

REPUBLIC OF SOUTH AFRICA



IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Not reportable

Of interest to other judges

CASE NO: JS 163/12

In the matter between:

FOOD AND ALLIED WORKERS UNION

1st Applicant

DIPUO MATLOU & OTHERS

2nd and further
applicants

and

**FOURIE'S POULTRY FARM (PTY) LTD
T/A CHUBBY CHICK**

Respondent

Date of trial: 10 -13 March; 31 March; 3, 16 and 17 April 2014

Date of judgment: 8 July 2014

Summary: Claim of unfair dismissal following mass dismissal for participation in an unprotected strike. Claim of provocation rejected - dismissal substantively fair. Dismissal held to be procedurally unfair, on account of employer's failure to comply with the provisions of Item 6 of the Code of Good Practice in relation to proper ultimatum and fair hearing. Compensation awarded, except to those dismissed employees identified as having participated in acts of strike-related violence.

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This case concerns the dismissal of the individual applicants on 31 August 2011, after they participated in an unprotected strike at the respondent's premises in Luitingh Street, Potchefstroom, North West Province.
- [2] The strike that is the subject of these proceedings commenced on 30 August 2011. Early that morning, the individual applicants gathered outside the fence surrounding the respondent's premises, and refused to start work.
- [3] The fence that separated the parties serves as an appropriate metaphor for the state of industrial relations at the respondent's plant, and perhaps more generally. On one side, stood the management, whose primary concern was to secure a return to work and full production. They thought that this was best accomplished by bellowing through a loudhailer a series of ultimatums to return to work or be dismissed, and passing copies of each ultimatum through the fence. All of these (predictably) were ignored by the workers, who threw the copies back over the fence. On the workers' side of the divide, a self-appointed cheerleader in the form of a local political activist led the individual applicants in chants that amounted, in some instances, to an incitement to commit murder. During the course of the strike, at least some of the crowd engaged in acts of gratuitous violence, and at least some of those employees who chose to work during this period were threatened with physical harm.

- [4] The next day, 31 August, before any meeting with the union, the individual applicants, most of them with many years' service, were dismissed. In subsequent discussions between management and the union, when matters came down to the proverbial wire, the respondent recognised that its interests were best served by compromise and a return to work of all of the dismissed employees. But the respondent required an immediate return to work before any discussions on grievances could commence. The individual applicants, on the other hand, insisted that there be a written agreement listing their grievances before they would return to work. With the application of a modicum of common sense, a solution might easily have been found. But attitudes had hardened to the extent that the gap was never bridged, with the consequence that more than 750 employees lost their jobs (with the resultant loss in income for them and their dependants) and a loss of millions of Rands for the respondent, which hired a new and inexperienced workforce. The cheerleader, of course, gets to walk away with no consequences for his actions. The union was left to institute this litigation, which it has done on behalf of its members and other employees dismissed by the respondent.

The issue

- [5] The individual applicants contend that their dismissal was substantively and procedurally unfair and seek an order reinstating them into the respondent's employ, with retrospective effect.

The material facts

- [6] There are a number of disputes of fact disclosed by the evidence, but as it transpires, they are not particularly material to the outcome.
- [7] It is common cause that the individual applicants embarked on an unprotected strike on 30 August 2011, that they gathered outside of the respondent's Chubby 1

plant on 30 and 31 August, and that they were dismissed by the respondent at 16:00 on 31 August 2011.

- [8] While Fourie testified that to this day he is not sure precisely what caused the strike, events at the respondent's premises in August 2011 have their roots in an incident that occurred in March 2011, when a Mr Christopher Moholeng, one of the respondent's employees, claimed that he had been assaulted by members of the applicant's management, in particular, by Callie van der Merwe (the respondent's human resources manager), and two supervisors, Shane Dick and Peet Kruger.
- [9] Although Moholeng gave evidence and described an assault on him by the three managers concerned, it is not necessary for me to make a finding as to whether Moholeng was in fact assaulted. Moholeng laid criminal charges against the managers concerned in March 2011. They were tried and acquitted by the Magistrates' Court on 29 August 2011. I accept for present purposes that the respondent's employees believed that Moholeng had been assaulted, and that they felt aggrieved as a consequence. All that is relevant for present purposes is the role of any assault (and the subsequent acquittal) as a trigger and/or justification for the strike.
- [10] Fourie's evidence was that he and a human resources manager, Mulutsi, investigated Moholeng's claim of assault, and that they had concluded that there was insufficient evidence to convene a disciplinary hearing. On 11 March 2011, Fourie issued the following memorandum:

As you are aware there have been some serious allegations made against employees at Chubby Chick, as a result of which Coko Mulutsi and Mr JA Fourie did a thorough investigation as to assess the facts. Both Coko and JA Fourie did all the interviews with all the relevant people, and together have come to the following conclusion:

- 1) Insufficient evidence to take action against any employees.

The Company will under no circumstances tolerate any disloyal, racialistic violent disrespectful or dishonest behaviour by any of its employees and any employee found guilty of the above will be severely dealt with.

- [11] The incident had in the interim become the subject of criminal charges against the managers concerned, and Fourie took the view that he would wait for the outcome of the trial. As I have indicated, on 29 August 2011, Van der Merwe, Dick and Kruger were acquitted by the Magistrates' Court.
- [12] On 30 August 2011, an organisation described as "Chubby Chick Workers" applied to the Tlokwe City Council to hold a gathering on a public road. The proposed gathering was described as one that would take place from 30 August to 9 September, on each day, at 1 Luitingh St, outside the Chubby Chick taxi rank. On 31 August 2011 an agreement was concluded between the council, the South African Police Services and what was described as the 'Chubby Chick Workers' to regulate what was described as picketing by approximately 800 employees in a demarcated area north of the Chubby Chicks main entrance.
- [13] The next morning, 30 August 2011, at about 7:15, Fourie says that he received a call from his son, who told him that there was a strike at the processing plant. On his arrival, Fourie saw a man whom he did not recognise, standing on a drum, addressing the assembled workers. After a short while, the man's attention was drawn to him (Fourie) and he stated words to the effect that *'Fourie is here – we have taken control of the farms and plant, we will run the plant and farms'*.
- [14] There is a dispute about the timing and sequence of ultimatums that were issued after the commencement of the strike. The respondent's witnesses, Fourie and Van der Merwe, testified that Fourie addressed a total of five ultimatums to the crowd; two on 30 August, and three on 31 August 2011. This evidence does not accord with the respondent's pleadings, or the record of documents produced at the trial, nor does it accord with the evidence of the applicants' witnesses.

[15] The record of documents produced at the trial reflects that on 30 August 2011, an ultimatum signed by Van der Merwe was issued, requiring employees to return to work by 7h30. The last two paragraphs of the ultimatum read as follows:

5. That is, you are warned that, unless you return to work by 07h30 today, disciplinary action will be taken against you, the result of which could be dismissal.

6. Should you fail to return to work by 07h30 notice of disciplinary hearings will be issued immediately.

[16] It is not disputed that no employees returned to work, and that no notices of disciplinary hearings were issued. It not clear when the next ultimatum was issued. The ultimatum is drafted in the form of a letter to the union and to FEDCRAW, but appears to address employees directly. The ultimatum reads as follows:

1. At 05h30 today (30 August 2011) you and your colleagues employed at Fourie's poultry farms t/a Chubby Chick, embarked on an unprotected strike. At 06h15, the factory manager requests you and your colleagues to return to your workplace and resume work.

2. At 06h30 the factory manager again request you and your striking colleagues in several times to return to your workplace and resume work.

3. At 06h49, the factory manager requests due to return to your working place and explained that will strike is unprotected from dismissal because you embarked on a protected strike:

- before attempting to have the dispute is settled by the CCMA as required by law
- without giving the statutory 48 hours advance notice

4. The union further takes responsibility for the union members action and behaviour

5. Union will be responsible for any damage to company property and loss and production income

6. The union and union representatives will be responsible for a zero tolerance intimidation of workers reporting for duty

7. Any misconduct during the and protected strike of your members will be dealt with according to the company disciplinary code
8. In terms of management's duty and legal right to the productive, and interrupted and peaceful continuation of the businesses operations you are issued with a second ultimatum
9. That is, you are warned that, unless you return to work at your normal starting time tomorrow morning (31 August 2011) disciplinary action will be taken against you, the result of which could be dismissal
10. Should you fail to return to work on 31 August 2011 at normal starting time, the company will apply ACT 64 of the LRA No 66 of 1995 (Sic).

[17] On 31 August 2011, the following document, signed by Fourie, was addressed to 'striking workers' and the unions-

Management hereby give you a final ultimatum to return to your workplace by 10h00 today (31 August 2011).

Employees not at their workplace by 10h00 will be summarily dismissed as per Company Disciplinary Code of the Company for taking part in an unprotected strike and re-employment of casuals will start with immediate effect.

Dismissed employees will be eligible for re-employment.

[18] On the same day, a further ultimatum signed by Fourie was issued. It reads as follows:

1. This serves as another ultimatum to all employees of Fourie's Poultry Farms t/a Chubby Chick who are participating in unprotected and unlawful strike action to return to normal work and comply with their conditions of employment by not later than 13:00 on 31/08/2011.

2. The Union, Shop Stewards or Employees have until 13:00 on 31/08/2011 to submit reasons:

- 2.1 Why they view the strike action as being protected and/or lawful. We reiterate our view that the strike action is unlawful and unprotected.

2.2 Why the employees participating in the aforesaid strike should not be dismissed. It is the company's intention to dismiss all employees who are participating in the strike, unless the employees comply with this ultimatum.

2.3 The Union, Shop Stewards or Employees must inform the Employer, Chubby Chick, in writing of their demands for negotiations.

3. All employees are instructed to return to work and the Shop Stewards are then invited to discuss the demands with Management in a normal working environment.

4. All the companies' rights remain strictly reserved (sic).

[19] That afternoon, the following notice was issued and appears to have been telefaxed at to the union at 16h10:

DISMISSAL OF EMPLOYEES

1. According to the final ultimatum presented to the shop stewards, union and employees at 13:00 today, all employees who did not return to their normal duties by 16:00 on 31 August 2011, would be automatically dismissed.
2. It is now 16:00 and this letter serves as a letter of dismissal to all the striking day shift workers who have not returned to their work by now.
3. Individual letters of dismissal will be issued in due course.
4. All employees who apply for their old positions by 17:00 on 1 September 2011 will be re-appointed by the company, after which no applicants will be considered.

[20] During the course of 30 and 31 August, a number of communications were sent to the union office. The first of these is the letter addressed to the union on 30 August, which incorporates the ultimatum to return to work by the morning of 31 August. The ultimatum requiring employees to return to work by 10h00 on 31 August was faxed to the union, as was the later ultimatum requiring a return to work by 13h00 on the same day. The notice of dismissal was also telefaxed to the union office.

[21] During this period, there was an exchange of correspondence between the union and the respondent. On 30 August 2011, Tau addressed a letter to the respondent

in which he proposed meeting on 31 August 2011 at 11h00. On 31 August, and in the absence of a response to his first letter, Tau sent a second letter, proposing a meeting on 1 September 2011 at 10h00. On the same day, Fourie replied, agreeing to meet at 11h00 on that day.

- [22] It is not disputed that on 30 and 31 August, the individual applicants gathered outside the respondent's plant, sang songs and chanted. A video recording was admitted into evidence, with a transcription of what was said. The statements include the following, taken from an transcript of the recording:

Kill the boer/farmer. The type of leader coming here today asked me why not stab the boss in the stomach, You must stab them in the fucking stomach, How do you let someone hit you, meanwhile you work with a knife? You must stab them so that the fucking bastards must understand that hitting someone is not good, so that when we go to court there can be two cases: that he beat you, that you stabbed him. That is the type of leader that I am sending inside there today; Callie could have been stabbed the time he was doing this in this building, He deserves not to live, Callie must be killed as we have done with Terrblanche, who is dead today because of shit. Why can we not do the same with Callie?

Dear Callie you are a traitor, you will die in the arms of Coko.

- [23] It is common cause that on 1 September 2011, at about 12h30, Tau and Marwele (a union official) met with Fourie and his two sons, Van der Merwe and a Ms Swanepoel from the respondent's human resources department. It is also common cause that at the meeting, Tau raised the issue of salaries and bonuses as some of the employees' concerns. Fourie replied that the employees had been dismissed, and that these issues were not relevant. Although the content of the minute of the meeting (prepared by Van der Merwe) is disputed, it is not in dispute that Fourie reiterated the offer reflected in the dismissal notice issued the previous afternoon, i.e. that employees would be reinstated if they presented themselves for work by 17h00 that afternoon, on penalty only of forfeiting wages for the three days of the strike. Tau undertook to take this offer to the workers.

- [24] Tau testified that after the meeting, he reported back to the striking employees and conveyed Fourie's offer of reinstatement. This evidence is consistent with that given by Matlou, a shop steward, who testified that Tau had reported that if workers returned to work before 17h00, they would be reinstated but that if they failed to return, new workers would be hired. It is not disputed that the workers rejected Fourie's offer, and insisted on an agreement, in writing, recording their specific grievances and an undertaking to address them, as a condition for a return to work.
- [25] Fourie testified that on the afternoon of 2 September, he met with Tau. He was informed that if he wished to resolve the dispute he should 'get rid of van der Merwe'. If he did so, there would be a return to work. Fourie took the view that the counterproposal was unacceptable. Tau denies that such a meeting took place. He testified that he met with Fourie once, on the afternoon of 1 September.
- [26] After 1 September, the crowd continued to gather outside the respondent's premises. Fourie testified (and this was not challenged) that various acts of intimidation and damage to property occurred. On 8 September 2011, the respondent filed an urgent application in the North Gauteng Division of the High Court. A rule *nisi* was issued on the same day, with a temporary interdict in terms of which the union and a number of individual respondents (who are among the individual applicants in these proceedings), were interdicted from assaulting and intimidating employees, preventing clients, customers and suppliers from entering the respondent's premises, erecting barricades and obstacles at the entrances to the respondent's plants, damaging the respondent's assets (including buildings, fences, vehicles and equipment) or congregating within a radius of 100 metres from the plants. These proceedings were not opposed by the union or any of the individual applicants in the present matter. The rule *nisi* was later confirmed, without opposition, by the High Court, on 19 September 2011.

- [27] In the founding affidavit deposed to in support of the urgent application, Fourie recorded the events that had occurred outside the respondent's premises from 31 August 2011. In particular, he stated that a vehicle driven by a foreman Thom was stopped by a group of people and that Thom was assaulted by Hendrik Madiele and Jimmy Mabaso. They later visited his home, on 1 September 2011. On the afternoon of 5 September 2011, Fourie states that Andries Jantjie and Petrus Dlamini informed Thom, Oliphant and Mathela (the latter being foremen) that they had better sleep at the plant, a remark which the foremen construed as a threat. On 1 September, Fourie states that while Oliphant was waiting in his vehicle at the main gate, Mapule Skosana damaged the mirror of one of the vehicles. He states that Nana Manailane, Abraham Konzane were also involved in the incident. On the evening of 1 September 2011, the home of a foreman Petrus Matela was visited by a group, who advised him not to go to work the next day. Joseph Nyabanyaba was identified as a member of this group. On 30 August 2011 Innocentia Mulutsi, the respondent's human resources officer, was threatened by one of the leaders of the protest then underway in front of the gate, one James Gadinabokao was part of a group that shouted that they were going to burn Mulutsi's house. He was holding a knife or panga that he pointed in her direction. Fourie also referred to an incident witnessed by Jan Hendrik Botha, when on the afternoon of 31 August he saw a bus full of casual workers stopped by a group of 150 ex-employees of the respondent. The group threw stones at the bus and damaged several windows. Members of the group assaulted Coert Erasmus and stole his watch. All of this evidence was supported by confirmatory affidavits, and none of it challenged.
- [28] In the present proceedings, Botha gave evidence regarding damage to vehicles outside of the respondent's plant. He also testified about an incident in which a petrol bomb was thrown at a vehicle loaded with live chickens. A series of photographs were introduced into evidence, recording these scenes. Botha also testified regarding the incident on 31 August when a bus carrying casual workers was damaged, and when Erasmus was assaulted. Both Thom and Oliphant testified as to the incidents of intimidation and violence that had been directed against them.

Their evidence accorded with that in the founding affidavit filed in the urgent application, and confirmed the identity of those persons alleged to have committed acts of misconduct. None of this evidence was seriously called into question during cross examination, nor were any of the individual respondents identified as having committed acts of violence and/ or intimidation called to give evidence to deny the allegations made against them.

- [29] It was not disputed that the losses sustained by the respondent on account of the strike were significant. Fourie testified that in his estimation, the respondent suffered a loss in profits of some R9.5m to R10m on account of the strike. It was put to Fourie that most of these losses were occasioned not by the strike itself but by his decision to replace those employees whom he had dismissed with new and unskilled recruits. Fourie did not dispute this proposition, and an exact quantification of the damages suffered directly on account of the strike remains elusive. However, for present purposes, the losses are clearly significant, running as they do into millions of Rand.
- [30] On 1 October 2011, the union referred a dispute to the CCMA. The referral was prepared by Tau. In his description of the dispute, Tau summarised the dispute in the following terms: *'Employees embark on unprotected strike for assaulted employee by supervisors.'* The dispute remained unresolved of the conciliation meeting held on 18 November 2011, and was thereafter referred to this court for determination.
- [31] The identity of the individual applicants to the present proceedings was initially the subject of some uncertainty. The parties have agreed that they are the persons whose names appear on the schedule filed at pages 258 to 291 of the bundle. These include 347 employees who were members of FAWU, 223 who were members of FECRAW, and 198 employees who had no union affiliation.

Applicable legal principles

[32] The legal principles to be applied to a dispute concerning a dismissal for participation in an unprotected strike are well established. Item 6 (1) of the Code of Good Practice contained in Schedule 8 to the Labour Relations Act reads as follows:

‘6 (1) Dismissal and industrial action. (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 the 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 are 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 intend 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 employee should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it all rejecting it. If the employer cannot reasonably be expected to extend the steps to the employees in question, the employer may dispense with them.’

[33] The Labour Appeal Court recently observed that it is clear from the provisions of s 68(5) of the LRA that a Judge called upon to determine the fairness of a dismissal effected on the ground of participation in an unprotected strike should consider, in addition to Item 6 of the code, the provisions of Item 7. That provision regulates dismissals for misconduct more generally, and requires the determination of whether dismissal was inappropriate sanction for the contravention of a relevant of rule or standard. (See *NUMSA v CBI Electric*

African Cables [2014] 1 BLLR 31 (LAC)). The determination of the substantive fairness of a strike-related dismissal must therefore take place in two stages – first, under Item 6 when the strike related enquiry takes place and secondly, under Item 7. In other words, a strike-related dismissal which may meet the requirements of item 6 may nonetheless fail to pass the substantive fairness requirements under Item 7, particularly when dismissal is adjudged not to be a fair sanction in the circumstances (see paragraph [29] of the *CBI* judgment).

- [35] The LAC referred (with approval) to Grogan: *Dismissal, Discrimination and Unfair Labour Practices* (Juta 2005), where the author expresses the view that Item 6 is neither exhaustive nor rigid, and that other factors including the duration of the strike, the harm caused by the strike, the legitimacy of the strikers demands, the timing of the strike, the conduct of the strikers and the parity principle are all relevant.

- [36] The requirement in Item 6 of the Code that an employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt, affords the union an opportunity to persuade the strikers to resume work and secondly, provides a safeguard against possible rash action by the employer. When an employer issues an ultimatum, it should meet the requirements of the Code, and in particular, must ensure that it allows employees sufficient time to reflect on the ultimatum and to respond to it (paragraph [35] of the *CBI* judgment). This court has long held that the requirements of procedural fairness incorporated in Item 6 do not constitute a series of steps with which the employer must comply for the sake only of compliance. The purpose of contacting a trade union regarding an unprotected strike is not a formal requirement of notice – it is to afford the union an opportunity to intervene and bring its influence to bear on the situation before any dismissal is effected, and to afford the union the opportunity to make representations to the employer.

- [37] Further, the courts have for some years made clear that the *audi alteram partem* principle applies in the case of a dismissal for participation in an unprotected

strike, irrespective of whether there has been a failure to comply with an ultimatum. In *Modise v & others v Steve's Spar Blackheath* (2000) 21 ILJ 519 (LAC), the LAC held that an ultimatum and a hearing serve two separate and distinct purposes. A hearing serves the purpose ultimately of affording employees or a union acting on their behalf the opportunity of stating why they should not be dismissed, notwithstanding their failure to comply with an ultimatum. In short, the requirements of procedural fairness relevant to dismissal for participation in an unprotected strike are not discharged only by the issuing of an ultimatum. When an ultimatum has gone unheeded, an employer must initiate further steps to afford the right to be heard in a manner that is appropriate to the circumstances.

Analysis - substantive fairness

- [38] The substantive fairness of the individual applicants' dismissal must necessarily be determined in the light of all of the relevant facts, having regard to those factors referred to in item 6 (1) of the Code. In so far as the seriousness of the contravention of the Act is concerned, it is not disputed that the applicants made no attempt whatsoever to comply with the provisions of the LRA. This must weigh heavily against them.
- [39] The LRA establishes dispute resolution procedures that are inexpensive, expeditious and efficient. If the individual applicants felt as aggrieved as Matlou now claims they did by the respondent's labour practices or the conduct of its management, they would surely have lodged grievances and referred disputes to the CCMA.
- [40] In her evidence, Matlou, gave identified a number of grievances. These ranged from deductions from bonuses, the maintenance of racially segregated parking and ablution facilities, insulting behaviour by senior managers and the like. However, Matlou could give no cogent explanation as to why none of these issues had been raised by the shops stewards, or why none of them had been referred to the CCMA.

In particular, she could not explain why none of these issues had been so referred in the period prior to the strike, and in particular in the period from March to August 2011. Under cross-examination, she was left to suggest that the shop stewards did not have the time to refer any disputes, an explanation that is mendacious to say the least. Similarly, Tau could not explain why no grievances had been lodged and why no disputes had been referred to the CCMA especially in the period March to August 2011. I accept that he was not as close to the respondent's operations and the conduct of its management as was Matlou, but the fact remains that if

- [41] It is common cause that on the night of 29 August 2011, a meeting of the respondent's employees was held at which it was resolved that they would strike at the respondent's premises on the following morning. Matlou was present at the meeting. She conceded the strike would be unprotected and that Ponyane, a union official at the meeting, had warned employees that by engaging in an unprotected strike, they would place their jobs at risk. This is consistent with the undisputed terms of the application submitted to the Tlokwe Council to hold a gathering, in which a protracted strike is foreshadowed. It should be recalled that the application was filed on the same date as the strike commenced.
- [42] It is clear from the evidence that the applicants clearly never had any intention of making a demand of the respondent, or affording the respondent a reasonable time within which to respond to any demand or grievance before declaring a dispute. The applicants, for reasons that they failed fully to articulate in these proceedings, simply decided to ignore the provisions of the Act.
- [43] Conduct that may have been justifiable in a non-democratic society is not justifiable in a democracy where the right to strike is constitutionally recognised, as are the reasonable limitations on that right reflected in s 64 and s 65 of the LRA. It is disturbing that 20 years after the advent of democracy and the negotiation of labour legislation that gives full expression to international and constitutional rights and which establishes an easily accessible dispute resolution system, the applicants

preferred to engage in the politics of protest rather than seek recourse through statutory dispute resolution structures.

- [44] The distinction between a protected and an unprotected strike is not an academic one – it is one that ought to have consequences, especially in a case, such as the present, where workers take a conscious decision to ignore the LRA. There is an irony in the act of appealing to this court for reinstatement into employment (as the applicants do) where the loss of that employment is the consequence of a considered and deliberate decision to flout the provisions of the LRA. It is not often, I would venture to say, at least in relation to substantive fairness, that this court will find a dismissal unfair where the decision to ignore the relevant statutory requirements is considered and deliberate.
- [45] This court has previously come to the assistance of employees in circumstances where the conduct of the employer provoked a response from them that amounted to unprotected strike action (see, for example, *National Union of Metalworkers of South Africa v Lectropower (Pty) Ltd*, where the court accepted that the summary dismissal of shop stewards provoked a unprotected strike that commenced immediately thereafter). In the present instance, the applicants have made much of the fact that the strike was called in response to unjustified conduct by the respondent or to repeat Matlou's monotonous and fatuous refrain, the 'working conditions'. The case for what the union referred to as a 'climate of discontent' at the respondent's business was foreshadowed in the statement of claim in which it was averred, by way of example, that employees would not be paid when they took sick leave their female employees who fell pregnant and took maternity leave were not paid and were penalised on their return to work with a reduction in their bonuses, that shop stewards were not permitted to speak in behalf of employees at disciplinary hearings, that they were abused and that black employees were subjected to several practices that the amounted to discrimination on the grounds of race. Some of these allegations were never put to the respondent's witnesses for

comment, and as I have indicated, the union failed in any event to lodge any grievance or refer any of these issues to the CCMA

- [46] The only reasonable conclusion to be drawn from these facts is that the case of 'working conditions' is a belated and contrived attempt to provide a justification for the decision to embark on an unprotected strike. Ultimately, the 'working' conditions' and the 'oppression' referred to by Matlou amount to nothing more than a construct by the applicants in an attempt to build a case of justification, where no such case exists. All of the evidence points to the acquittal of Van der Merwe and his co-accused by the Magistrates' Court on 29 August 2011 as the trigger for the strike. But for the acquittal, there would have been no strike on 30 August. Indeed, Tau conceded as much under cross-examination.
- [47] As I have indicated, it is not necessary for me to make any finding in relation to the alleged assault on Moholeng. For present purposes, all that is relevant is that there was a degree of discontent with the respondent's decision not to proceed with a disciplinary enquiry at the time, and to await the outcome. To the extent that the applicants rely on what they believed to be an assault on Matlou to justify their conduct, the evidence does not support that justification. First, the events complained of occurred in March 2011, some six months before the strike. Matlou reluctantly conceded as much under cross-examination, when she acknowledged that all of the issues that she said caused the strike had happened by 11 March 2011. At that stage, Fourie had conducted an investigation and concluded that there was insufficient evidence to convene a disciplinary hearing. He was content to allow the criminal proceedings that had been initiated to take that course. It might be suggested (As Adv. van der Riet did) that with the benefit of hindsight, Fourie's decision was a poor one and that had he dealt with the situation differently, the strike might never have occurred. Even if that is so, it does not necessarily follow that a strike called in breach of any provision of s 64 the LRA is justifiable. All of the facts and circumstances in the period leading up to the strike need to be considered. By 11 March, the respondent's workforce knew that the respondent's

management did not intend to take any immediate action. The union that first drew the issue to Fourie's attention, FEDCRAW, of which Moholeng was then a member did not pursue the issue.

- [48] It was only after the acquittal of the managers on 29 August 2011 that there was any real sign of discontent amongst the respondent's employees. The acquittal was obviously something over which the respondent had no control. To the extent that the applicants may have been dissatisfied at the manner in which the trial was conducted, and in particular with the failure to call certain witnesses, this was none of the respondent's doing. The applicants could have directed their anger at the National Prosecuting Authority. Instead, they deliberately chose to target the respondent.
- [49] What is also clear from the evidence is that the industrial action that occurred on 30 and 31 August was hardly spontaneous. It was not disputed that a meeting was held in Potchefstroom on the night of 29 August and that the meeting resolved to commence a strike the following morning. The submission of the application to the local council is further evidence of what appears to have been an intention to call and continue a protracted strike at the respondent's plant, and deliberately to flout the LRA.
- [50] To the extent that the union's statement of claim foreshadows a case of provocation based on a celebration that took place after the acquittal of van der Merwe and that black employees were openly mocked and became particularly angry, this is not a case that was made in the evidence presented by the applicants.
- [51] In summary: the reason for the strike was the acquittal of Van der Merwe, Dick and Kruger on 29 August 2011. In these circumstances, in my view, it cannot be said that the respondent had any control over the issue giving rise to the strike, or that it provoked the industrial action that occurred. For these reasons, the individual

applicants' resort to unprotected strike action was not justifiable, and I find that their dismissal was substantively fair.

Analysis -procedural fairness

[52] As I have indicated, Fourie's evidence that he issued two ultimatums on 30 August and three on 31 August is not consistent with either the statement of defence or the record of documents. For the purposes of determining the respondent's compliance with the requirements of fair procedure, I intend to have regard to the ultimatums that are the subject of the record. What these disclose is a failure to comply with both the spirit and the letter of Item 7. First, the ultimatums obviously did not disclose any serious intention to dismiss, not initially, at least. It is difficult to appreciate how the intention of the ultimatum (amongst other things, to provide an opportunity to reflect on what is required of an employee) is met when a string of ultimatums is issued, each requiring a return to work at a different time. It is also difficult to appreciate quite how an employee is required to take the employer seriously in these circumstances, and quite when an ultimatum is intended to be any less tentative than the last. Further, the respondent ought to have appreciated after issuing the first ultimatum on 30 August and in the face of the derision with which it was met, that little purpose would be served in churning out ultimatum after ultimatum, or reading each ultimatum over a loudhailer in circumstances where none of the employees for whom it was intended could hear what was being said. This smacks of a mindless going through the motions, with the intent perhaps of ensuring compliance with what were perceived to be a series of procedural obligations. The requirements of Item 6 are largely instrumental – they are intended to secure an engagement between management and the union and/or employees before a decision to dismiss is taken.

[53] In the present instance, while the union had been called to the scene and had offered to deal with the issues giving rise to the strike as early as 30 August 2011, Tau's evidence was in effect that he spent fruitless hours outside of the

respondent's premises on both 30 and 31 August, only to be received by Fourie and the members of the respondent's management team at 11h00 on 1 September, after the individual applicants had been dismissed. This is not conduct that is conducive to any earnest attempt to resolve the dispute that had arisen.

- [54] In any event, on its own version, the respondent did not afford the individual applicants a hearing prior to dismissal, not even through the agency of the union. As I have indicated, the first meeting that the respondent agreed to have with union officials occurred almost exactly two days after the union first indicated its willingness to intervene, and a day after the individual applicants had been dismissed. The respondent has therefore manifestly failed to comply with the requirements of fair procedure.
- [55] There is a dispute of fact concerning what Fourie testified was a meeting between him and Tau on 2 September, when Fourie says that Tau stated that the individual applicants would return to work on condition that Van der Merwe was removed from his post. Tau denies that any such meeting took place. In my view, Tau's version is the more probable. His clear recollection was that he left Potchefstroom on the evening of 1 September to prepare for the union's national congress. Fourie could produce no record of the meeting, nor was there any other witness to it. Matlou at no stage in her evidence raised the issue of Van der Merwe being removed, certainly not as a core demand. It is probable then that no meeting between Tau and Fourie took place on 2 September at which a demand for the removal of Van der Merwe was tabled. This conclusion is not of any major consequence – what is undisputed and confirmed by the evidence of Fourie, Tau and Matlou is that on 1 September, Fourie was prepared to reinstate all of the employees who had been dismissed, conditional only on a return to work by 17h00 on 1 September 2011 and the application of the no work, no pay principle for the three days of the strike.

Remedy

- [56] If a dismissal is found to be only procedurally unfair, the court may not order reinstatement. Any amount of compensation to be awarded for a dismissal that is procedurally unfair is the subject of a discretion to be exercised by the court. The LRA requires that any award of compensation be reasonable. It is a well-established principle that all relevant facts and circumstances must be taken into account. In the present circumstances, I must take into account the fact that despite the fact that Fourie in effect refused to meet with Tau on 30 and 31 August. I must also take into account that the ultimatums variously issued by the respondent on 30 and 31 August were not unequivocal. By 31 August, even for an individual applicant who had been prepared to read the series of ultimatums issued and seriously contemplate their contents, it was not clear what the degree of departure from the procedural requirements prescribed by item 6 are therefore not insignificant.
- [57] I must also take into account the conduct of the individual applicants. They took a conscious decision to commence the strike without invoking any of the dispute resolution mechanisms in the Act. This is not a case in which the protected or unprotected nature of a strike was dependent on some legal technicality – the individual applicants took a considered to disregard the provisions of the LRA. Further, they were warned by their union official of the consequences of doing so. Despite that warning, they elected to take the law into their own hands.
- [58] More fundamentally, on their own version, the individual applicants were offered the opportunity to return to work on conditions that were more than reasonable and that would have involved minimal prejudice to themselves. The offer made by Fourie to Tau amounted to a return to work, conditional only on the loss of pay for the three days of the strike, an amount to which they were in any event not entitled. In this sense, the offer was one of unconditional reinstatement. Had the individual applicants accepted the offer on 1 September, the employment relationship would have been fully restored, with their rights intact to pursue whatever grievances they

had against their employer both in an internal discussion that had been agreed, and by recourse to the LRA if necessary. For reasons that remain largely inexplicable, the individual applicants chose not to accept the offer, and they must bear the consequences of that decision. It would not be equitable to visit the respondent with a hefty award of compensation in circumstances where had the individual applicants acted more prudently, these proceedings would have been avoided.

- [59] Finally, there is the issue of violence and participation in acts of violence. Despite Matlou's bland but implausible denial of any acts of violence perpetrated by those gathered outside of the respondent's premises, the evidence regarding damage to motor vehicles, the damage to the bus carrying casual workers, the assault on Erasmus and the abortive petrol bombing of a truck carrying live chickens was not seriously called into question. There is also the issue of the content of the songs and chants some of which, as I have indicated, amounted to nothing less than an incitement to murder.
- [60] Acts of gratuitous violence have regrettably become endemic in strike action in South Africa, to the extent that the court might question whether those who participate in acts of strike-related misconduct should forfeit any right to a remedy to which they might otherwise have been entitled by an employer's lapse in procedure. For this court to reward those who resort to violence or the threat of violence is to surrender to the tyranny of the mob. Neither the union nor any of the individual applicants disassociated themselves from the conduct of the mob, a factor that must necessarily weigh heavily against them when a fair quantum of compensation is assessed. Indeed, as I have indicated, in her evidence, Matlou persisted with a denial that any acts of violence had taken place. There were a number of identified individuals against whom specific allegations of serious misconduct were raised, and not specifically disputed. In my view, none of them should be entitled to compensation; they will have to be content with what will amount to a declaratory order that their dismissal was procedurally unfair.

[61] The most recent precedent concerning compensation for a procedurally unfair dismissal in the context of an unprotected strike is the *CBI* judgment referred to above. In that case, the LAC increased the sum awarded by the court *a quo* to an amount equivalent to 12 months' remuneration. I am not persuaded that a similar amount, or anywhere near it, is appropriate in the present circumstances. In the present instance, as I have indicated, the fact that strike was accompanied by acts of gratuitous violence must weigh heavily against all of the individual applicants, not only those directly identified as having perpetrated specific acts of violence and damage to property. The union and its members assumed no responsibility for the acts of those who were clearly guilty of misconduct and through Matlou, persisted with the implausible denial that there was no violence, despite the graphic evidence to the contrary presented by Botha. Secondly, the issue over which the strike was called (unlike the situation in *CBI*) was one over which the respondent had no control. Thirdly, and fundamentally, in the present instance the applicants spurned an offer made within 24 hours of their dismissal for what amounted to unconditional reinstatement. On this basis alone, there are cogent grounds for denying the individual applicants any compensation at all. However, I must necessarily take into account what amounts to a serious breach by the respondent of the requirements of fair procedure. In my view, compensation in a sum equivalent to two months' remuneration for each of the individual applicants, but for those specifically identified as having committed acts of strike-related misconduct, is fair and reasonable.

[62] Costs are an issue that in terms of s 162 of the LRA is the subject of a discretion to be exercised by the court, having regard to the requirements of the law and fairness. In so far as the result is concerned, the applicants have been only partially successful in their claim. It is not clear to me from the evidence whether a collective bargaining relationship between the parties remains in existence, nor am I able to determine the extent to which (if any) any relationship between the parties may be prejudiced by any costs order. In the circumstances, and given that the applicants

have succeeded only partially in their claim, in my view, the interests of fairness are best served by making no order as to costs.

For these reasons, I make the following order:

1. The dismissal of the individual applicants was substantively fair, but procedurally unfair.
2. Each of the individual respondents, but for Hendrik Madiele, Jimmy Mabaso, Andries Jantjie, Petrus Dlamini, Mapule Skosana, Nana Manailane, Abraham Konzane, Joseph Nyanbanyaba, James Gadinabokao, is awarded compensation in a sum equivalent to 2 (two) months' salary, to be calculated at their rate of remuneration on the date of dismissal.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicants: Adv. JG van der Riet SC, instructed by Cheadle Thompson and Haysom Inc.

For the respondents: Adv. A Snider, instructed by DLA Cliffe Dekker Hofmeyr