THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 881/09

TRANSPORT AND ALLIED WORKERS UNION OF SOUTH AFRICA obo GUSTAF MATJILA AND 26 OTHERS — **Applicant**

and

NORTH WEST PARKS AND TOURISM BOARD — **Respondent**

Heard: **5 May 2014, 6 May 2014 and 23 June 2014**

Delivered: **2 June 2015**

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] This matter came before this Court by way of a statement of claim, in terms of which the individual applicants alleged that their dismissals were automatically unfair on the basis that they took part in a strike that was lawful and protected.

In the alternative, the individual applicants contend that their dismissals were both substantively and procedurally unfair. They seek retrospective reinstatement, or alternatively compensation.

[2] Transport and Allied Workers Union of South Africa (TAWUSA) was cited as a party to the dispute. However, when the matter came before the Court, it no longer had any involvement in it, since the individual applicants had approached their attorneys of record for legal assistance. The Court extends its gratitude to Advocates G Fourie and M Sibanda for appearing *pro bono* on behalf of the individual applicants.

[3] It was however common cause that at all material times prior to the dismissals, the individual applicants were members of TAWUSA even though it was not a recognised union and did not have any organisational rights within the workplace. The respondent had at all material times, a recognition agreement with SACCAWU, which was the majority union.

Background and common cause facts:

[4] The individual applicants were employed by the respondent as field rangers, general workers and gate attendants. The respondent dismissed them with effect from 14 December 2008 pursuant to disciplinary enquiries held in their absence on 11 and/or 12 December 2008. The charges preferred against the individual applicants were the following[1]:

> 4.1 "Knowingly participating in an illegal strike action on the 29, 30 November 2008 and 01 December 2008 thereby violating the Labour Relations Act Section 64 subsection {a} {i} {ii}, {b} and {d}.
>
> 4.2 Refusal to heed an advice from the employer on the 27th November 2008 not to go on an illegal strike, and an ultimatum on the 29th November 2008 to go back to work. (Sic)
>
> 4.3 Intimidation of colleagues who were not on strike."

[5] The respondent operates fourteen game reserves in the North West Province. Its employees are required to report for duty on public holidays and weekends

[1] At page 24 of Bundle A

including Sundays. Prior to January 2008 employees were paid overtime for work done on Sundays and public holidays. Towards the end of January 2008, the respondent had discovered that there were numerous incidents of employees submitting fraudulent claims in respect of overtime, Sunday and public holidays work. The respondent's executive management took a decision to investigate the matter and immediately stopped making such payments though the employees were required to work shifts scheduled on Sundays and public holidays.

[6] A dispute pertaining to unilateral change to the terms and conditions of employment was referred to the Commission for Conciliation, Mediation and Arbitration (the CCMA) by TAWUSA, acting on behalf of its members. The dispute could not be resolved at conciliation and a certificate of outcome was issued on 7 August 2008, entitling the employees to embark on a protected strike. §

[7] The strike commenced on 18 September 2008, and the dispute was thereafter resolved between the parties in terms of a 'memorandum of agreement' signed on 25 September 2008. The agreement was framed in the following terms and conditions[2]:

> *"MEMORANDUM OF AGREEMENT BETWEEN AGGRIEVED STAFF AND MANAGEMENT OF THE NORTH WEST PARKS & TOURISM BOARD*
>
> *This memorandum of agreement (MOA) between management of the staff of the Tourism Board (particularly those from Conservation Division) emanated from a meeting held the boardroom Heritage house on 25 September 2008 at which the following issues were tabled:*
>
> 1. *The suspension of payments for Sunday work done since January 2008*
> 2. *The Suspension of payments for work done on public holidays also from January 2008.*
>
> *These matters were thoroughly discussed and it was agreed that:*
>
> - *All staff who are being owned payments for work done on Sundays and public holidays will be paid as per the stipulations of the Act.* (Sic)

[2] At page 109 of bundle B

- *That the payments for working done on these days need to be separated from overtime payments work (which is work done beyond the 45 hour work week) as per the stipulations of the Act* (Sic)
- *That payments for work done on Sundays and public holidays will be affected by Tuesday the 30th September 2008 and that,* (Sic)
- *The payments will be effected from January to August 2008,*
- *That aggrieved staff agreed to suspend the strike and to resume duties with immediate effect"* (Sic)

This agreement he signed on this 25th day of September 2 008 at Heritage House in Mafikeng by the parties listed below"

[8] It is common cause that the payments due to the employees on 30 September 2008 were only made on 30 October 2008. Again, the payments due for the month of October 2008, which were due to be paid to employees during November 2008, were also not paid. The respondent contended that it had administrative problems resulting in the non-payments and had communicated this to the employees.

[9] TAWUSA had directed correspondence to the Respondent on 21 November 2008 demanding that it resolve the issue of payments as a matter of urgency and threatened to issue a 48 hours strike notice. The respondent did not respond to the correspondence and a 48 hours strike notice was issued on 27 November 2008 advising, that a strike would commence on Saturday 29 November 2008. The respondent had responded to TAWUSA on the same day, informing it that the intended strike action would be unlawful and unprotected as the issue in dispute had been resolved, and that the provisions of the LRA had to be followed if there was intention to embark on another strike action.

[10] The strike commenced on 29 November 2008, and the respondent had issued an ultimatum to the employees to stop the strike action and to return to work by 13h00 on the same day failing which they risked being disciplined for participation in an unprotected strike. It was common cause that this was the only ultimatum that was issued during the course of the strike action.

[11] The strike action had nevertheless persisted until 1 December 2008 after the respondent had approached this court under case number J 2561/08 and obtained a *rule nisi* calling upon the employees to show cause on 26 February 2009 why a final order should not be granted declaring the strike to be unprotected and ordering them to return to work. The *rule nisi* was eventually discharged on 1 September 2009.

[12] The individual applicants' contention was that after the *interim* interdict was issued, they had returned to work on 2 December 2008 but were not allowed to resume their duties. They were then issued with notices of suspension on 3 December 2008.

[13] TAWUSA sent correspondence[3] to the Respondent on 5 December 2008 objecting to the suspension of their members, insisting on representing them at any disciplinary proceedings to be held and further requesting that all further correspondence be directed to its Mr Mankge.

[14] The Respondent convened disciplinary hearings on 11 and or 12 December 2008 pursuant to which the applicants were summarily dismissed for participating in an unlawful strike, refusing to heed to an ultimatum, and intimidation of other employees during the course of the strike. It was common cause that the individual applicants did not attend these hearings, and that of the employees collectively charged, only two had attended the hearing. These two employees had on the respondent's version, pleaded guilty to the charges against them, begged for forgiveness and alleged that they were intimidated into joining the strike action. The chairperson of the disciplinary enquiry had recommended that they should be issued with final written warnings and a deduction of one month's remuneration.

The issues for determination:

[15] The dispute between the parties essentially revolved around the status of the strike action and the fairness of the subsequent dismissals. In this regard the salient issues for determination are firstly, whether the strike embarked upon subsequent to the memorandum of agreement of 25 September 2008 was

[3] At page 16 of Bundle A

protected or not; secondly, whether the dismissal was automatically unfair, and in the alternative, whether the dismissals were substantively and procedurally fair. In the light of the evidence presented, and further in view of the three central issues identified, the Court proposes to deal with them individually to the extent where it is necessary to do so.

Was the strike action of 29, 30 November and 1 December 2008 protected?

[16] The respondent contends that the agreement of 25 September 2008 effectively addressed and resolved the issue in dispute, and was accordingly implemented as the employees had subsequent thereto, resumed their duties. It had called upon Messrs Peter Moholo (Moholo) and Sonwabo Shibane (Shibane) to testify on its behalf. These witnesses were employed at the time of the strike as the Human Resources Manager and Employee Relations Manager respectively.

[17] When the individual applicants discovered the non-payment in respect of October 2008, they had approached TAWUSA and registered a grievance. TAWUSA in response had then addressed a letter to the respondent on 21 November 2008[4], advising it that despite the memorandum of agreement signed on 25 September 2008, the certificate of outcome issued by the CCMA was suspended pending the payments. In ineloquent terms, TAWUSA effectively informed the respondent that it would uplift the suspension on the certificate of outcome and issue 48 hours' notice of its intention to embark on strike action unless the matter was resolved on an urgent basis.

[18] According to Moholo's testimony, after TAWUSA had issued its strike notice on 29 November 2008, it was advised in writing on the same day that the intended strike action was unlawful and would thus be unprotected as the issue in dispute had been resolved. TAWUSA had however ignored that correspondence.

[4] Page 22 of the Applicants' bundle

[19] Moholo’s testimony under cross-examination was that he understood the applicants’ complaints leading up to the agreement to be in respect of non-payment then and for future purposes. In the same vein, he had conceded that amongst the issues identified in the agreement, no provision was made for payments after the agreement was concluded. He had further conceded that properly construed, the agreement regulated payments in respect of January to August 2008, and did not address the issue of payments post the signing of the agreement, *albeit* the strike embarked upon was over the same issues.

[20] Moholo had further conceded that in September and November, payments were not made in accordance with the agreement even though letters were sent to employees to explain the problems encountered by the respondents in that regard. He further conceded that the employees were not notified in advance that they would not be paid in November 2008.

[21] The individual applicants on the other hand alleged that their strike action on 29 November 2008 until 1 December 2008 was protected. Two witnesses, Ms Gladys Pule and Mr Gustaph Matjila who were employed as a Gate Attendant and Field Ranger respectively prior to their dismissal were called upon to testify on their behalf.

[22] Pule, was signatory to the memorandum of agreement, and her evidence was that the employees had embarked on the second strike after receiving advise from TAWUSA following non-payments in November 2008. She denied under cross-examination that the agreement covered payment of overtime for the future, and contended that the second strike followed non-payments in September and November 2008. In the same vein, she testified that when the agreement was signed, it was in respect of past and future payments. She however denied that the dispute was resolved. Matjila’s testimony also followed a similar line to the effect that the second strike was protected according to the advise the employees had received from TAWUSA.

The legal framework:

[23] As it was correctly pointed out on behalf of the respondent, the employees' right to strike is entrenched in the provisions of section 23 (2) of the Constitution[5] and section 64 (1) of the LRA. This right was emphasised by the Constitutional Court in *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another*[6] in the following terms;

> "In section 23, the Constitution recognises the importance of ensuring fair labour relations. The entrenchment of the right of workers to form and join trade unions and to engage in strike action, as well as the right of trade unions, employers and employer organisations to engage in collective bargaining, illustrates that the Constitution contemplates that collective bargaining between employers and workers is key to a fair industrial relations environment.... This case concerns the right to strike. That right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system."

[24] Since the respondent's contention was that the strike was unprotected in the light of the memorandum of agreement signed on 25 September 2008, the pertinent provision in this regard is section 65(1) (a) of the LRA which provides that:

> "No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out if –
>
> (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute; ….."

And

Section (65) (3) (a) of the LRA which provides that;

> "Subject to a collective agreement, no person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or lock-out –
>
> (a) if that person is bound by –
>
> (i) any arbitration award or collective agreement that regulates the issue in dispute …."

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[5] Constitution of the Republic of South Africa, 1996

[6] [2003] 2 BLLR 103 (CC) at para 13.

[25] It was conceded on behalf of the applicants that the agreement concluded on 25 September 2008 is a collective agreement as defined in section 213 of the LRA[7]. It therefore follows that if the issue in dispute that led to the initial strike was resolved by way of the agreement of 25 September 2008, the second strike embarked upon by the employees would have fallen foul of the provisions of sections 64 and 65 (3) (a) of the LRA. The provisions of section 64 of the LRA requires the issue in dispute to first be referred to a bargaining council having jurisdiction over the dispute, or if there are no such council, to the CCMA[8]. Employees only have the right to strike once a bargaining council or a Commissioner of the CCMA have issued a certificate stating that the dispute remains unresolved or once a period of 30 days has lapsed since the referral was received by the Council or the Commission[9], and only if they have given the employer at least 48 hours' notice of the intended strike action[10].

[26] In further determining the lawfulness of the second strike action, it is also important in this case to determine what was the *'issue in dispute'*[11] that was referred for conciliation and ultimately resolved on 25 September 2008 in terms of the agreement.

The submissions:

[27] The respondent's contention was that the applicants were engaged in an unprotected strike which was not in compliance with the provisions of Chapter IV of the LRA and thus committed misconduct in that;

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[7] Section 213 provides that;

A collective agreement is a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, and on the other hand-

(a) one or more employers

(b) or one or more registered employer's organisations or one or more employers and one or

(c) more registered employers' organisations

[8] Section 64 (1) (a)

[9] Section 64 (1) (a) (i) and (ii)

[10] Section 64 (1) (b)

[11] An issue in dispute is defined in section 213 as;

"... in relation to a strike or lock-out ... the demand, the grievance, or the dispute that forms the subject matter of the strike or lock- out"

27.1 The main issue in dispute was resolved on 25 September 2008

27.2 The real issue in dispute between the parties related to the decision by the respondent to stop payment for overtime work, public holidays and Sunday work due to allegations of fraud, which after a referral to the CCMA was then resolved;

27.3 The memorandum of agreement could not be interpreted to provide for the piece-meal resolution of the underlying issue in dispute;

27.4 The applicants' characterisation of the issue in dispute as the delay in effecting payments was to be rejected, as it was a deliberate and desperate ploy to seek justification for engagement in a strike without complying with the provisions of Chapter IV of the LRA.

[28] The submissions made on behalf of the applicants on the other hand were the following;

28.1 On a proper reading of the agreement, future payments were not covered, and the agreement was silent on the regulation of future overtime payments;

28.2 Two issues were recorded in the agreement, viz, (a) the suspension of payments for Sunday work done since January 2008 and (b), the suspension of payments for work done on public holidays as from January 2008.

28.3 The manner with which the two issues were phrased suggested that the issue of payment for Sunday and Public Holiday work was limited to what was already owed to the employees between January and September 2008;

28.4 From a plain reading of the agreement, nothing suggested that there was any agreement to restore the *status quo* as nothing was mentioned about future payments of overtime.

28.5 Since the referral to the CCMA pertained to unilateral changes to terms and conditions of employment, which dispute was wider than the dispute settled, it was contended that the applicants were entitled to embark upon a strike on the broader issue;

28.6 Even if the issue in dispute was regulated by the agreement, the strike was still protected in that the agreement contemplated a strike as the appropriate means by which to resolve a breach of that agreement;

28.7 The strike could not be unlawful because section 65 (1) of the LRA only applied where the agreement in question actively prohibited the strike, and that in this case, the agreement contained no such provision;

28.8 The fact that the agreement made reference to a 'suspension of the strike' did not imply a waiver or cancellation of the strike. The suspension of the strike could be uplifted in the event that the employer failed to honour the agreement, and if the suspension was uplifted, there would be no need to follow the provisions section 64 of the LRA.

Evaluation:

[29] The central issue in this case is whether the agreement of 25 September 2008 regulated the dispute that led to the initial strike action and also all future disputes. If not, then the strike would have been protected. If however the agreement was disposive of all the issues in dispute, then the strike would have been unprotected.

[30] It is trite that this Court lacks jurisdiction to interpret a collective agreement[12] in the light of the provisions of section 24(8) of the LRA[13]. In order to

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[12] *South African Post office Ltd v CWU obo Permanent Part-Time Employees* (2014) 35 ILJ 455 (LAC)
[13] Which provide that;

> "If there is a dispute about the interpretation of application of a settlement agreement contemplated in either section 142A or 158(1)(c), a party may refer the dispute to the council

determine whether the second strike was protected, it would however be necessary to look at the terms and conditions of that agreement. An analysis or interpretation of this agreement is however not pivotal and fundamental to the resolution of the main dispute. It is merely incidental to the resolution of the dispute between the parties, and in particular, whether the agreement resolved the dispute between the parties that had led to the initial strike action or not.

[31] In *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building and Allied Workers Union & others*[14] the Labour Appeal Court stated that it was necessary to look at the real dispute between the parties and not just simply the parties' own description of the dispute. In this regard, it further held that;

> "….The refusal of a demand, or the failure to remedy a grievance, always needs to be examined in order to ascertain the real dispute underlying the demand or remedy. The demand or remedy will always be sought to rectify the real, underlying, dispute. It is the nature of that dispute that determines whether a strike in relation to it is permissible or not…"[15]

[32] The above principles were reiterated in *Fidelity Guards Holdings (Pty) Ltd v PTWU & others*[16] where the Labour Appeal Court also held that a fundamental enquiry needs to be conducted to establish what the demand, the grievance or the dispute was that formed the subject matter of the strike[17]. In *Wardlaw v Supreme Mouldings (Pty) Ltd*[18], the Labour Appeal Court also held that the true nature of the dispute is to be determined from an analysis of the facts and not from the parties' characterisation of the dispute.

[33] The dispute referred to the CCMA pertained to unilateral changes to terms and conditions of employment. The Court was not furnished with a copy of the Form 7.11 referral to ascertain the details of dispute referred to the CCMA.

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or the Commission and subsections (3) to (5), with the necessary changes, apply to that dispute."

[14] (1997) 6 BLLR 696 (LAC)
[15] At para 703F-H
[16] (1997) 9 BLLR 1125 (LAC)
[17] See also *Coin Security Group (Pty) Ltd v Adams & others* [2004] 4 BLLR 371 (LAC)
[18] [2007] 6 BLLR 487 (LAC)

However, in the light of the issues addressed in the agreement itself, and further in the light of it being common cause from the evidence presented in these proceedings that the dispute was precipitated by the suspension of payment of overtime in January 2008, it can safely be concluded that the principal issue was the non-payment of overtime pay for Sunday and Public work done since January 2008 following the suspension of those payments. These conclusions are fortified by the provisions of the agreement itself, which state that;

> "*This memorandum of agreement (MOA) between management of the staff of the Tourism Board (particularly those from Conservation Division) emanated from a meeting held the boardroom Heritage house on 25 September 2008 at which the* <u>*following issues*</u> *(m*y emphasis) *were tabled:*
>
> *3. The suspension of payments for Sunday work done since January 2008*
> *4. The Suspension of payments for work done on public holidays also from January 2008."*

[34] Notwithstanding the respondent's contention that the agreement covered future payments, from the plain reading of the agreement itself, no such intent can be gleaned nor is it explicit from its terms. In terms of the issues agreed to in the agreement, it was recorded that;

> *"All staff who are being* <u>*owned*</u> *payments for work done on Sundays and Public Holidays will be paid as per the stipulations of the Act"* (Sic).

[35] I am in agreement with the submissions made on behalf of the applicants, and in reference to *Kubyana v Standard Bank of South Africa Ltd*[19] that where an agreement is silent on certain provisions, the evidence of the parties as to what they thought the agreement covered cannot be of assistance, and that the Court cannot read anything into the agreement that is not covered by the parties themselves in explicit terms.

[36] It is clear that the agreement merely referred to what was <u>*owned*</u> (Sic) to the employees as a result of the suspension of payments from January 2008. Therefore, nothing turns on the evidence that sought to impute any contrary

[19] 2014 (3) SA 56 (CC) at para [78]

meaning to the terms of this agreement. Moholo's attempts to give meaning or to explain the intention of the parties when the agreement was entered into are not of assistance since he was not present when the agreement was concluded. The fact that he was briefed in his capacity as Human Resources Manager after the agreement was concluded cannot assist him or this Court in understanding what the intention of the parties were at the time. Having been taken through the agreement during cross-examination, he had reluctantly conceded that no provision was made for future disputes relating to payment.

[37] In the light of the common cause facts leading to the referral of the dispute, the issues of dispute as identified by the parties and resolved in terms of the agreement, it follows that where the respondent failed to meet its obligations in terms of that agreement, the issue of non-payment of overtime pay, which had been referred to the CCMA as a unilateral change to terms and conditions of employment, remained unresolved.

[38] Significant however to whether the strike was protected or not, is the fact that a specific term and condition of that agreement was that the strike was suspended, which in my view implied that the parties acknowledged that the dispute remained alive. There is no basis on the facts and on the interpretation of the agreement, for a conclusion to be reached that by entering into the agreement, the employees had for all intents and purposes, abandoned any future strike action on the issue. Any such argument in any event would have been countered by the principle enunciated in *Transportation Motor Spares v National Union of Metalworkers of SA and Others*[20], where this Court (per Zondo J as he then was) had held that if employees who had already commenced striking temporarily suspended the strike, there would be no need for them to issue a fresh notice to strike or refer the dispute for conciliation again[21].

[20] (1999) 20 ILJ 690 (LC) at para [28] to [32]
[21] The same principle was approved in *SA Clothing & Textile Workers Union v Stuttafords Department Store* (1999) 20 ILJ 2692) (LC) at para [33]

[39] Furthermore, since the agreement did not make any reference to the resolution of the issues being in full and final settlement of all disputes future and past on the same issue, and further since no provision was made as to how to resolve any disputes arising from that agreement, the applicants' resort to strike action was protected, and could not have fallen foul of the provisions of sections 64 and 65 (1) (a) of the LRA. As also correctly pointed out on behalf of the applicants, even if the issue was regulated by the agreement, the strike was protected in that section 65 (1) of the LRA only applied where the agreement in question actively prohibited the strike, which was not the case in this matter.

The claim in respect of automatically unfair dismissal:

[40] Having established that the strike action embarked upon by the applicants on 29, and 30 November, and 1 December 2008 was protected, the next issue for consideration is whether the dismissal of the individual applicants was automatically unfair. In terms of Section 187(1), a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5, or if the reason for the dismissal is-

> '(a) that the employee participated in or supported, or indicated an intention to participate in or support, a *strike* or *protest action* that complies with the provisions of Chapter IV.'

[41] The principles surrounding automatically unfair dismissals as contemplated in section 187 (1) of the LRA were set out in In *SACWU and Others v Afrox Ltd*[22] where the Labour Appeal Court held that:

> 'The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilized here…. The first step is to determine *factual* causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or

[22] (1999) 20 ILJ 1718 (LAC) at para 32

> support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of *legal* causation, namely whether such participation or conduct was the 'main' or 'dominant', or 'proximate', or 'most likely' cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare *S v Mokgethi* at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases….'

[42] In line with the principles set out in *Afrox*, the Labour Appeal Court again in *Kroukam v SA Airlink (Pty) Ltd*[23]*,* held if the '*dominant or principal* reason or reasons' for the dismissal was a reason listed in section 187(1), the dismissal would be automatically unfair, and further added that;

> '…. even if the reasons that I have found to constitute the dominant or principal reason or reasons for the dismissal did not constitute the principal or dominant reasons for the appellant's dismissal, I would still find that the dismissal was automatically unfair if such reasons nevertheless played a significant role in the decision to dismiss the appellant. In my view for policy considerations, where such reasons have influenced the decision to dismiss to a significant degree, the dismissal should be dealt with as an automatically unfair dismissal in order to deter as many employers as possible from entertaining such illegitimate matters as, for example, racism and the exercise of rights conferred by the Act as factors in their decisions to dismiss employees."[24]

[43] There is no doubt in this case that the main reason for the dismissal of the individual applicants was their participation in the strike action and refusal to heed the ultimatum as confirmed by Moholo his during cross-examination and also as gleaned from the first charge, which read;

> **"**Knowingly participating in an illegal strike action on the 29, 30 November 2008 and 1 December 2008 thereby violating the Labour Relations Act Section 64 {a} {i} {ii}, {b} and {d}" (Sic),

and the second charge which read;

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[23] 2005) 26 ILJ 2153 (LAC) at para [96]
[24] At para [103]

> "Refusal to heed an advice from the employer on the 27th November 2008 not to go on an illegal strike, and an ultimatum on the 29th November 2008 to go back to work."

[44] As the strike turned out to be protected, it follows that the dismissals of the individual applicants were automatically unfair. Ordinarily, once it is accepted that the main or real or dominant reason for dismissal was, or related to participation in a protected strike, there is no room for a conclusion that the dismissal was not automatically unfair but only substantively unfair[25], and thus it would be the end of the matter.

[45] It is however trite that an employer is entitled to discipline and/or dismiss striking employees even if they had embarked on a protected strike. The relevant provisions in this regard are section 67(4) of the LRA, which state that;

> "An employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation of or in furtherance of a protected strike."

and section 67(5) which provide that;

> "Subsection (4) does not preclude an employer from fairly dismissing an employee in accordance with the provisions of chapter VIII for a reason related to the *employee's* conduct during the strike, or for a reason based on the employer's *operational requirements"*

[46] In *South African Transport and Allied Workers Union and Others v Collett Armed Security Services*[26], this Court per Snyman AJ held that;

> 'Where it has been shown in evidence there is a nexus between the dismissal of employees and participation in a protected strike, it then becomes for any employer not wishing to be struck with section 187(1)(a) to show that despite this nexus, the actual reason for dismissal is something else, being either operational requirements or misconduct. Where there is a protected strike and employees are then dismissed for circumstances that arose in or flowed

[25] National Union of Public Service & Allied Workers and Others v National Lotteries Board at para [202]
[26] (JS 1280/09) [2013] ZALCJHB 239 (3 October 2013) at para [40]

from this strike and the employees' participation therein, then there has to be at least on a *prima facie* basis as a matter of principle a nexus between the dismissal and participation in a protected strike. Also, the closer the temporal nexus between the strike and the dismissal, the stronger the inference that the dismissal has something to do with participation in the protected strike. It is then, under these circumstances, up to the employer to place convincing and credible evidence before the Court to show that despite this nexus, it was, for example, because the employees committed assault during the strike that they were dismissed or as another example, it was because the employer lost an important customer during the strike which necessitated the employer to cut back on jobs that caused the employees to be retrenched….'

[47] Having disposed of the first two charges as they related to the lawfulness or otherwise of the strike action, the issue in this case is whether there was a basis for dismissing the employees on account of the charge of intimidation of other employees during the course of the strike action as alleged by the respondent.

[48] In alleging that the individual applicants had intimidated other non-striking employees, the evidence of Moholo was that the two other employees who were not dismissed had during the course of the disciplinary enquiry, testified that they were intimidated by other striking employees into joining the strike. Not much turns on this hearsay evidence even if one wanted to consider and apply the provisions of section 3 of the Law of Evidence Amendment Act[27].

[49] Shibane's testimony on the other hand was that even though he was based at the Mafikeng range, during the course of the strike action, he had visited the Pilanesburg Park on 29 November 2008 and had witnesses the strikers impeding the main entrance to the park. On 30 November 2008 the strike had continued and the police had to be called in as the strikers were causing a disturbance. Shibane testified that although he could not remember the names or details of all of the employees who were gathered he had spoken to one of the applicants being Pule, who acted as a representative/ spokesperson of the other employees. He testified further that the employees were requested to identify among themselves who had participated in the

[27] Act 45 of 1988

strike and those who had not. Once this was done, the non-participants in the strike action were not charged or dismissed.

[50] As it was correctly submitted on behalf of the applicants, save for some bald allegations of disturbances or violence, no particulars or evidence was led in regards to the charge of intimidation, for a finding even on a balance of probabilities to be made that indeed the individual applicants had intimidated the non-striking employees. It is not known which non-striking employees were intimidated, in what manner if so, and by whom of the individual applicants. On a proper consideration of the evidence as led on behalf of the respondent on this charge, nothing points to it being sustainable.

[51] In the light of the above, the only conclusion to be reached is that the *main*, *real, proximate* or *dominant* reason for the dismissal of the individual applicants was for their participation in the strike action and also for failing to adhere to the ultimatum issued on 29 November 2008 to cease the strike and return to work. The dismissals were therefore contrary to the provisions of section 67(4) of the LRA in view of the finding that the strike was protected, and thus were automatically unfair as contemplated in section 187(1) (a) of the LRA.

Relief:

[52] The individual applicants seek retrospective reinstatement. Moholo on behalf of the respondent had testified that the individual applicants were replaced in January 2009. He had further testified that even if reinstated the applicants would not enjoy a cordial relationship with the employer.

[53] Section 193(2) of the LRA obliges the Labour Court to require the employer to reinstate an employee whose dismissal has been found to be automatically unfair or substantively unfair unless one of four considerations listed therein are present.[28]. Ultimately, and as the Constitutional Court had stated in *Equity*

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[28] (a) the employee does not wish to be reinstated or re-employed;
(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others[29];

> "It is trite law that the power to grant a remedy in section 193 is by its nature discretionary and that the discretion must be exercised judicially by a court that enjoys that unfettered discretion".

[54] It was submitted on behalf of the applicants that they were entitled to the order of reinstatement in that the respondent was still operational; that the sole objection to a reinstatement order was that there was a new workforce and further that absent compelling reasons to justify any deviation, the court should apply the primary remedy. It was acknowledged on behalf of the applicants that the dismissals took effect some six and a half years ago. It was nevertheless contended that the applicants were not responsible for the delay in the hearing of this matter.

[55] I accept from the wording of section 193 (2) of the LRA and also established in *National Union of Public Service & Allied Workers obo Mani and Others v National Lotteries Board*[30] that the primary remedy is that of reinstatement. In addition to these provisions, section 193 (3) of the LRA further provides that;

> "If a dismissal is automatically unfair, or if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances"

[56] I understand these provisions to imply that even though primary remedy should be invoked, in the event that a dismissal has been found to have been automatically unfair, the Labour Court has discretion to determine *inter alia*, the retrospective nature of the order of reinstatement[31]. This is also in line with *dictum* in *National Union of Public Service & Allied Workers obo Mani and*

(d) the dismissal is unfair only because the employer did not follow a fair procedure

[29] (2008) 29 ILJ 2507 (CC) at para [48]

[30] *supra*

[31] *National Union of Public Service & Allied Workers obo Mani and Others v National Lotteries Board* 2014 (6) BCLR 663 (CC) at para [206].

Others v National Lotteries Board[32] where it was held that this Court has a discretion in making any other order attached to that primary remedy.

[57] In this case, other than relying on the argument that the individual applicants have since been replaced, nothing was placed before the Court as contemplated in section 193 (2) of the LRA to militate against the primary remedy. It is trite that the mere fact that the dismissed employees have since been replaced is not a bar to an order of reinstatement. Furthermore, it is not sufficient for the employer to simply allege that once reinstated, the dismissed employees would not enjoy a cordial relationship. A basis for that inference or conclusion must obviously be laid.

[58] In considering the nature of relief to be granted, regard is also had to the following principles set out in *Hoffmann v South African Airways*[33], where it was held that:

> "The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of a constitutional right; second, to deter future violations, third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining the appropriate relief, 'we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source'".

[59] In the light of the above principles, in considering the appropriate relief, it is my view that the following factors, (*albeit* they were not raised by the respondent), should be taken into account;

59.1 Despite the submissions made on behalf of the applicants that they were not the cause of the delay in finalising this matter, this is not so when regard is had to the protracted history of this matter. In this regard, it was common cause that;

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[32] supra
[33] 2000 ILJ 2357 (CC) at para 45

59.2 The applicants were dismissed on 14 December 2008. Having referred the dispute to the CCMA, a certificate of outcome was issued on 18 February 2009.

59.3 Rather than referring the dispute for adjudication to this Court, it was then referred to the CCMA for arbitration. The respondent having properly raised an objection to the jurisdiction of the CCMA, a jurisdictional ruling was issued on 20 May 2009.

59.4 The statement of case was only served on the respondent on 2 October 2009, or was filed with the Court at least some four months later, necessitating an application for condonation which was filed on 11 November 2009 and opposed.

59.5 The application was considered and granted by the Honourable La Grange J on 19 May 2011. Thereafter, the matter was set down for a hearing on no less than three times and was either postponed or removed from the roll for a variety of reasons. This included;

59.5.1 On 20 February 2002 when it was postponed with costs to allow some of the individual applicants to obtain legal representation, and also due to the fact tht the applicants had not attended to the pagination and indexing of the court's file;

59.5.2 On 29 October 2012 when it was removed from the roll, and also

59.5.3 On 3 February 2014 for reasons that remain unclear;

59.6 Other than these postponements or removals, until the applicants' current attorneys of record came on board, they had changed attorneys on no less than three occasions.

[60] In addition to the above considerations, it is further my view that the individual applicants' refusal to participate in the internal disciplinary hearings did not assist their cause. It has repeatedly been stated by this Court that an employee cannot complain of procedural unfairness of an internal disciplinary hearing held in his or her absence if he or she had wilfully and voluntarily

refused to attend the hearing. In this regard, the Supreme Court of Appeal in *Old Mutual v Gumbi*[34] held that;

> "The right to a pre-dismissal hearing imposes upon employers nothing more than the obligation to afford employees the opportunity of being heard before employment is terminated by means of a dismissal. Should the employee fail to take the opportunity offered, in a case where he or she ought to have, the employer's decision to dismiss cannot be challenged on the basis of procedural unfairness (*Reckitt & Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union & Others* (1991) 12 ILJ 806 (LAC) at 813C-D)

[61] Thus even if there might be genuine concerns about the fairness of the intended enquiry, including factors surrounding representation, requests for documents or postponements, perceptions of bias on the part of the chairperson of the enquiry, or any other factor that an employee views as potentially impeding the fairness of a hearing before it starts, the employee is still obliged to attend such a hearing, register his or her concerns or requests, and then let the chairperson of the enquiry make a decision on those issues.

[62] However, where an employee blatantly refuses to attend a disciplinary hearing even if *prima facie* there might be justifiable reasons for refusing to do so, that employee in the end should be regarded as having waived his or her rights to that hearing, and the employer is entitled to proceed with that hearing in the employee's absence.

[63] More disconcerting in this matter however is that those employees who attended the internal disciplinary hearings are still employed. Worst still, some of the individual applicants were incorrectly identified as having participated in the protected strike action; whilst some were officially on leave or sick leave during the course of the strike action. In some instances the notices to attend the disciplinary enquiry were not properly served or the applicants may have received short notice. Be that as it may, by refusing to attend the internal enquiry when at the very least they knew about it notwithstanding these problems, they unfortunately invited a dismissal in their absence.

[34] [2007] SCA 52 (RSA) at para [8]

[64] In considering the appropriate relief, and in further exercising its discretion under the provisions of section 193 of the LRA, the Court as implored in *Hoffman* has in the light of all the considerations as stated from paragraph 59 of this this judgment, balanced the various interests that might be affected by the remedy to be granted. It has also been taken into account that the dismissal of the applicants was automatically unfair, and that there is a need to address the wrong occasioned by the infringement of the individual applicants' constitutional rights and to deter future violations. Most importantly, fairness to both parties has been taken into account.

[65] In these circumstances, and constraint as I might be, fairness and equity dictates that the individual applicants should be reinstated because this is what the provisions of section 193 (2) of the LRA requires in the light of a finding of automatically unfair dismissal. It is nevertheless my view that in the light of the considerations stated above, and my firm belief that to a large extent, the applicant are blameworthy for the invidious position they find themselves in six and a half years since their dismissal, they should not be entitled to full retrospective reinstatement. To this end, equity dictates that any back-pay consequent upon retrospective reinstatement should be limited to six months' salary.

Costs:

[66] In the written closing submissions, it was contended on behalf of the applicants that the Court should grant a cost order in their favour in the event that they were successful. Having had regard to the considerations of law and fairness, and further taking into account that the applicants were represented *pro bono*, I do not deem it appropriate to make any order as to costs.

Order:

i. The dismissal of the individual applicants as identified in paragraph 1 of their statement of claim is declared to have been automatically unfair as contemplated in section 187 (1) (a) of the Labour Relations Act.

ii. The respondent is ordered to reinstate the individual applicants in its employ, retrospective from 14 December 2008, and on the same or similar terms as applicable to their employment at the time of their dismissal.

iii. The respondent is ordered to pay to each of the individual applicants as back pay, an amount equal to six months' salary calculated at their rate of pay as at 14 December 2008.

iv. The individual applicants are to report for duty within 21 days of the date of handing down of this judgment.

v. There is no order as to costs.

Tlhotlhalemaje

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicants:	Adv G Fourie and Adv M Sibanda
Instructed by:	Howes Inc (*Pro Bono*)
On behalf of the Respondent:	Adv O Chwaro
Instructed by:	Kgomo Mokhetle & Tlou Attorneys