for engaging in unprotected strike action. According to the respondent, a further effort was made to appeal to the workers who did not attend the first session to attend the second session of the wellness launch. This message was conveyed to a meeting of all the production workers in the canteen at approximately 11h45 hours that day, and some workers responded positively to this appeal. The union was also advised about the members' participation in the strike action and was asked to warn them of the consequences of the same.

- 32] The employer essentially agreed that the first disciplinary hearings could not proceed because no agreement could be reached on whether a mass hearing or hearings of groups of 10 applicants at a time would be held, but says that the applicants were only dispersed when they became disruptive. The workers were further advised orally that the disciplinary hearings would continue that day and those which had been scheduled in the morning would resume at 13h45 to give them an opportunity to obtain representation by fellow employees. The applicants did not attend, but employees represented by NUMSA did.
- 33] The respondent pleaded that, after finding the employees guilty, the chairperson "considered that the Accused Employees had a previous (albeit expired) final written warning for participation in an unprotected strike and accordingly imposed the sanction of dismissal."
- 34] It further claimed that employees whose disciplinary enquiries could not be concluded on 6 March were issued with fresh notices to attend enquiries on 9 March 2009, starting at intervals from 07h30, but the applicants did not attend. The chairpersons' conclusions were the same as in the previous instances. TAWUSA made a belated request to represent the applicants on that day, but the hearings had already been concluded *in absentia*.

35] Some of the dismissed employees appealed and TAWUSA requested that a single appeal hearing should be held at which employees would be represented by 10 elected representatives, but the respondent would not agree to a hearing on this basis and advised the union of the scheduled dates and times of the appeal hearings. However, the union declined to attend as did some of the dismissed employees. Of those who did attend their appeal hearings some were successful in obtaining reinstatement.

The evidence

36] The parties called a number of witnesses. The respondent commenced leading evidence. In order of appearance, its eight witnesses were: Ms F Suliman, the HR Manager ; Mr W A Cilliers, the General Works Manager ; Mr E Dzanibe, Production Manager ; Mr M A Magatsela, Security Technologist ; Mr S Majombosi, Skills Co-ordinator ; Mr E Molefe, a Wellness 'Champion'; Ms R Molabatse, Systems Co-ordinator, and Mr P B Hlatshwayo, Production Superintendent. The applicants called two witnesses Mr T P Bubisi, a tapping team member, and Mr K Zwane, a furnace operator.

37] For ease of narration, the summary of evidence set out below will follow the sequence of events rather than iterating each individual witness's testimony. Issues of credibility will be addressed separately where necessary.

38] The relevant events and issues leading up to the dismissal may be conveniently described under the following headings:

38.1 the nature of work being performed at the plant in the first quarter of 2009;

38.2 the grievances lodged by a section of the workforce before the wellness launch;

38.3 the publicity preceding the wellness day and what was conveyed to employees about the wellness program during certain so-called

'toolbox' meetings;

38.4 the events of 3 March 2009 when the wellness launch took place, and

38.5 the disciplinary proceedings.

The activities of employees at the plant in the first quarter of 2009

39] The question of what exactly employees were doing at the plant in March 2009 acquired some prominence during the hearing as an issue because of the employees' defence to the allegation that they were on strike. The thrust of the applicants' case was that once they had received no satisfaction from Cilliers about the question of compulsory testing, they returned to their "normal duties". They claimed they were engaged in production activities, and in particular, what was referred to as 'hand recovery' of metal from slag piles. For its part, the respondent's contention was that to the extent employees were engaged in activities of any sort, they were engaged in training, painting and cleaning activities.

40] In any event, the essence of the respondent's case is that the applicants were issued with a lawful and reasonable instruction to attend the launch of the wellness program on 3 March 2009, and their failure to do so, coupled with their representations to Cilliers over their wage queries, amounted to strike action. Thus, although evidence was led at considerable length about training that the applicants were supposedly undergoing and the cleaning tasks they were performing, the charge of participating in unprotected strike action related specifically to their alleged boycott of the wellness campaign launch taking place on that day. Assuming for the time being that they were under an obligation to attend the wellness launch and that a failure to obey a lawful and reasonable instruction was sufficient to constitute industrial action and if the other requirements of what constitutes a strike were met, then what the

applicants were doing up to that point or afterwards is not particularly significant. However, as it may have some indirect relevance to other issues in the case, the activities will be outlined.

The nature of work performed in the first quarter of 2009

- 41] In early December 2008, the General Works Manager, Cilliers, issued a notice to all employees of a drastic reduction in production and shutdown of furnaces owing to the world economic crisis and a major slump in stainless steel demand which had impacted on the business more than anticipated. According to the notice, the firm's biggest customers cancelled all their orders for December and for the first quarter of 2009. Consequently the firm decided to extend the leave period so that it would last from 11 December 2008 until 18 January 2009. The additional leave would be advanced to employees as a credit against their 2009 paid leave. Cilliers confirmed that continuous casting was shut down in December 2008 as it had been decided it was better to try and sell the firm's excess stock. The shutdown ended in May 2009 when production resumed on only two of the six furnaces. There was a staggered resumption of normal production which was only returned to normal levels in September that year. He confirmed that during the shutdown period, part of the plan was to occupy workers with training.
- 42] According to the evidence of Suliman, the period from January to June 2009, was a period during which no production work was done, but employees attended various training sessions in health and safety industrial relations and SAP systems. When she was challenged with the non-members' version that they were doing hand recovery work and cleaning, she responded that there could not have been any hand recovery work to do if the furnaces were not operating. Dzanibe confirmed that training for production workers was scheduled during the months of January to March 2009.
- 43] Cilliers's evidence on the question of hand recovery differed to some

extent with Suliman. He agreed that in the first month after the furnaces had been switched off, cleaning - up operations would have been done and metal which had been skimmed off with slag would have been picked out. However, it definitely would not have been on the work schedule in March. Under normal production conditions, today's spillage would be recovered the following day. The volume of any additional recovery work after production was shut down would not have taken more than 2 to 3 days to complete. It was suggested to Cilliers under cross-examination that there would have been a huge quantity of unrecovered metal when the plant was shut down, but Cilliers pointed out that there was competition between the different plants in the company to lower costs and if all metal was not recovered and weighed, then this would be reflected in higher production costs for the relevant month.

- 44] Dzanibe also confirmed that no hand recovery took place in March 2009 and would not have occurred if the furnaces were off. Majombosi corroborated this and denied that there were heaps of slag left at the end of the year from which metal still had to be recovered. In particular, he specifically denied that Paul Bubisi was performing 'hand recovery' work. He recollected that the contractors who performed outside recovery had stopped working in November 2008, contrary to the evidence of Cilliers and Hlatshwayo who said they stopped in early December that year.
- 45] Hlatshwayo explained under cross-examination that the work process was not designed for spillages, and that is why contractors were engaged for outside recovery. When it was suggested to him that the production employees had performed this function from January to March 2009, he challenged them to show him the production figures recording that, because the weight of metal recovered would have been recorded. This indirectly corroborated Cilliers's evidence that outside recovery was recorded as part of the volume of metal produced because it affected the plant's production costings.

- 46] Dzanibe was questioned closely on the scheduled training by Mr Morwane. He agreed that the production workers would not have been fully occupied with training duties and would return to the plant when they had finished where they would be assigned housekeeping duties by their shift co-ordinators. Majombosi confirmed that apart from training, workers were engaged in housekeeping and painting. Dzanibe said there would not have been more than 3 to 4 days recovery work to be done and that the type of duties assigned to production workers would have been painting and cleaning work. Although he insisted that workers could not have performed any work without supervision, he had no direct knowledge of what work was assigned to them each day. Majombosi denied that the workers performed cleaning or other duties without supervision. He would delegate tasks at the toolbox meetings and inspect work before workers knocked off.
- 47] Dzanibe stated that slag normally took a day to cool before it could be worked on and it took the sub-contractors who previously dealt with recovery about a day to deal with the average day's spillage. He was adamant that there were no large piles of slag around when the plant closed in December 2008, even though the contractors had been taken off the job in October that year. Majombosi was also adamant that no shifts were engaged in hand recovery of metal from slag. However, when Bubisi testified he claimed that there was a slag pile twice the area of the court room and twice his height when they returned to work in January 2009. Excavation of the slag was being conducted by a small mechanical excavator. He also testified under cross-examination that slag obtained from spillages when the furnaces were still on was combined with the slag obtained from scavenging, even though it was put to him that these different materials obtained through outside recovery are not mixed. When he continued with his evidence the following day he then said that such 'mixing' did occur during a slow down.
- 48] Bubisi's initial version of hand recovery work was that, it did not

require supervision. However, under cross-examination he said that on 3 March 2009 he was working under the supervision of one Mr K Zwane, who was a furnace operator who was representing Majombosi. They worked until the normal departure time at 16h30. It is notable, that Majombosi was not challenged on his evidence that he would check the work that was done every day, and it was never suggested to him that he had delegated his responsibilities to Zwane. Zwane's only evidence in chief was to corroborate Bubisi's version that, responsibility for supervising hand recovery had been given to him by Majombosi. He could not explain why the persons who supervised hand-recovery operations for furnaces 1 and 2 and 3 and 4, under normal operating conditions, Messrs D Magoje and E Masuku, respectively, would not have been in charge of supervising such activity. He also could not explain why the applicant's had failed to put this version of his supervisory role to Majombosi.

- 49] Zwane was confronted with alleged production sheets which showed furnace production and outside recovery tonnages for the months of December 2008 to March 2009. The applicant's objected to the introduction of this evidence, which had not been introduced in the company's evidence in chief, but I allowed its admission into evidence as the company was entitled to put documents to Zwane to rebut his version of being delegated to supervise hand recovery work and that the tonnage recovered was recorded. Zwane then said that Majombosi was responsible for recording the tonnage recovered.
- 50] At face value, the documents suggested that an amount equivalent to about 10 % of the ordinary furnace tonnage for December 2008 was obtained from outside recovery, but there was no outside recovery or furnace production recorded for the first quarter of 2009. Later, in his re-examination of Zwane, Mr Morwane sought to place the authenticity of the signatures on the documents in doubt and that it was strange the production documents were not signed by Cilliers. Zwane noted also under re-examination by Mr Mogane that signatures of production managers seemed for different departments

appeared to be identical and suggested the documents could not be reliable for this reason.

The grievance meeting of 26 February 2009

- 51] Suliman testified that she was approached by the production manager, Dzanibe, with a request that two employees would like to see her, namely 'Dannyboy' and Mr T B Bubisi. They claimed to represent the production workers, even though they were not shop stewards of NUMSA. Suliman asked the NUMSA shop steward, Wilson Sengani to attend the meeting as well. When asked why she had permitted the two individuals to approach her directly, she said that she had an open door policy and Sengani did not know about the issues they wanted to raise. She also mentioned that at that stage the recognised union was NUMSA. Two of the issues raised at the meeting namely the absence of a nightshift allowance and overtime, related to remuneration which was no longer paid after the shutdown of the furnaces and cancellation of night shifts and overtime. The third issue concerned unspecified individual pay queries. The understanding reached was that the company would be provided with a list of the individual queries, but that never happened.
- 52] The union representative questioned Suliman closely to try and discredit her version that such a meeting took place. Bubisi, testifying as a witness for the employees represented by TAWUSA, though initially he said he was neither a member of TAWUSA nor NUMSA, strenuously denied that such a meeting had ever taken place. Under cross-examination he said the only reason he gave evidence was that he had been implicated in the alleged meeting about pay issues. He was just an ordinary member and the elected shop stewards of TAWUSA were J Mdebele and J Mthembu. He could not explain why the company witnesses would have identified an ordinary worker like himself as having requested a meeting, rather than the shop stewards. He further denied being dissatisfied with the changes in remuneration, which had occurred as a result of the reversion to a

straight day shift after the furnaces were closed.

- 53] Dzanibe said he had phoned Suliman to say that P Bubisi, one 'Dannyboy' and Wilson Telane had asked for a meeting to discuss pay issues. He confirmed that the issues raised were about annual leave, the shift allowance, overtime pay and individual pay issues. The leave query concerned the issue of taking further leave during 2009 because of the leave taken in December 2008. They were unhappy about the lack of overtime pay because they had budgeted on the basis they would be receiving it. On the individual queries, Suliman had asked Telane to assist Bubisi and 'Dannyboy' to compile a list and to obtain payslips from the workers concerned.
- 54] It was put to Dzanibe that it was unlikely such a meeting would have occurred because it would have taken place contrary to the procedures and protocols for raising such issues, especially as neither of the two employees who raised the issues were shop stewards. Dzanibe said he listened to them because he was concerned and the HR department had agreed to the meeting provided the shop steward was present. Majombosi claimed not to have been aware of any pay queries being the reason why production workers did not attend the launch.
- 55] Hlatshwayo was aware of individual queries arising from the loss of; overtime, shift allowances and the like, but not of any collective grievance. As a result he was unaware of what he referred to as 'the memorandum' submitted to the HR department until the day of the wellness campaign launch. He denied he should have been the first to know of this, as the production manager could also have dealt with it. It appears Hlatshwayo's recollection was that, talk of a memorandum had first been raised when he had attended the gathering of the production workers on the day of the Wellness Campaign launch. He identified the person who mentioned it as one "Mogoeng" who was with two other employees identified as 'Ramodia' and 'Tsepo'

The Wellness Campaign

- 56] Suliman testified that the only material difference between the wellness campaign in 2009 and the previous campaign was that other chronic illnesses were included in the tests which were available. It was a national campaign launched by the parent company. Under re-examination, she recalled that there was also no launch day in the 2007 campaign, and participation in the voluntary testing programme was poor. This was confirmed by Cilliers who said that previously the participation rate in the voluntary counsellor and training campaign had only been about 50% and the CEO of the company based in London wanted to achieve 100% participation. To introduce the campaign a number of so-called "wellness champions" were appointed who briefed employees during their toolbox meetings. These persons were specifically trained to brief employees on the campaign and to explain to them on a daily basis what to expect during the voluntary counselling and training phase. The object of the campaign was firstly for people to learn their status, then for those who require treatment to receive it so that people would be able to continue a long and prosperous life on treatment.
- 57] The company had been advised that the low response in previous campaigns was because it required those who wanted to be tested to leave the workplace to queue for testing. That unnecessarily identified and stigmatised those who went to be tested. On this occasion, during the second phase of the program all the employees would be counselled by a nursing sister and they could then indicate whether they wish to be tested or not. In that way no one would know who had actually agreed to be tested. The wellness champions were trained to convey this in the preparation for the campaign.
- 58] Toolbox meetings were held in different units before a shift started when employees were briefed on specific work outcomes and safety issues. Hlatshwayo testified that the campaign built up over a period and was regularly raised at toolbox meetings. An example of a minutes of such a meeting held on 11 February 2009 with the

production staff of furnaces 1 to 4 recorded the following:

"Wellness Launch-there will be a launch on the 03/03/2009.

Every employee must attend the launch.

CLOSURE: Emilio to have full kit and also must report more

REDS. Also employees must not forget to attend the launch.

Wellness champions will be given a platform to brief employees about the wellness program and launch. This will be done every day."

59] Dzanibe, attended this meeting. He said that all the production workers and eight production co-ordinators were present. He could not obtain attendance registers for all the teams as some co-ordinators had lost them. Majombosi confirmed that he no longer had his attendance register for that day, and there was no prescribed time period for which they had to be retained. The meeting was also attended by the production engineer, a technologist and the Production Superintendent, Mr B Hlatshwayo, who was responsible for furnaces 3 and 4, together. Hlatshwayo confirmed that Molefe had addressed the meeting and told workers that attendance at the launch on 3 March was compulsory but testing was voluntary. He also made it clear that no testing would take place on that day and testing would include other illnesses. Dzanibe also confirmed that the wellness champions had a daily platform at the toolbox meetings to address employees.

60] Under cross-examination, Dzanibe confirmed he had left the meeting after Molefe's presentation. He said that when Molefe asked if there were any questions: there were none. He did not hear of any altercation taking place when he left. He agreed that the minute of the meeting did not reflect that the date of the launch and the date for voluntary testing were not the same, but said that Molefe had told the meeting that on the day of the testing, testing would be voluntary. Later, under re-examination he confirmed that he did not hear anyone asking questions about the supposed compulsory testing, nor

did he hear any report after the meeting that there was a concern expressed about this. Majombosi, who remained at the meeting until it ended, did not hear any queries of this nature being raised. He was also confident that Molefe had clearly distinguished between the compulsory attendance of the launch and the voluntary testing. Majombosi did say under cross-examination that he did not know if Dzanibe was at the meeting, but he did not see him on that occasion. He maintained that it was explained that testing would be voluntary even though the minute of the meeting did not specifically mention this. He also said that if there had been any complaints about the testing programme he would have been the first to know. Hlatshwayo mentioned that even though there was time for questions at the end of Molefe's presentation, no questions or queries were asked. Hlatshwayo said he left after the silence following Molefe's briefing, but conceded he would not have known how the item was concluded. He said Molefe was at the meeting from the beginning.

- 61] When he was questioned why voluntary counselling and testing was not mentioned in the agenda, Hlatshwayo's explanation was that VCT was part and parcel of the wellness campaign. Although no date was mentioned for the voluntary testing at the toolbox meeting, the fact that testing would be voluntary was mentioned. Dates were on the notices on the notice boards. As he understood it, the importance of the launch was the information that was going to be conveyed at that function.
- 62] Bubisi also attended the meeting and heard Molefe address it. Molefe told the meeting about the campaign and that testing for all the illnesses mentioned would be compulsory. According to Bubisi, this was a surprise to the workers. In previous HIV campaigns they were never told it was compulsory and only those who volunteered to be tested attended. When J Mndebele queried this with Molefe he could not 'give them clear answers'. He never gave them an answer to the question and told them that if anyone wanted answers they should go to the owner of the company because he was sent by

management to speak to them. In turn, workers at the meeting told him that he must call management to come to a meeting with the workers since he was sent by management.

- 63] Under cross-examination, Bubisi went further and stated that Molefe had also said the launch and the testing would be held on the same day. Bubisi was taxed in cross-examination why Molefe was not asked about the statement that management should be approached for answers.
- 64] He said Dzanibe and Hlatshwayo left the meeting before Molefe did. In the end the meeting was not 'concluded' and management did not hear the worker's side of the issue. Bubisi agreed that Molefe had addressed the meeting on the other ailments such as diabetes and which they would have to be tested for.
- 65] The voluntary counselling and testing programme was scheduled to start on 09 March and would run until 20 March 2009. The testing was conducted at an area outside the plant by five nursing sisters. There was an incentive of R100 offered to everyone who underwent testing and further incentives if they needed treatment and subsequently underwent the treatment. Dzanibe testified that he attended a voluntary counselling and testing session. The attendees were shown a video after which they went to separate cubicles where a sister explained the nature of the tests and that the testing was voluntary.

Events on 3 March 2009 (the launch day)

- 66] Suliman testified that attendance at the wellness launch was compulsory and attendees had to sign the attendance register. A program of the launch shows that the session was to be divided into various presentations, motivational talks, a drama session, industrial theatre, ending in a raffle draw using the tickets issued to attendees. The agenda for the different sessions was placed on the notice boards according to Suliman. All employees were issued with tickets

for the launch which entitled them to refreshments and to participate in a raffle at the end of the launch.

- 67] Bubisi testified that workers attended the toolbox meeting as usual that morning. They were reminded by their supervisors that they had to attend the wellness day event. Bubisi could not recall which supervisor or foreman had conveyed the message. The workers expressed their dissatisfaction with this because they had asked Molefe to go to management and they were still waiting for his response. Their foreman told them to go to the assembly area and management would meet them there. This explanation of how the workers had come to assemble on the grass was never put to any of the company witnesses.
- 68] The launch was divided into a morning and afternoon session. In the morning session production staff from furnaces 1 to 4 would attend and in the afternoon staff from furnaces 5 and 6 would attend.
- 69] Dzanibe said he was told by Hlatshwayo and John Nutu that the production workers were refusing to attend and he went to speak to them. Hlatshwayo says he was asked by Cilliers where the workers were, and Hlatshwayo left the tent to find out. On his way he met Majombosi and Nutu. He did not get a clear explanation from them. However, when he got to the gathering of employees and enquired why they were not coming to the launch they told him they were not coming because of their issues raised in the memo sent to the HR department which had not been addressed. The person who gave this response was one 'Ramodia'. When he told them they were expected at the launch they told him to 'fuck off'. He could not say who had said it. Majombosi tried to address the gathering but they would not listen to him. Hlatshwayo characterised the mood of the crowd as disruptive and unruly. Contrary to this, Bubisi was adamant that he was next to Ramodia in the gathering and the latter did not utter a word.
- 70] Cilliers described the launch as a big day for the company. The

managing director of the company arrived at about 07h15, but by 7h45 the tent was only about half full. Cilliers said he asked Majombosi where people were and he told them they were not coming. He instructed him to go and fetch them but they refused. He then sent the production manager, JN, to talk to the workers and they returned saying that the employees were in front of the social services office and will not be coming because they were unhappy.

71] Cilliers was very upset and went to the group of workers himself and asked them why they were not coming. He was told by one employee that they were not happy about pay. Cilliers's view was that, that could be discussed on another occasion and they should attend the launch because the managing director was waiting. Cilliers was very upset because he tried to prevent retrenchments and "stuck his neck out" in asking for them to be paid. He was not prepared to talk to them and they wanted to strike and pointed out to them that there was no production they could stop. He warned them that when he returned they would be "discussing separation". He decided that the launch must carry on and reported to the managing director that there was unhappiness about pay. He also asked the NUMSA representative Bernard Mchochwa to speak to the workers after the morning session. Mchochwa later reported to Cilliers that they did not want to listen to him. Suliman essentially confirmed what the production coordinators had told Cilliers at the launch tent. Cilliers had spoken to Suliman after he had addressed the workers on the grass and told her that they had wanted to resolve their pay queries before they could attend the launch. She explained to him that they could not address those queries because they never received the requested query list.

72] Cilliers denied that anyone had asked about the wellness program and found it difficult to believe that Molefe, who was one of the wellness champions, would have misled employees to believe that testing was compulsory as he was thoroughly committed to the campaign. Cilliers went to speak to the workers after he had

instructed Dzanibe and another production manager to speak to them without success. He said when he went there he asked them why they were not attending. He was told that they have some pay issues. He told them that it was very important to attend to the launch as it was for their benefit and they could gain from it. He stressed that he would not discuss pay issues at that time: those could be discussed after the launch. He was accompanied by Dzanibe and Hlatshwayo. Hlatshwayo translated into Setswana what Cilliers said, and workers told them to 'fuck off' in English and Afrikaans. He said there was no overt intimidation he could see, but the crowd was disruptive and was shouting when Dzanibe and Cilliers addressed them. He conceded he saw no evidence of violence or weapons being brandished. There were some contradictions between Cilliers and Hlatshwayo's evidence about whether Cilliers found him at the meeting, but Hlatshwayo recalls Cilliers joining him and Dzanibe later at the tent.

- 73] Although Hlatshwayo said he was at the gathering when Cilliers arrived, he confirmed he had translated Cilliers's message to the gathering. It was put to him that he was not understood by the crowd and it would have been better if Dzanibe had translated. but no evidence was led on this score.

- 74] Hlatshwayo said it was he who told Cilliers that the reason for the workers not attending the launch was the pay issue. He confirmed that Cilliers was angry and told the gathering that the issues in the memo to HR would be sorted out but they must go to the launch tent. Dzanibe essentially corroborated Cilliers's account and that the workers were disruptive and unwilling to listen. He also confirmed that Cilliers was angry. It was put to Dzanibe, but not to Cilliers, that Hlatshwayo could not have interpreted for Cilliers because he was Zulu speaking, but Dzanibe responded that he might speak with a Zulu accent, but spoke Setswana.

- 75] Bubisi contended that while he was waiting on the grass with the others, he saw Dzanibe with one group of the workers and went to

listen. After a couple of minutes he left and returned with Cilliers. Cilliers told them to go to the tent and if they did not , they should notice that the furnaces were not running and he would take further steps. Asked for the words used by Cilliers, he answered that Cilliers had said he would note their names and there would be 'a separation'. After that speech, the workers returned to work according to him. No question was posed to the workers by Cilliers according to Bubisi, contrary to the testimony of company witnesses. He claimed that the reason they had not asked him why the testing was compulsory that year was because he was angry, and because he had not approached them with the purpose of addressing the issue that concerned them.

- 76] When asked why he did not attend the launch, Bubisi's response was that he wanted to attend the launch on that day. However, Molefe had said it was compulsory to test and the workers wanted to meet with top management before going to the launch tent and had assembled on the grass to hear management's explanation of why they had to go to the tent. He was adamant that pay queries were not the reason for remaining on the lawn. At the end of his testimony he said he wanted to go to the launch to obtain information on diseases, but he did not go because Cilliers never gave them a chance to understand why testing was compulsory. Moreover, it was taking place on the same day as the launch.
- 77] After the morning launch session, Cilliers asked a senior NUMSA unionist to try and persuade them to attend the afternoon session.
- 78] Dzanibe was tested on the nature of the instruction to attend the launch. He was adamant that it was part of that day's schedule of activities and part of that day's work for everyone. He regarded their action as strike action because they refused to attend the launch because of their pay queries. The launch was compulsory and it was part of their work to attend. He did not think it was unfair to require employees to attend the launch.

- 79] Cilliers conceded he was angry as the event was very important for the company, and it was the only thing the workers could disrupt as no production was taking place. He believed it was part of the campaign by TAWUSA to gain more recognition to show that they could cause disruption. At that time, the company had only granted the union stop order rights and NUMSA was still the recognised union. He disputed the contention that the queries had been about the Voluntary Counselling and Testing. The Wellness Programme had been in the pipeline since the last quarter of the previous year and they had ample opportunity to raise any concerns before then.
- 80] Dzanibe was the master of ceremonies at the launch and could see the production workers remained on the grass during the launch. Afterwards, when they went to the canteen he went to the canteen with Majombosi. The NUMSA shop steward told them they could still attend the afternoon session of the launch and if they did not do so they would face disciplinary action. The workers told him it was a TAWUSA meeting. Nobody asked why the HIV testing was supposedly compulsory, nor was that raised at any time during the morning.
- 81] The majority of those who did not attend were TAWUSA members. Only a handful of NUMSA members did not attend. She sent a letter to the union after the first session of the launch, concluded at about 12 o'clock. The letter stated:

"Re: Unprotected Industrial Action

The company will would hereby like to bring to your attention that some of your members have embarked on unprotected industrial action on the morning of 03 March 2009.

We hereby reserved the right to take any necessary action to remedy the situation and encourage you as a union to advise your members of the consequences of their actions.

Please do not hesitate to contact me if you have any queries in

this regard."

- 82] At that point, the workers who had boycotted the launch returned to the canteen after remaining on the grass near the administration block where the general works manager had addressed them. Cilliers asked the chairperson of NUMSA's shop steward committee, B Mchochwa to address the workers in the canteen to try and persuade them to attend the afternoon session. A few employees responded to this appeal and attended the afternoon session. Majombosi also attended the meeting in the canteen with Mchochwa at about 12h15. Workers had turned all the chairs around so they faced the entrance doors. Mchochwa asked them to go to the launch, as it was 'a must' and they would be making trouble for themselves if they did not attend. However, the workers did not respond and did not reply when asked what was wrong. The two of them then left the workers in the canteen. Majombosi said none of the workers came back to the workplace before 16h30 and denied that they had returned to their normal duties that afternoon.
- 83] Bubisi's version was simply that workers returned to work after they dispersed after Cilliers spoke to them. However, he later seemed to agree that they went to the canteen and returned to their work after lunch, but no meeting of any kind had taken place there. He returned to his hand recovery work, but their foreman, Majombosi, was not present. The issue of whether this work was supervised is discussed above. Under cross-examination, Suliman conceded that if the employees who did not attend the launch had returned to their workplace they would not have been on strike, though she was advised that the employees who had gone to the canteen remained there until they knocked off work at the normal time.
- 84] Suliman did not personally issue any ultimatum because other managers were assigned to address the matter and she did not have time to do it as she was busy with her duties at the launch itself. The

employees were charged with participating in an unprotected strike action because they had been issued with a reasonable lawful instruction to attend the wellness launch and despite being paid for that day, they refused to attend. Under re-examination, Suliman said that if the strike had not ended an ultimatum would have been issued. In the past three ultimatums had been issued.

- 85] Cilliers was of the view that what the workers had done amounted to unlawful industrial action and they would follow the normal steps for taking disciplinary action against them.

The disciplinary process

- 86] According to Suliman, the production superintendents had collected the tickets of the launch which had not been issued to determine who did not attend as a basis of identifying who should receive notices of a disciplinary enquiry. The tickets issued to employees bore their company number. Production coordinators then called together groups of employees and asked them to sign for receipt of the notices. Although Suliman could not testify directly about the handing over of the notices to the employees she was advised by the coordinators that the notices had been handed out. In any event all the employees arrived at the hearing venue.
- 87] However, Majombosi testified that he did issue notices to all A-shift workers and this was not disputed under cross-examination. The charge contained in the notices to attend the disciplinary enquiries read:

"On 03/03/2009 at 07h30, you participated in an unprotected industrial action, in that you refused to continue with normal activities at the operation. Even after management had spoken to you and requested you to attend the wellness launch you still continue to gather the entrance of the plant and refused to attend."

- 88] Bubisi denied receiving any notice on 4 March of the enquiry and maintained that the toolbox meeting on that day proceeded normally after which they returned to their duties. According to him it was only the following day, in the toolbox meeting that their foreman told them in the meeting that all the workers who did not attend the wellness campaign launch were charged and must attend a hearing the following day at 07h30. They were reminded again at the toolbox meeting of 6 March to attend the hearing and they went to the Lost City boardroom. This version of how the employees came to know of the hearing was never put to the company witnesses and, under cross-examination, Bubisi conceded that he could not say that Majombosi had not given notices to anyone else in A-shift. It was also put to Bubisi that it was unlikely the employees would not have queried being instructed to attend a hearing merely on oral notice. Moreover, given that TAWUSA's own statement of case was that, notices were issued to workers on 5 March 2009, it was inherently improbable that some would have received notices but others not.
- 89] Hlatshwayo said he drew up the charge and signed the notices, the day after the launch, and it was issued to workers based on the unused tickets that had been collected at the launch. He regarded their failure to attend the compulsory launch as misconduct and that is what prompted him to initiate the charge. In reply to the contention that since there was no work being performed by workers on that day, on the company's version, they could not have been on strike, he answered that their work for the day was to attend the launch. Attendance at the launch was compulsory: if you did not attend the launch, you did not work.
- 90] Hlatshwayo appointed Dzanibe to be the chairperson because company policy required the relevant head of department to chair enquiries in their departments. The wisdom of this choice was questioned by Mr Mogane, who pointed out that Dzanibe had been present when the recalcitrant workers had been addressed by Cilliers and Hlatshwayo. Hlatshwayo said that no objections were raised by

the employees to Dzanibe's appointment as chair even at the appeal stage.

- 91] Hlatshwayo said all the employees who had been charged arrived at the Lost City boardroom at 07h30 on 6 March 2009. The scene at the boardroom was chaotic and out of control. Suliman said that it was the employer's intention to draw up schedules of groups of workers, ten at a time, to conduct the hearings. When she tried to address the employees on the procedure for conducting the hearings, she was not given a chance to explain and she was told to shut up. Hlatshwayo tried to convey the same message to the employees. When one Dumisane and Hlatshwayo tried to calm the workers down they were told that they were her 'dogs'. Dzanibe confirmed the insults hurled at the managerial personnel.
- 92] At this time Suliman estimated there were about 50 persons inside the building and a similar number outside.
- 93] Mr A Magatsela, the firm's Security Technologist, was summonsed and tried to calm matters down and eventually workers left the building. He testified that when he arrived he saw angry, shouting people. He recalled that Hlatshwayo and Dzanibe were in attendance when he arrived. When he stood on the table he asked everyone to leave except those whose names were on the list he was given by Hlatshwayo for the first hearing, which he read out. However, nobody remained in the hall because everyone 'barged out'. He conceded that when he read out the list in the board-room, it was possible some persons did not hear him because a number of the crowd were still shouting. Suliman remembered that Magatsela told her that the workers were demanding that all of them should attend the hearing at the same time and she explained that it would not be practical. Dzanibe, who chaired the enquiries, said that the workers who had arrived for the hearings insisted on holding one hearing and were not interested in the proposal to combine ten cases at a time. They were disruptive and would not let Suliman address them even when Hlatshwayo stood on a table in the board room and tried to calm

them down. Similarly, when Magatsela spoke to them they would not listen.

- 94] Bubisi's version was that workers did not want to leave because they had been told to come to their hearing at that time. Moreover, they were simply told to disperse. Everyone was behaving quite normally. He agreed that Magatsela climbed on the table to speak to them and then they all left and returned to their workstations. He denied hearing Suliman or anyone else saying the company wanted to conduct hearings with 10 employees at a time, even though TAWUSA's statement of claim confirms that this was said. It was put to him that it was implausible that all of them would have simply dispersed without anyone querying what would transpire regarding the enquiry. His answer was simply that he did not know what happened to the hearing but if management was serious they would have repeated the process. He denied any knowledge of a demand for a single hearing.
- 95] The crowd insulted him in derogatory terms and threatened that he 'would pay' if they lost their jobs. He denied telling them all to disperse. Outside the building he addressed them and explained how the hearings would be conducted. Magatsela says he read out the list of names of those due to attend the rescheduled enquiries at 13h45 and 16h00. Hlatshwayo says he gave Magatsela the list of names. Hlatshwayo claimed he was next to Magatsela when he addressed the workers outside the building and was convinced they heard him reading out the names of those who should attend the two enquiries on that day and that the remainder would have their hearings on Monday, 9 March 2009. Magatsela said he and Hlatshwayo had tried to hand out notices to those outside but they threw them on the grass.
- 96] Magatsela did read out the names of the first ten employees who were to attend the first session of the disciplinary enquiries at 09h30 hours. Suliman denied that the workers returned to their workplaces after they were addressed outside the building. A note was made on

the individual hearing forms of the affected individuals confirming that they had been 'verbally' informed of the new time. However when the time arrived, nobody attended even after workers who were still outside the building were told that the hearing would start in their absence.

- 97] The remainder were told that their hearings would be on 9 March 2009 and copies of amended notices signed by the complainant were issued to them on that day. It was never put to company witnesses that when Magatsela supposedly spoke to workers outside the boardroom, there was nobody there to hear him. Bubisi denied that Hlatshwayo was holding any notices in his hand, and denied any knowledge of the rescheduled hearing for later that day.
- 98] Suliman conceded that the amended notices did not specify the time of the hearing. Some workers discarded the forms and these were collected after they had dispersed by security personnel. It was suggested to Suliman under cross examination, that these workers did not know of the postponement, but she pointed out that the union would not have written the letter (referred to below) if they had not known of the new date. Hlatshwayo agreed that not everyone received revised notices of the hearing on 4 March 2009 and that some were issued the following day only which would have been less than the two days notice stipulated in disciplinary code. However, he later insisted that all employees who were required to attend enquiries on 6 March did receive their notices on 4 March. He also agreed that some employees might not have heard their names called out, but questioned why a number of the employees refused to accept notices of the enquiry. He also pointed out that the employees were free to appeal if they said they did not get notice of the enquiry. Hlatshwayo also agreed that the hearings on 6 March were scheduled after normal working hours.
- 99] At 13h45 on 6 March, when the first (postponed) hearing was due to commence, nobody attended and Dzanibe conducted the hearing in absentia. He dismissed them for participating in unprotected

industrial action in accordance with the firm's code of conduct. Under cross-examination he said Hlatshwayo confirmed that those employees who were supposed to attend had been given notice of the hearing. Dzanibe said Hlatshwayo had a bundle with him but did not provide him with written proof the employees had been notified of the hearing. When referred to the handwritten note indicating the new time of the hearing on the hearing notices, he agreed that the notification had been done 'verbally'. He denied that it was unfair to have relied on this oral notification of the hearing. He agreed that the hearing had been scheduled after the normal knock-off time on a Friday, namely 13h35.

100] Hlatshwayo, who testified as the complainant at the hearings, confirmed that the hearings followed the sequence set out in the blank pro-forma hearing minute. He testified on the events of the previous day and how the workers who had not attended the launch could be identified by the tickets picked up.

101] The hearing scheduled for 14h00 that day followed the same pattern. Dzanibe conceded that he had been present at some of the events on 3 March 2009, but insisted he was capable of not being biased and would not agree that it might have been inappropriate for him to act as the chairperson of the enquiries.

102] Cilliers was not present at the boardroom where the above events took place. There had been protest action at the plant and a demand for management to meet Mr Masemene of TAWUSA to discuss the short pay received since December, which he was attending to. This was not disputed and lends credence to the claim that workers wanted to deal with pay issues on the day of the launch. Management sent administration staff and to meet with Masemene. At the meeting he was handed a letter and was told that the company would not meet with him under threat. The protesting workers left after this meeting.

Hearings on 09 March 2009

103] Most of the remaining 70 or 80 employees with enquiries pending did not present themselves for the hearings when they were scheduled to start at 07h30 hours on 09 March. Dzanibe also chaired those hearings. Of those who did attend, some claimed to have been intimidated and were given final warnings. Hearings proceeded in absentia for those who did not attend and they were also dismissed. He satisfied himself that the employees who attended had received an amended notice of the hearing, by asking them if they had received a written notice of the hearing, which they confirmed. Hlatshwayo said it took the whole day to finalise the outstanding hearings on that day, but later acknowledged that in fact hearings took place on 10, 11 and 12 March 2009 as well.

104] It was only at 10h00 on 9 March that TAWUSA sent a fax, which stated:

"Re: Disciplinary Hearing for Our Members

1. *with the above reference we are been instructed by members to request for them to elect 10 members who will attend the hearing on their behalf as a **COLLECTIVE HEARING**.*
2. *Written warning issued We also request the memo delivered to our members informing them not to participate in an unprotected strike and how you have addressed them as Management.*
3. *We as the union of the accused would like to know how the strike action affected the production of the employer whether schedule 8 to the LRA was taken into account because we understand that there are employees dismissed already in the company due to this unprotected strike action Tuesday the employees embarked on.*
4. *Remember that the substantive fairness of such a dismissal of*

us depends on all circumstances surrounding the strike and not merely on the fact that the strike is unprotected in terms of the LRA."

105] Apparently because the HR manager was attending the hearings which were held elsewhere on the company premises she only received this letter at about 14:00. The pertinent portion of her reply stated:

Unfortunately the request to elect 10 representatives to participate in the hearing on behalf of the accused employees cannot be granted. The company cannot agree to the employee not attending his/her scheduled hearing. It is in the best interests of the employee to attend the scene given explanation for the alleged misconduct. Every employee has a right to be represented by fellow employee at the hearing; this however does not mean that the employee does not have to attend the hearing.

As to your question regarding how production was affected. You are well aware that the plant is nonoperational at the moment, however on the date the protected industrial action took place; employees were instructed to attend a company wellness initiative, which they fail to do. You are also reminded that even though the plant is nonoperational at the moment employees are still receiving their salaries are required to report for work and on management instructions in the normal course."

106] By that stage approximately 40 employees' enquiries had been processed. In response to the letter the company confirmed that it intended continuing with the hearings but gave the union an opportunity to attend and represent them at the hearing. Suliman testified that she attended all of the enquiries.

107] From Bubisi's perspective, workers were oblivious to these developments and had not been notified of any hearings scheduled for 9 March. It was only on 10 March that they were simply advised

by their foreman after lunch that they were dismissed and should all proceed to the Lost City boardroom, which they did. They were then presented with their 'charge form' and notices of their dismissal. He claimed to be still ignorant of the reason he was dismissed. He could not offer any explanation how TAWUSA could have known of the dismissals on 9 March 2009 if workers were only told the following day. Once again it was suggested to him that it was improbable, workers would simply accede to the instruction to proceed to the board room without querying how they came to be dismissed. Bubisi said they did not ask, because he would simply have said he did not know the reason and would have referred them to others. Bubisi could offer no explanation for the contents of the letters of TAWUSA which showed a much greater awareness of what was happening to its members than he was prepared to admit to.

The appeals

108] According to Suliman all the dismissed employees appealed, but TAWUSA made a written request for the appeal to be conducted collectively which was sent to the company on the day the hearings were due to take place. The union filed a collective appeal form in which the grounds of appeal were set out in the following terms:

"We were not informed about the hearing its date and time and we were not engaged in strike. We only wanted to enquire why the undergoing of HIV test is compulsory this year whereas the last several years it was voluntary."

109] Attached to this appeal form was a list of names next to 93 of which were signatures. The company did not proceed with the appeal hearings on that day in view of the letter but postponed them to 20 March 2012. Nonetheless, in keeping with its stance that each employee had to make an individual appeal it insisted that, appeal forms should be filed for all the remaining individuals as the appeal form submitted only bore Mr J Mndebele's name. According to Suliman the reason for insisting on individual appeal forms was that

the company was not satisfied on the basis of the single appeal form submitted that all employees would appeal on the same grounds. The company also wanted an opportunity to question the individual employees.

110] The union responded by implicitly confirming that all its members adhered to the grounds of appeal set out in the single appeal form sent to the company. This time, the letter was addressed to Cilliers in an apparent attempt to communicate directly with senior management and not through the HR manager. It stated in a letter dated 17 March 2009:

"We are being requested by our members to respond to your memorandum above.

1. *They all lodged an appeal which they are still waiting for a set down date.*
2. *They are willing to VOLUNTARILY participate in the company wellness campaign as it was the wish to really understand that whether the campaign was voluntary or compulsory as it was firstly addressed to them. **SEE ATTACHED LETTERS***
3. *We realised that the information brought by your line management to the people is not what you told them to do especially your HR manager even wrote the letter to this office that they instructed employees to attend the campaign because the company is paying them as the plant is not in operation. We request that you intervene this matter urgently and respond to this office.*

We request that you intervene to this matter urgently and respond to this office"

111] On 27 March 2009, the company relented partially on its insistence on individual hearings by offering to hear groups of five individuals at

a time in combined appeal hearings. On 30 March 2009 in a letter in reply from the union, apart from complaining that some of the names on the list sent by the company were not clear, it said somewhat cryptically:

"we are being requested by the dismissed members to request that if the company is willing to conduct the appeal hearing, then they want to be represented by only 5 (five) elected employees to attend to their appeal hearing and the rest of the employees to wait outside for the outcome in order for the appeal not to delay their salaries which are still pending."

112] It would seem from this reply that the union had not accepted the compromise proposal of joint hearings of five appeals at a time, but had reduced its own demand for joint representation at a single appeal hearing to only five representatives. The company confirmed in a letter on 2 April 2009 that this was its understanding of the letter and that it could not agree to such a request. It reiterated that it wanted to make sure that the appeal hearings were conducted in a fair manner and that the individuals be present. It reiterated its offer to hear the appeals in groups of five and undertook to pay employee salaries on 3 April 2009 so that the appeal hearings would not delay the payment of their salaries. Again the company reiterated that, on receipt of acceptance of its proposal, the appeal hearings would be scheduled accordingly. Suliman was challenged as to why the company did not proceed to hear the appeals because the workers had reported at the company premises, but she said that because the union had not accepted the proposal of hearing 5 appeals simultaneously, they could not proceed. Cilliers was of the view that TAWUSA was attempting to gain recognition through this process as it had been refused recognition in view of the threshold of membership in terms of which the company recognised NUMSA.

113] Bubisi confirmed that the workers had been told by their leaders of the date set for the appeal hearing but they waited in vain at the gate until 12h30 on the appointed day as management never attended to

them.

The sanction of dismissal and the validity of the 2007 final written warning issued for participation in unprotected strike action

114] Suliman conceded that the normal period of validity for a warning was six months, but she contended that it was still relevant because of the tendency of production employees to stop work if they could not resolve their grievances. She also testified that in the 2007 strike, employees had initially been dismissed for their participation in unprotected strike action but subsequently had been reinstated in terms of an agreement with NUMSA, subject to a final written warning being issued to them. Under cross-examination Suliman agreed that there had been no previous strike relating to a wellness campaign.

115] Suliman was also questioned about the fact that the strike did not last for more than a day at most. Implicit in this question was a suggestion that dismissal had been too severe a penalty, but her response was that the issue that was of concern was that the strike was 'deliberate'. It was also pointed out that there was no loss of production and there was no violence accompanying the strike, to which Suliman retorted that it was not the first time that the workers had resorted to unprotected strike action. The fact that the warning had expired did not make a difference because there was a trend in their conduct in resorting to unprotected strike action. Under re-examination, her attention was drawn to the records of a couple of hearings in which workers had complained of intimidation and were not dismissed.

116] Later, when cross-examined by Mr Mogane for the non-union group, it was put to her that in 2007, workers had not been paid when they went on strike yet on this occasion they were paid for 3 March 2009. As to why the company had not adopted the same approach of issuing a final warning and docking workers' pay, Suliman said that in 2007 that had been proposed by NUMSA, but on this occasion no

similar proposal had been forthcoming from TAWUSA.

117] Dzanibe felt it was fair to have dismissed the employees even though the strike endured only for a day, in the sense that they attended neither session of the launch, because it was clear that they would have failed to attend the whole duration of the launch even if it had been longer. He also took account of the code of conduct, which recommended dismissal for such misconduct, and the tendency the production workers had, of embarking on strike action. When it was put to him that in 2007, some of those dismissed had not been on strike on that day, he said that he wanted to treat all of the employees the same for not attending the Wellness day event, and would have dismissed all participants even if they had not participated in action in 2007. He did not respond when asked how one could speak of a trend of participating in unprotected strike action if someone had not participated in the 2007 strike.

118] When asked why nothing was entered on the pro-forma minute of the enquiry under 'mitigating factors' in respect of workers who did not attend the hearing, Dzanibe explained that because they were not present, no mitigating evidence was given, but they still had the opportunity to appeal. However, he denied that he had not considered the duration of the action, the absence of violence, or that productivity was not affected, or deducting pay for the day as an alternative sanction.

119] The first question that needs to be resolved is whether or not the conduct of the applicants on 3 March 2009 amounted to a strike? The starting point for determining the factual issue is the definition of a strike in s 213 of the Labour Relations Act, 66 of 1995 ('the LRA'). A strike is defined in the following terms:

“strike” means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving

a dispute in respect of any matter of mutual interest between employer and employee, and every reference to “work” in this definition includes overtime work, whether it is voluntary or compulsory;...

120] Two of the key requirements therefore are firstly whether the employees refused to work, obstructed work taking place or slowed the pace of work down and, secondly, was there some demand they were pursuing in doing so.¹ In this instance, the applicants admit they did not attend the launch, but argue that attending the launch did not amount to work and that they were performing productive work in the form of hand recovery anyway. On the question of pursuing any demand, they say the only reason they did not attend was that they wanted clarity on the requirement of compulsory testing before they attended and since they did not get any clarity from Cilliers, they returned to work. Both claims are disputed by the employer, who argues that attending the launch did amount to work on that day and that the workers had used the only opportunity when they could pressurise the employer by not co-operating with it, to raise their unresolved pay grievances. Further, it disputes that they were performing other productive activities in any event.

The nature of work

121] Previous debates about the scope of work were primarily concerned with whether the work which employees would not perform was contractual or otherwise. It has been accepted that under the current

¹ In ***National Union of Mineworkers obo Employees v CCMA & others* (2011) 32 ILJ 2104 (LAC)**, the LAC in more abstract terms expressed the requirements of a strike thus, at 2108, [15]: “A strike, as defined, has three key characteristics:

- 1 there must be a requisite act or omission;
- 2 it must be concerted; and
- 3 it must be directed at the achievement of a specified purpose.”

definition of a strike voluntary overtime work which an employee is not contractually required to perform can be regarded as work, the interruption of which would satisfy the act or omission part of the definition. However, in the present matter the issue does not concern non-contractual obligations and the characterisation of Smalburger, JA in **SA Breweries Ltd v Food & Allied Workers Union & others (1989) 10 ILJ 844 (A)** is apposite, viz:

“It would seem that the word “work” in the phrases “to continue to work” and “to resume their work” encompasses , broadly speaking, that which a particular employee factually engages in within the ambit of what are considered to be his normal employment duties.”.

122] Allowing for differences in phrasing between the strike definition in the former LRA and the current one, it seems it would be safe to say that activities falling within an employee’s normal employment duties would constitute ‘work’ for the purposes of the strike definition. Those normal duties would include in my view the duty on an employee to obey the reasonable and lawful instructions of the employer. In this regard the following dictum cited with approval by Basson (AM) and Hartdegen (AM), from *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 at 287F remains true, despite its archaic terminology:

‘It is, no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard - a complete disregard - of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, I unless he does so, the relationship is, so to speak, struck at fundamentally.’²

123] In this case there is little doubt and it is common cause that the

2 Commercial Catering & Allied Workers Union of SA & another v Wooltru Ltd t/a Woolworths (Randburg) (1989) 10 ILJ 311 (IC) at 313G-I

applicants did not heed an instruction by Cilliers to attend the launch. It was also not seriously contended that they did not remain on the grass for the duration of the morning session of the launch. Assuming for the moment that the instruction was merely that they must attend the launch function and not that they had to subject themselves to involuntary medical testing, there was nothing unlawful or unreasonable about the instruction.

124] However, the applicants say they were performing their normal duties. In particular they say they were performing productive hand recovery work. There are a number of problems with the 'hand recovery' allegation. Firstly, it was common cause there was no furnace operating since the previous year. Secondly, the evidence that normally spillages could be recovered within a few days after they occurred. Thirdly, it was common cause that until production was discontinued in 2008, outside recovery work was done by contractors. It was precisely because the need for this function disappeared once the furnaces were switched off that they were no longer required. Fourthly, the applicants did not put Bubisi and Zwane's version of supervised hand recovery to the company witnesses, so the latter did not have an opportunity to contradict that evidence when they gave evidence. As a result the weight I can attach to the applicant's versions is difficult to assess and I must give more weight to Majombosi's evidence that he supervised their work and checked what was done at the end of the day. There is also a significant weakness in the explanation that hand recovery was still being performed as late as March 2009. Added to this is Bubisi's explanation that he was not personally recording figures for the weight of slag recovered even though he had supposedly been given the task of supervising the outside recovery, as Majombosi should have been doing that, but he was not present.

125] If it had been the case that, then, there would have been a backlog of nearly six weeks' worth of unrecovered steel, because no new production had taken place from 18 January to 3 March 2009. This

must be weighed with the evidence that it normally took three days for the spillage to cool sufficiently before outside recovery could start, but once it cooled the recovery would take a day.

126] The next question is whether the applicants did not comply with the instruction for the purpose of pursuing some grievance or demand. The employer contends they were refusing to attend the launch until their pay grievances were addressed, whereas they say it was lack of clarity about the launch which prompted their reluctance to go to the tent.

127] In my view, the relative probabilities of these two competing versions are sufficient to decide the matter, without having to make individual credibility findings.

128] Firstly, on the applicants' version, if it was correct, it would mean that the company had changed its previous policy of voluntary testing, for no obvious reason. There was no evidence for this other than what Bubisi and Zwane claim Molefe told them. Bubisi also testified that he wanted to go to the launch but because management had not explained why testing was now compulsory he waited on the grass with the others. However, although the whole group did not go in for that reason, not one of them was willing to ask Cilliers to clarify the issue when he came to address them, even though they had supposedly been waiting over three weeks since 11 February for an answer from senior management. The fact that they acted as a group is difficult to reconcile with their unwillingness to even voice the concern that caused them all not to go to the launch, bearing in mind that they had told Molefe to call senior management to explain why testing was compulsory. Bubisi said this was because Cilliers was angry when he approached them. However, if they were intimidated by his anger, then it is odd they did not obey him when he made it clear they must go to the tent.

129] Secondly, there was no evidence that testing was conducted on the same day as the launch, contrary to what the applicants claim they

were told. In fact the evidence was that it was nearly a week later that testing facilities were available and also that inducements were offered to encourage employees to undergo testing, such as conducting it in a way that would preserve the anonymity of those who decided to undergo testing and providing a cash incentive. It is hard to reconcile such undisputed features of the scheme with an allegation that testing was to be compulsory. Moreover, since testing was not conducted on 3 March 2009, it raises the question why Molefe, who was steeped in the wellness campaign, would have misleadingly said it was going to take place on the same day. Likewise, if the testing was in fact voluntary when it was conducted, why would Molefe have said it would not be?

130] Thirdly, if workers were keen to go to the launch, but for the queries they wanted answered, why did they never raise it in any toolbox meeting between 11 February and the day of the launch if it was a matter of such concern? Further, if, as Bubisi conceded, he knew that management could not force people to undergo testing, why did he and those who shared that view not go to the launch to get the information they wanted to receive, but refuse any attempt to force them to undergo testing?

131] Lastly, if the toolbox meeting on 11 February 2009 ended in confusion, it is improbable, given his responsibility for the success of the wellness campaign, that Molefe would not have been keen to sort this out long before the day of the launch.

132] In short, it seems unlikely that Molefe would have made such a misleading statement about the testing and launch being on the same day, when there was nothing to support that this was indeed the case, and he ought to have known that. Secondly, the notion that compulsory testing was part of the 2009 programme is at odds with the evidence about how testing was actually conducted, which makes it very unlikely that it was intended to be compulsory, and that Molefe would have said it was.

133] Is the respondent's version of the reason for boycotting the launch more plausible? It is not disputed that employees lost a number of allowances and overtime pay as a result of the cessation of normal production in December 2008. We also know that a special arrangement was made to offset additional annual leave granted at the end of 2008 against employees' 2009 annual leave. All the queries which Suliman says were raised in the meeting of 26 February concerned remuneration issues linked to the consequences of the cutback. Thus the financial impact of the loss of all the previous allowances is consistent with an account that these issues were raised on behalf of employees. This meeting was also much closer to the launch of the Wellness Campaign than the toolbox meeting on 11 February 2009. This also supports an inference that it was an issue that was currently in the minds of those who raised it. There is also the evidence that Bubisi was identified as one of the spokespersons, whereas other known leaders of TAWUSA members were not identified. Had the respondents' witnesses fabricated the event, it seems unlikely they would have identified someone like Bubisi as a participant and spokesperson.

134] On balance, I am persuaded that the probabilities favour the employer's version as to why the applicants did not attend the wellness campaign launch, and that the real reason was that the applicants wanted to pursue their pay issues and force management to address them. It is true that they never produced a list of 'individual pay' queries as requested, but that does not mean there was not a grievance they were seeking to remedy and it must be remembered that all other queries were addressed at the meeting in February and it was only the unspecified 'individual' pay queries which remained to be addressed. The reason they chose that day to highlight the issue, was that the wellness campaign launch was an important event for the company and provided an opportunity to put pressure on it in a way that was not possible, given the other daily housekeeping duties the production workers had at the time.

135] Consequently, I am satisfied the applicants were engaged in strike action. It was common cause that if their conduct was characterised as strike action, it would be unprotected, so the next issue that arises is the substantive and procedural fairness of their dismissals.

Substantive and procedural fairness

136] In the case of unprotected strikes, guidance on the fairness of a dismissal is provided by Item 6 of Schedule 8 of the LRA. It states:

“(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including—

(a)

the seriousness of the contravention of this Act;

(b)

attempts made to comply with this Act; and

(c)

whether or not the strike was in response to unjustified conduct by the employer.

(2)

Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either

by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.”

137] Some features of this strike which makes it different from the typical strike scenario. Thus, its length was effectively determined by the fact that the action consisted of a boycott of the launch and hence was limited by the duration of the launch which was over in a day. It is clear from the notice of the charges that the fact that none of them took advantage of the second opportunity to attend the launch in the afternoon was seen as a continuation of the strike in the morning. Further, its impact was not economic but was designed to ensure that the planned activities of the company that day would not proceed as intended. The importance of the launch to the company should not be trivialised. It was part of a significant company-wide health initiative that was an attempt to remedy what were perceived to be the shortcomings of the previous campaign. It also represented an investment by the company in the well being of its workforce, which it was retaining in circumstances where many other employers would have retrenched. By boycotting it, the value of the launch as a component of the campaign was clearly compromised. It was clear from the design of the program that it was hoped that using a launch as a component of the wellness programme would significantly increase the prospect of employees opting to subject themselves to testing, so it had an important purpose in the context of the health initiative.

138] It is true that an ultimatum in the conventional sense was not issued. However, it was not suggested by either of the applicant's witnesses that they were baffled by what Cilliers meant when he told them if they did not go to the tent then 'separation' would be discussed. Secondly, Bubisi did concede that the workers went to the canteen and only claims they returned to their workstations after lunch. Given the importance of getting workers to attend the launch, it is more

probable in my view that management would have tried to persuade them to attend the afternoon session, before it started. In a conventional strike, more time might be allowed to let employees reflect on matters, but the opportunity to attend the launch was slipping away and would not have been available the following day. Having been warned to attend by Cilliers earlier that morning and having been afforded another opportunity at lunch time to reconsider their stance, I believe workers had sufficient time to re-consider their position between Cilliers speaking to them in the morning and the afternoon session of the launch.

139] The strike was not spontaneous, but was clearly timed to occur at the point that would create maximum pressure on the company in the context of a plant that was not engaged in productive work. Likewise it could not be characterised as one that management provoked given the nature of the demand. Management has asked the shopfloor delegation to gather the details of the alleged individual pay queries and submit them to management. They never did this after the meeting in February. The next time the issue was raised was in the strike. Thus, it could not be said to be a result of management intransigence or heel-dragging which caused the workers' frustration to build up and boil over.

140] It is true that some reliance was placed by the chairperson on the alleged 'tendency' of the production workers to strike and on the fact that many of them had been issued with final written warnings in the previous unprotected strike in 2007, which had already expired. To the extent that reliance might have been placed on a tendency that was not substantiated, or on the previous warning, that could not have been legitimately taken into account as an aggravating factor. Therefore a question is whether the dismissals were fair if this consideration is ignored.

141] It is not disputed that the employer did contact the union, though it could have done more than send a letter. However, given the union having been content to draw its own conclusion about the existence of a strike and decided not to intervene or to contact management, it cannot be said that management should have done more on the day.

142] Before finalising the consideration of the substantive fairness of the dismissals, it is necessary to address the question of procedural unfairness because the applicants conduct in relation to the hearings also has a bearing on the issue of substantive fairness, though not in the sense that they committed any further misconduct.

143] Although there was much controversy over whether employees got written notice of the enquiry scheduled to start at 07h30 on 6 March 2009, it was common cause that they all reported at the board room that morning, which means they came to know about the hearing. Further, the applicants could not dispute Hlatshwayo's testimony that he drew up the notices containing the charges and Majombosi's evidence that he handed notices to all A-shift employees was not disputed which increases the probability that it was done.

144] It was argued that in terms of the company code workers should have got two day's notice of the hearing and its stands to reason that if they only learnt of the hearing on the morning of 6 March 2009, the notice was formally defective. However, it was not part of the applicants' pleaded cases that their dismissal was procedurally unfair for this reason and it was never claimed that they needed more time to prepare for the hearing. The claim was rather that they were not notified of the hearing, yet TAWUSA conceded in its statement of

claim that some employees were served with notices to attend the hearing on that day. Likewise the non-union group's pleadings also stated they received notices, though only on 5 March.

145] On the applicants' version they were simply dispersed without being advised of any subsequent disciplinary proceedings that day. Thus although they had been told they had to attend a disciplinary hearing about their non-attendance at the launch, they assumed that management had simply decided not to proceed. Although Bubisi testified to this, what could not be explained was how the union had knowledge of dismissals already by 9 March 2012 as evidenced by its letter of that date. It seems more likely that in fact the workers did know of the hearings on 6 March 2012 if the union already knew by the next working day after the hearings scheduled for Friday, 6 March. In any event they were still afforded an opportunity to appeal.

146] A factor which bedevilled both the hearings and the appeal hearings was how they would be conducted. It is undisputed that the union sought a single disciplinary hearing on behalf of members and adopted a similar approach to the appeal hearings. This strongly supports the company's version that, workers did not want to attend smaller hearings comprising ten employees at a time. I am therefore more willing to accept that this was the main reason the hearings could not start at 07h30 on 6 March. The company was offering a comprehensive and inclusive hearing and appeal process to employees, but they decided to make an issue of this in order to reinforce their ability to act collectively.

147] If they did not attend either type of hearing, and consequently did not get an earlier opportunity to put to management the arguments they have now raised in court as to why they should not have been

dismissed, they were the cause of that. I am satisfied that the company gave them more than a fair opportunity to present their side of the story but they rejected it. In the circumstances, I cannot find that their dismissals were procedurally unfair.

148] This brings me back to the substantive fairness of the dismissals. I agree that it would be wrong to dismiss employees for conduct for which they were not charged.³ However, in my view it does not assist the applicants that they have never taken advantage of the opportunities offered to clarify their alleged understanding of the Wellness Campaign, and have waited until this trial to do so.

Conclusion

148.1 I am satisfied the employees were fairly dismissed for participating in unprotected strike action on 3 March 2009 and their dismissal was procedurally fair for the reasons above.

148.2 As the applicants might have genuinely believed they had good prospects because of their conception of what constituted strike action, irrespective of their conduct, I make no award of costs.

Order

149] In the circumstances, the applicants' claim of substantively and procedurally unfair dismissal is dismissed and no order is made as to costs.

³ See *Flex-O-Thene Plastics (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 1028 (LAC) at 1031, [11] and [12].



R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

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i As varied on 21/08/2012 and 27/08/12