



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS318/13

In the matter between:

NATIONAL UNION OF MINE WORKERS

First Applicant

obo

MARUPING ALFRED SHAYI & 186 OTHERS

Further Applicants

and

SISHEN IRON ORE COMPANY (PTY) LTD

Respondent

**Heard: 1 to 4 December 2014, 29 June 2015 to 3 July 2015, 5 December 2016
and 12 December 2016 (oral argument)**

Delivered: 30 June 2017

JUDGMENT

MOKOENA, AJ:

Introduction

- [1] On or about 15 October 2012, the Respondent dismissed the Applicants on the allegations that they embarked and participated in an unprotected strike which caused severe damage to the Respondent.
- [2] Subsequent to the Applicants being dismissed by the Respondent, the Applicants referred their dispute to the CCMA.
- [3] On or about 12 November 2012, the CCMA conciliated the dispute between the parties and issued a certificate to the effect that the dispute between the parties remained unresolved.
- [4] On the strength, of the CCMA certificate indicating that the dispute between the parties remain, unresolved, on or about 11 February 2013, the Applicants referred their dispute to arbitration.
- [5] On 22 January 2013, the Respondent concluded a settlement agreement, wherein the parties agreed that the Applicants must refer their dispute to this court within 90 days of the signature of the settlement agreement, which was 22 January 2013.
- [6] The Applicants' statement of case was delivered, late, on 31 May 2013. The Applicants initiated a condonation application, which was granted, by this court.
- [7] These proceedings relate to the dismissal of the Applicants who were employed by the Respondent. The Applicants contend that their dismissals were both procedurally and substantively unfair.¹
- [8] The Applicants contend that, should this court find their dismissal to be both procedurally and substantively unfair, the Applicants should be retrospectively

¹ NUM obo 18 Applicants' heads of argument, p. 4, para 8; the rest of the Applicants' heads of argument, unnumbered pages, paras 5 and 6.

reinstated to the positions that they occupied immediately prior to their dismissal without any loss of their benefits.

Representation of the parties

- [9] At the commencement of the trial, I was informed that the Applicants are divided into two groups. In terms of the citation of the parties, these proceedings were brought on behalf of 187 Applicants.
- [10] From the 187 Applicants, 18 Applicants were initially represented by Adv Nxumalo who was briefed by Cloete Attorneys. The rest of the Applicants were represented by Mr Mafa from Mafa Attorneys. The Respondent was represented by Adv Mosam and Adv Itzkin who were briefed by Edward Nathan Sonnenbergs Attorneys.
- [11] The names of the Applicants who were, initially, represented by Adv Nxumalo and Cloete Attorneys, were contained in a document which was submitted to the court, as Exhibit A, consisting of 18 names. While on the other hand, the Applicants who were, initially, represented by Mr Mafa, were contained in a document, submitted as Exhibit B, during these proceedings, which reflected and/or contained 91 names.
- [12] As the trial proceeded, the representation of the parties changed. The 18 employees who were initially represented by Adv Nxumalo, were, subsequently represented by Adv Makoti and Adv Kunene. While the remaining Applicants who were initially represented by Mr Mafa, were, subsequently represented by Adv Tutubalang.
- [13] I am highlighting this change of representation of the parties as it impacted on the different approach adopted by the Applicants' old and new legal teams. I deal more full, with this aspect, elsewhere, in this judgment.

Analysis of the Pleadings

Applicants' statement of case

[14] The centrepiece of the Applicants' case as formulated in their statement of case, can be summarised as follows:-

'The dismissal of the Applicants was substantively unfair in that:

- (i) *None of the Applicants, alternatively, not all Applicants participated in any strike action;*
- (ii) *In the further alternative to the above, and in the event that the Honourable Court finds that Applicants did in fact participate in strike action, and that the said strike action was unprotected, the sanction of dismissal was unfair and unreasonable.*
- (iii) *Respondent dismissed Applicants inconsistently and arbitrarily, in that it dismissed Applicants, whereas a large number of employees who participated in the work stoppage were not disciplined or dismissed.*

The dismissals were procedurally unfair in that;

- (i) *No charges were brought against the Applicants, and no disciplinary hearings were held, and the Applicants were dismissed in absentia; Applicants were not given a proper hearing before the dismissal.*
- (ii) *The appeal hearings of 46 Applicants who were in custody at the time of such hearing, were unfair in that such Applicants were denied to be present at such hearings and fully present their appeals. **Annexure "B"** hereto contains the names of such Applicants.*
- (iii) *No fair ultimatums were issued*
- (iv) *First Applicant was ignored and not consulted adequately during the work*

*stoppage and prior to the dismissals.*²

[15] In the circumstances, the Applicants seek the following order:-

'RELIEF

*Retrospective reinstatement of Applicants in their positions on the same terms and conditions that governed their employment prior to their dismissal, with no loss of salary and benefits.*³

Respondent's statement of defence

[16] The Respondent's defence is captured in paragraphs 65.1 to 65.4 of its statement of defence, couched in the following terms:-

65.1 The Second to Further Applicants were dismissed after being found guilty of the charges as set out in paragraph 44 above.

65.2 An illegal strike occurred from 3 October 2012 until 16 October 2012.

65.3 It is denied that Sishen implemented a lockout during the period 3 October 2012 to 16 October 2012.

65.4 Due to the exceptionally high levels of violence and intimidation, Sishen however, for health and safety reasons, as set out above, instructed its employees who did not participate in the illegal strike not to attend at its premises. These employees were paid in full for this period.⁴

The burden of proof

[17] Section 192 of the LRA provides as follows:-

² Pleadings bundle, Vol. 1, Applicants' statement of case, p. 4, para 12.

³ Pleadings bundle, Vol. 1, Applicants' statement of case, p. 7, para 15.

⁴ Pleadings bundle, Vol. 1, Respondent's statement of defence, p. 35, paras 65.1 – 65.4.

- (1) *In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.*
- (2) *If the existence of the dismissal is established, the employer must prove that the dismissal is fair.'*

[18] It is trite that in dismissal proceedings, the *onus* rests with the employees to establish and prove that they were dismissed. On the other hand, the employer has to demonstrate and/or show that the dismissal was fair. In general, this means that the Applicants must prove that the Respondent has taken some initiative to terminate the contract, and that the Respondent's action has caused the termination.⁵

[19] As envisaged in section 192 of the LRA, on the first day of the trial, it became apparent that the parties were *ad idem* that the duty to begin and the *onus* of justifying the fairness of the dismissal, lied with the Respondent. On those bases, the Respondent was the first to adduce oral testimony through various witnesses.

[20] This matter proceeded before me on the following dates:-

- 20.1 1 to 4 December 2014;
- 20.2 29 June 2015 to 3 July 2015;
- 20.3 5 December 2016;
- 20.4 12 December 2016 (oral argument).

[21] After having reserved my judgment on 12 December 2016, Adv Tutubalang, representing the employees described in Exhibit B, on 15 December 2016, despatched further heads of argument (after the parties having advanced their

⁵ *Ouwehand v Hout Bay Fishing Industries* [2004] 8 BLLR 815 (LC); See also *CWIU v Johnson and Johnson (Pty) Ltd* [1997] 9 BLLR 1186 (LC)

oral submissions).

[22] As a result, I afforded the parties, to react to the new further submissions delivered by Adv Tutubalang, by submitting their further heads by no later than 24 February 2017.

[23] I have considered all these further submissions by the parties. It would appear from having perused the further submissions from the other counsel involved in this matter, that I should not consider these further submissions as they were delivered under extraordinary circumstances (i.e. post the parties having submitted their oral argument and the matter being adjourned, as the judgment was reserved).

Oral Evidence

Respondent's witnesses

[24] The Respondent called the following witnesses:-

24.1 Mr Marius Jakobus Matthee ("*Mr Matthee*");

24.2 Ms Tanya Aucamp ("*Ms Aucamp*");

24.3 Mr Craig Owen Malander ("*Mr Malander*");

24.4 Mr Nico Smit ("*Mr Smit*").

The evidence of Mr Matthee

[25] In October 2012, he was employed by the Respondent. He has been working for the Respondent for 33 years. He is employed in a capacity of the Head of Employee Relations.

- [26] He witnessed the unprotected strike that took place during October 2012 at the Respondent's premises. This unprotected strike was different from the ones he had experienced before as it was a violent strike action wherein individuals were assaulted and the Respondent's huge mining equipment, including big trucks were seized by those employees who participated in this unlawful strike.
- [27] The Respondent is mining iron. It produces approximately 35 million tons of iron ore per annum. The Respondent is part of the Sishen Iron Ore Group.
- [28] The wage increments and wage disputes are dealt with by means of a collective wage agreement which is negotiated on a central basis for all participating mines. Such wage agreements will cover a period of two years. The employees are normally represented by NUM and Solidarity.
- [29] The witness was referred to page 201 of bundle A and identified that document as an interdict for the unprotected strike. The witness was referred to the founding affidavit in the interdict application which indicated that *"On Tuesday, 25 September 2012, employees handed the memorandum of demands to Sishen management. In terms of the memorandum the employees demanded a basic wage of R15 000 ... The employees gave Sishen management a deadline to respond to their demands by Wednesday, 3 October 2012"*.⁶
- [30] He testified on a document on page 221 of bundle A and identified it as a letter from the employer in response to the employees' demands which recorded that all the demands of the employees can only be dealt with through the officials of the recognised unions.
- [31] The witness also testified on a document on page 348 which is a signed wage agreement concluded between the employer, Solidarity Union and National Union of Mineworkers. Fundamentally, this agreement contained an express term to the effect that *"This agreement shall be valid and enforceable for the*

⁶ Transcript of 1 December 2014, p. 14, line 1 – p. 23, line 2.

*period 1 July 2012 to 30 June 2013”.*⁷

- [32] The Respondent would not be able to afford the demand of R15 000 increment which was demanded by the employees as this would represent 130% increment on the salaries which they were already being receiving from the Respondent.
- [33] On Sunday, 30 September 2012, the employees working in morning shift, handed the same memorandum of demands, as the one already alluded to above. The employees were informed by means of a document on page 194 of the bundle that they are engaged in an unprotected strike action. The employer will automatically apply the no-work-no-pay rule. The conduct of the employees constitute a serious misconduct which may lead to their dismissal.⁸
- [34] Throughout this illegal unprotected strike, NUM was engaged by the Respondent. During the interaction between the Respondent and NUM, NUM informed the Respondent that it was not in charge and/or responsible of the strike action.⁹
- [35] The strike was interdicted by this court and confirmed to be an unprotected strike as per the court order dated 3 October 2012.¹⁰
- [36] The court order of 3 October 2012 was served on the Applicants and distributed to the employees through different means.¹¹
- [37] On 4 October 2012, a NUM delegation from NUM Regional Office in Kimberly arrived at the employer’s premises. This delegation attempted to engage with the striking employees but their attempts were in vain as they were chased away.¹²

⁷ Transcript of 1 December 2014, p. 25, line 10 – p. 27, line 17.

⁸ Transcript of 1 December 2014, p. 30, line 20 – p. 33, line 13.

⁹ Transcript of 1 December 2014, p. 35, line 17 – p. 36, line 25.

¹⁰ Transcript of 1 December 2014, p. 39, line 11 – p. 40, line 25.

¹¹ Transcript of 1 December 2014, p. 43, line 9 – p. 44, line 25.

¹² Transcript of 1 December 2014, p. 45, lines 10 – 19.

- [38] A meeting was held with the representative of the striking employees. The meeting was attended by Loots, Matthee, Malander, Mokwana, Thue, Khairone, Botleng and Khasebe. However, the meeting did not yield any positive results as the employees who engaged in the strike persisted with their conduct. The management was concerned about the value of the trucks which costs approximately R50-million and the safety of other employees. The strike action resulted in a total mine closure.¹³
- [39] The employees were aware of the court interdict. Furthermore, they were informed that they were in contempt of the court interdict as they persisted with their illegal strike. The Respondent issued various notices to the employees which yielded no results.¹⁴
- [40] On 7 October 2012, a further meeting was convened between representatives of the employer and the striking employees. The employees persisted with demanding an increment.¹⁵
- [41] The illegal unprotected strike was violent in nature as the employees drove the big trucks onto the fence which resulted in the fence being flattened and destroyed. The strike posed a real threat to property being damaged and people being injured.
- [42] The witness was referred to page 258 of the bundle which confirmed that employees were engaged in an illegal strike and these employees did not only include those from shift D but it included shifts A, B, C and D.¹⁶
- [43] The witness was taken through other documents in the bundles which confirmed that there was an unlawful unprotected strike. The employees persisted with the strike. The employees were acting outside the mandate of their unions and outside their bargaining structures. Furthermore, that the employees were

¹³ Transcript of 1 December 2014, p. 47, line 20 – p. 50, line 24.

¹⁴ Transcript of 1 December 2014, p. 51, line 1 – p. 53, line 14.

¹⁵ Transcript of 1 December 2014, p. 53, line 15 – p. 55, line 4.

¹⁶ Transcript of 1 December 2014, p. 57, lines 1 – 24.

afforded an amnesty which they declined. Fundamentally, that the employees proceeded with the strike despite the court orders made by this court.

- [44] The Respondent was left with no option but to notify all the striking employees of the disciplinary proceedings initiated against them. The notice to attend the disciplinary inquiry were distributed by means of a helicopter, bulk SMS messages, copies of the notices distributed to the employees together with their food parcels, there was a continues broadcast on the local Kurara radio station wherein the employees were informed of the disciplinary inquiry.¹⁷
- [45] The strike action became worse. The Respondent had to approach this court for a second interdict. The Respondent sought the intervention of the police in order to regain its property and for its properties to be secured.¹⁸
- [46] The witness was referred to a document on page 33, paragraph 51 wherein NUM sought a postponement of the disciplinary inquiries which were scheduled for 15 October. This demonstrates that NUM and the Applicants were indeed aware of the disciplinary inquiries as they have received the notices, to that effect. The Respondent refused to grant the Applicants' postponement.¹⁹
- [47] During the set down of the disciplinary inquiry, NUM did not attend. However, there were employees who attended the disciplinary inquiry. From 3 to 15 October, the Respondent was in constant engagement with NUM. In some instances, the Respondent would engage two to three times a day with NUM discussing the illegal strike.
- [48] The strike action cost the Respondent to lose an amount of \$14-million in revenue, per day. The trust relationship between the Respondent and the employees were broken down irretrievably as a result of the damage caused by the employees to the Respondent.

¹⁷ Transcript of 1 December 2014, p. 71, line 9 – p. 74, line 23.

¹⁸ Transcript of 1 December 2014, p. 76, line 3 – p. 78, line 19.

¹⁹ Transcript of 1 December 2014, p. 78, line 20 – p. 80, line 3.

- [49] There are no longer positions available as the vacant positions were all filled subsequent to the employees being dismissed.²⁰
- [50] The witness was cross-examined at length. The issues canvassed during cross-examination sought to exonerate all the striking members and/or the Applicants before court premised on the employer's failure to demonstrate that it was able to identify each and every employee who was on strike.²¹
- [51] The witness was also challenged on his evidence pertaining to whether or not the court order was served to all the Applicants. The witness testified that the Respondent did everything possible to convey the court order to the Applicants and their representative.²²
- [52] The witness was also cross-examined on the disciplinary notices which were distributed by the Respondent to the Applicants. It was suggested to the witness that because of the volatile environment it was possible that some of the employees did not receive the notices. It was suggested that some of the witnesses might not have attended the disciplinary inquiry as it was not safe for them to travel to the venue where the disciplinary hearing was held. **However, no witnesses was called by the Applicants to testify on this issue.**²³
- [53] The witness was also challenged on the SMS's which was despatched to the Applicants notifying them about the disciplinary inquiry. It was suggested that because the Respondent did not have any record of the list of the Applicants who received the SMS's, it was therefore possible that the Applicants did not receive same. **What is evident from the record is the fact that NUM did request a postponement and this is indicative of the fact that the Applicants were aware of the date, time and venue of the disciplinary inquiry.**²⁴

²⁰ Transcript of 1 December 2014, p. 81, line 2 – p. 82, line 24.

²¹ Transcript of 2 December 2014, p. 96, line 12 – p. 97, line 4; **see also** p. 98, lines 10 – 24; p. **108, lines 3 - 23.**

²² Transcript of 2 December 2014, p. 102, line 7 – p. 105, line 5.

²³ Transcript of 2 December 2014, p. 111, line 7 – p. 112, line 25.

²⁴ Transcript of 2 December 2014, p. 114, lines 18 – 24.

- [54] The witness was also questioned on the appeal hearing. It was suggested to the witness that it was dangerous to attend the appeal hearing and that was a justification for some of the employees not to attend the appeal hearing.²⁵

The evidence of Ms Aucamp

- [55] In October 2012, she was employed by the employer at Sishen Mine in Kathu. During the unprotected strike, she was still employed by the employer as the Communication Manager.
- [56] She was responsible for all communication, strategic planning and the execution of the communication plan pertaining to the strike and managing the crises communication.²⁶
- [57] During the unprotected strike, she was responsible for both internal and external communication which was directed to the specific audience groups. The communication was directed at the community, stakeholders and employees.
- [58] The employees were informed about the unprotected strike by means of SMS system which has over 17 000 people that are registered. The employer utilised radio communication and newspaper communication in various newspapers. The employer also used flyers. Furthermore, the employer used helicopters to distribute the notice. In addition, the employer used emails and information billboard, as well as screens inside the mine.²⁷
- [59] In relation to the communication through radio, the employer focused on radio adverts which were aired on the local community radio station called Kurara FM. There were interviews conducted through Motswedding radio station.
- [60] In terms of the print media, the employer posted adverts in the local newspapers which are distributed within the community and covers the area as far as

²⁵ Transcript of 2 December 2014, p. 134, line 10 – p. 135, line 10.

²⁶ Transcript of 3 December 2014, p. 214, lines 2 – 20.

²⁷ Transcript of 3 December 2014, p. 214, line 10 – p. 218, line 21.

Uppington. Other adverts were posted in Media 24, Northern Cape newspaper and the Volksblad.²⁸

- [61] More specifically, in relation to the notices distributed during the strike, the witness testified that the employer used SMSs and flyers. The cellphone numbers of the employees were obtained from the HR system. The notices were also wrapped with the food parcels which were offered to the employees. In addition, the notices were dropped through helicopter. Furthermore, there were posters which were placed as strategic shopping points.
- [62] In relation to the two interdicts, the same methods of notifying the employees were utilised (i.e. flyers despatched with the food parcels, SMS notifications, helicopter drop-offs and posters at the shopping centres).
- [63] The witness was cross-examined but her evidence remained consistent throughout pertaining to how the employees were engaged and notified about their illegal conduct, including how the employees were notified about the disciplinary inquiry and the two interdicts.

The evidence of Mr Malander

- [64] During October 2012, he was employed by the Respondent in the capacity of HR Operations Manager. He was later promoted to a position of Senior Specialist: Transformation. He testified in relation to annexure H.
- [65] The employees who were participating in the unprotected strike as listed on annexure H, were identified by using the time and attendance register, the clocking system and the access control system. The clocking system will indicate when the respective employees went into the mine and/or clock in and out from their respective shifts. The assumption was made that the employees that had failed to clock out, were therefore participating in the unprotected

²⁸ Transcript of 3 December 2014, p. 214, line 10 – p. 218, line 21.

strike.²⁹

- [66] He also testified in relation to annexure A which contained a list of employees who have abandoned the strike. Some of these employees reported to management that they were no longer participating in the strike.
- [67] He also testified in relation to annexure I. Annexure I shows when the employees on that list entered the mine and when they exited the mine.
- [68] He was referred to a document on page 397, which listed the employees that were identified as participating in the strike through various means of identification, which was utilised by the employees.
- [69] The other means of identifying the employees that were on strike was by means of the list received from the South African Police Services which contained the names of the employees who were arrested on 16 October while being at the G80 dump.³⁰
- [70] If one has regard to annexures H, I and J including the 49 employees who were arrested, this indicates that all the Applicants who were accounted for as having engaged in the unprotected strike were totalling to 110.
- [71] There were three meetings which were held with the employer representatives. These meetings were held on 4, 7 and 9 October. The minutes of those meetings were also identified by the witness.³¹
- [72] The witness was cross-examined and the contents of the minutes were placed in dispute including the individuals who attended the meeting.
- [73] Furthermore, it was suggested to the witness that the Respondent was unable to demonstrate through annexures H, I and J as to which of the employees actively

²⁹ Transcript of 3 December 2014, p. 236, line 18 – p. 237, line 16.

³⁰ Transcript of 3 December 2014, p. 238, line 20 – p. 239, line 20.

³¹ Transcript of 3 December 2014, p. 239, line 21 – p. 241, line 5.

participated in the unprotected strike.

The evidence of Mr Smit

- [74] In October 2012, he was employed by the employer as the Plant Manager. He is currently employed by Diro Resources and he is the CEO of the aforesaid company.
- [75] In October 2012, he was appointed as the chairperson of the disciplinary hearing which were held on 15 October 2012. During the disciplinary inquiry, he was satisfied that the employees who were absent from the disciplinary inquiry were indeed notified about the set down of the disciplinary inquiry.³²
- [76] He was referred to bundle A, page 346 and identified that document as a notice to attend the disciplinary inquiry. He testified that NUM sought the disciplinary inquiry to be postponed.³³
- [77] He further testified that there was a response to NUM's request for postponement. NUM was informed that it must attend the disciplinary inquiry in order to move an application for postponement on behalf of the employees.³⁴
- [78] During the disciplinary inquiry, no request for postponement was made. The representative of NUM, were not present at the disciplinary inquiry. Only 7 employees attended the disciplinary inquiry on 15 October. There was sufficient security at the venue of the disciplinary hearing.
- [79] He reiterated that he was satisfied with the methods which the company utilised to notify the employees about the disciplinary inquiry and he was contend that the employees were aware and did receive the notice of the disciplinary inquiry.³⁵

³² Transcript of 4 December 2014, p. 254, lines 1 – 25.

³³ Transcript of 4 December 2014, p. 256, line 3 – p. 257, line 15.

³⁴ Transcript of 4 December 2014, p. 258, lines 4 – 20.

³⁵ Transcript of 4 December 2014, p. 259, line 14 – p. 260, line 13.

- [80] The 7 employees who attended the disciplinary inquiry were informed of their rights. He testified about the minutes of the disciplinary inquiry which was held on 15 October 2012 and confirmed the correctness of same.³⁶
- [81] The witness was cross-examined. It was put to him that in the capacity in which he was employed by the Respondent, he would do everything to protect the interest of the employer.³⁷
- [82] He was asked at length about NUM's request for a postponement. He testified clearly that during the disciplinary inquiry, NUM did not bring any formal application for postponement on behalf of the employees despite being informed to do so by means of the correspondence which the parties referred to.³⁸
- [83] He was questioned whether during the disciplinary inquiry evidence was led demonstrating how each and every employee participated in the unprotected strike. He was questioned about annexures H, I and J which contained the different names of employees.³⁹
- [84] It was put to him that before he was appointed the chairperson of the disciplinary inquiry, he already had a view that the employees were engaged in an unprotected strike.⁴⁰
- [85] The Respondent closed its case and it was the turn of the Applicants to adduce their oral evidence.

Applicants' witnesses

- [86] The Applicants called the following witnesses:-

³⁶ Transcript of 4 December 2014, p. 262, line 19 – p. 271, line 7.

³⁷ Transcript of 4 December 2014, p. 272, lines 10 – 17; **see also** p. 273, line 1 – p. 274, line 10; p. 275, line 17 – p. 276, line 19.

³⁸ Transcript of 4 December 2014, p. 293, line 1 – p. 295, line 20; **see also** p. 297, line 20 – p. 299, line 25.

³⁹ Transcript of 4 December 2014, p. 307, line 20 – p. 311, line 21; **see also** p. 314, line 2 – p. 315, line 4.

⁴⁰ Transcript of 4 December 2014, p. 323, lines 14 – 20.

- 86.1 Ms Kehilwe Jane Maruping (*“Ms Maruping”*);
- 86.2 Mr Moses Khewagele Kgabutswe (*“Mr Kgabutswe”*);
- 86.3 Ms Constance Kelebogile Kgosimele (*“Ms Kgosimele”*);
- 86.4 Mr Thue (*“Mr Thue”*);
- 86.5 Mr Bongani Emmanuel Kies (*“Mr Kies”*);
- 86.6 Mr George Meyer (*“Mr Meyer”*);
- 86.7 Mr Poloko Vincent Moruti (*“Mr Moruti”*);
- 86.8 Mr Mosala Abel Tsheko (*“Mr Tsheko”*).

The evidence of Ms Maruping

- [87] She testified that she still remembers what occurred on 2 October 2012, as there was a strike. She was doing a dayshift and was supposed to knock off at 20:00 in the evening. She was operating under the C shift.
- [88] The strike started during the night and at that time D shift was at work. The Respondent never told the employees to stay at home, instead, it suspended their access cards so that they were unable to enter, at the employer’s gate.⁴¹
- [89] At the end of her shift, she exited the employer’s premises. She used her access card, as it was still functional. On 3 October 2012, she was supposed to do a night shift, and she discovered that her card was deactivated. She does not have proof that the employees who commenced the unprotected strike from D shift were aggressive.⁴²

⁴¹ Transcript of 29 June 2015, p. 337, line 14 – p. 338, line 20.

⁴² Transcript of 29 June 2015, p. 339, lines 5 – 18.

- [90] On 3 October 2012 when she arrived at the employer's premises, she witnessed that there were other employees who were waiting at the gate trying to gain access to the employer's premises as their cards were deactivated. The security guards told them to go back home.⁴³
- [91] On 3 October 2012, she did not participate or take part in the unlawful strike. She was not among the employees from the B shift who broke the gates in order to gain access to the employer's premises and to join the other employees at the G80 dump.⁴⁴
- [92] On 4 October 2012, she was supposed to do a nightshift. She went to the employer's premises and waited at the gate. She observed that there were other employees who were waiting at the gate who could not access the employer's premises. She then went back home. In essence, she testified that on 3 and 4 October 2012, she was unable to gain access to the employer's premises.⁴⁵
- [93] On 5 October 2012, she telephoned Mr Loots and asked him about when was she expected to return to work and asked him about the situation at work. At the time when she called Mr Loots, she was at the gate. Mr Loots informed her to call Mr Marius. She called Mr Marius who in turn requested the witness and others to form a delegation. This delegation was the one which was supposed to hold a meeting with the management of the employer.⁴⁶
- [94] The people who constituted the delegation of the employees, *inter alia*, included the witness, Bongani Kies and Ben Makhutle as all of them were standing outside, at the Respondent's premises. The security official opened the gate for them, in order for the delegation to access the gate. They followed Mr Marius to his office.

⁴³ Transcript of 29 June 2015, p. 339, line 19 – p. 340, line 12.

⁴⁴ Transcript of 29 June 2015, p. 340, line 21 – p. 341, line 7.

⁴⁵ Transcript of 29 June 2015, p. 341, lines 8 – 25.

⁴⁶ Transcript of 29 June 2015, p. 342, line 20 – p. 343, line 10.

- [95] In the meeting discussions related to how to resolve the problem of the employees who were at the mountain (G80). They were informed by Mr Matthee about the demand of the employees who were at the mountain that they were demanding an amount of R15 000. She only became aware of the demand on 5 October 2012.⁴⁷
- [96] On 6 October 2012, they had a meeting with the management. The purpose of this meeting was to discuss what to do with the people who were still at the mountain. There was no agreement. In the words of the witness, she states that *"We never had an agreement"*.⁴⁸
- [97] Mr Loots indicated that there is only one union that was recognised which the employer can discuss with. That union was NUM. A meeting took place with NUM. At this meeting, there was no agreement. The employee left for the day. On 7 October 2012, there was a meeting with the employer, but she does not remember what was discussed.⁴⁹
- [98] Her employment was terminated by means of an SMS which she received on 15 October 2012. The SMS message indicated that she was not present at the hearing and as a result, she was dismissed. Prior to 15 October 2012, she did not receive anything from the employer and that is the reason why she was surprised by the SMS she received on 15 October 2012.⁵⁰
- [99] After having received the SMS of 15 October 2012, NUM intervened on behalf of all the employees and instituted an appeal on behalf of the employees.⁵¹
- [100] The witness testified that she did not receive a notice informing her about the disciplinary inquiry. She was not aware of any notices which were dropped off by means of a helicopter. She was not part of the employees who were engaged in

⁴⁷ Transcript of 29 June 2015, p. 344, lines 4 - 24.

⁴⁸ Transcript of 29 June 2015, p. 346, lines 3 – 11.

⁴⁹ Transcript of 29 June 2015, p. 347, lines 6 – 25.

⁵⁰ Transcript of 29 June 2015, p. 348, lines 3 – 23.

⁵¹ Transcript of 29 June 2015, p. 349, lines 2 – 18.

the unprotected strike.⁵²

[101] She did not hear any adverts broadcast by the employee at the local radio station (Radio Kurara). She was not aware, at all, about the rights of the employees which were provided for to the employees pertaining to being represented at the disciplinary hearing.⁵³

[102] The witness was cross-examined and the cross-examination revealed the following:-

102.1 the witness conceded that there was an unprotected strike;⁵⁴

102.2 during the strike she was elected as a delegate;⁵⁵

102.3 the employee was confronted with her version which she gave during the appeal proceedings and it was demonstrated that in material way contradicted her evidence in court. The employee was unable to explain these contradictions except to lay the blame on her legal representative as she said *“Which mean, M'Lord, I did not understand my lawyer well, I thought that we were talking about the 7th and we ended on the 7th, so I never knew, I never understood I had to explain further after the 7th”*;

102.4 this evidence is indeed contradictory as the witness in her evidence in chief only testified about the events until the 7th October and in so many words testified that she did not recall what transpired on 7 October. Yet, the record of appeal clearly demonstrates that she participated beyond 7 October 2012;⁵⁶

⁵² Transcript of 29 June 2015, p. 352, lines 2 – 17.

⁵³ Transcript of 29 June 2015, p. 353, line 2 – p. 354, line 3.

⁵⁴ Transcript of 29 June 2015, p. 355, lines 10 – 12.

⁵⁵ Transcript of 29 June 2015, p. 356, lines 15 – 16; **see also** lines 20 - 22.

⁵⁶ Transcript of 29 June 2015, p. 359, line 8 – p. 360, line 13.

102.5 the witness also materially contradicted herself when it was demonstrated that she was in fact elected by the employees to represent them and that she was not chosen by Mr Marius or Mr Loots as she testified, before this court;⁵⁷

102.6 the witness was confronted with the minutes of 7 October 2012 and it was demonstrated that the minute was correct to the extent that it referred to her;⁵⁸

102.7 it was put to the witness that the minutes demonstrate that Mr Kies, who was part of the team and the other three, including the witness were there for the same purpose and supporting the demands of the employees. The witness answered that *"I will not be able to answer that"*;⁵⁹

102.8 more fundamentally, on page 371, line 2 to page 372, line 12, the witness testified as follows:-

"Okay, now, I want to take you down two paragraphs to where your name appears. It says here, and this is what you then say:

"We want you to know, it is not just B and D shift on strike. A, B, C, D shift are all with us, also, if we were satisfied with the union, we would not have been here."

--- What I said there, M'Lord, is that all the shifts, they are affected by the strike and the NUM is supposed to be with us as the delegation in the meetings that we are having.

⁵⁷ Transcript of 29 June 2015, p. 360, lines 14 – 25.

⁵⁸ Transcript of 29 June 2015, p. 363, line 20 – p. 367, line 20.

⁵⁹ Transcript of 29 June 2015, p. 368, lines 6 – 11; **see also** p. 368, line 20 – p. 370, line 4.

Okay, so these are the words you said and that is what you meant, you are telling this court? --- That is true.

Okay, and when you say: "A, B, C, D shifts are all with us," who is the "Us" there? --- The delegation, M'Lord.

Oh, so you had the A, B, C, D shifts in that meeting with you in the delegation?

INTERPRETER: Pardon?

MR ITZKIN: Are you saying the A, B, C, D shifts were all with you as part of the delegation? --- Yes.

Okay, so we had a delegation of hundreds of workers that was meeting with management? --- In the delegation that was meeting with the management, there was skof A, skof B, skof C, skof D.

What is "Skof"?

INTERPRETER: Shift, sorry, M'Lord.

MR ITZKIN: Shift. And were you representing them, you say? --- I do not understand that, question ...[intervenes]

Okay, which shift were you representing? You say they were delegates from each shift, which shift were you there to represent? --- Maybe you did not understand me. What I meant is that the delegation that was selected, was selected to represent all the four shifts.

Oh, so you were representing all of them? --- It is true.

And in this first line you say:

"We want you to know, it is not just B and D shift on strike."

*So you are saying, all of the shifts are on strike, it is not just B and D, correct? --- I said all the shifts are being affected by the strike and the situation that was there.*⁶⁰

102.9 the witness was confronted with the document on page 259 and she appeared to not remembering the contents of what was contained in the aforesaid document. In fact, there were other parts she remembered and others which she said she did not remember.⁶¹

The evidence of Mr Kgabutswe

[103] On 3 October 2012, he was working in the plant. He was operating under B shift. He knocked off in the morning on 3 October 2012. After work, he went to the hostel. He became aware of the strike when he knocked off as he saw people who were waiting outside.

[104] On 4 October 2012, he was at the hostel. He heard people saying that the mine has been shut down.⁶²

[105] He normally uses his clock card to access the employer's premises. The last time when he used his clock card was on 3 October 2012, in the morning. On 5 October, he spend most of his time in the hostel.

[106] When he knocked off on 3 October 2012, he was supposed to return to work on 7 October 2012 and he did not go back to work on 7 October 2012 as the gates at the employer's premises were closed. He did not take part in the strike.⁶³

[107] He sustained injuries during the strike. He was assaulted during the strike. He received medical attention at the Kimberley Hospital. He was admitted as a patient.

⁶⁰ Transcript of 29 June 2015, p. 371, line 2 – p. 372, line 12.

⁶¹ Transcript of 29 June 2015, p. 379, line 12 – p. 382, line 3.

⁶² Transcript of 29 June 2015, p. 413, lines 1 – 24.

⁶³ Transcript of 29 June 2015, p. 414, lines 1 – 19.

[108] After he was discharged from hospital, he received a notification about the appeal. He attended the appeal. He was not aware of any disciplinary inquiry that took place before the appeal.⁶⁴

[109] During the appeal proceedings, he was represented by NUM. He did make a statement at the appeal hearing. He was not given any reasons for his dismissal.⁶⁵

[110] The witness was cross-examined. The cross-examination revealed the following:-

110.1 he stayed at G80 overnight because of lack of transport. Furthermore, he stayed at G80 overnight as he was waiting for a report from the person in charge;⁶⁶

110.2 it was further put to the witness that on probabilities he was at the G80 as he was supporting the demand of R15 000 increment. The witness said he was not going to answer that question;⁶⁷

110.3 it was put to him that on probabilities, the witness was in fact at G80 in order to support the unprotected strike and the demand of the employees pertaining to the salary increment to R15 000;⁶⁸

110.4 the witness conceded that he was not prevented to leave G80 on 15 October 2012;⁶⁹

110.5 he disputed the evidence which was put before the employer's witnesses that he was arrested on 16 October 2012. He said that he was not arrested but he was assaulted. However, when pressed for answers, he

⁶⁴ Transcript of 29 June 2015, p. 416, lines 3 – 20.

⁶⁵ Transcript of 29 June 2015, p. 417, line 5 – p. 418, line 3.

⁶⁶ Transcript of 30 June 2015, p. 428, lines 15 – 20.

⁶⁷ Transcript of 30 June 2015, p. 428, lines 10 – 14.

⁶⁸ Transcript of 30 June 2015, p. 429, lines 1 – 13.

⁶⁹ Transcript of 30 June 2015, p. 429, lines 17 – 18.

then conceded that he was in fact arrested;⁷⁰

110.6 he was referred to the appeal record on page 114. He agreed that he was represented by NUM during the appeal proceedings. It was demonstrated to the witness that during the appeal proceedings, nowhere was it ever submitted on his behalf that he did not know the charges against him;⁷¹

110.7 it was also demonstrated to the witness that during the appeal proceedings there was no defence which was advanced on his behalf;⁷²

110.8 it was demonstrated to the witness that during the appeal proceedings, he did not deny that he participated in the unprotected strike.⁷³

The evidence of Ms Kgosomele

[111] On 3 October 2012, she was operating on B shift. She was supposed to do the dayshift on 3 October 2012. She did not go to work on 3 October 2012, as she was booked off duty by the doctor, for medical reasons. In essence, from 3 to 8 October, she was not at work, as she was on sick leave.⁷⁴

[112] She was supposed to go back to work on 12 October 2012. However, she was unable to work as there was a lockout. When she went to work on 12 October 2012, her card was deactivated. She also remember that the reason why there was a lockout is because the employees were demanding R15 000 from the memorandum and also raising other issues pertaining to SARS.⁷⁵

[113] When she went to work on 12 October 2012 and discovered that her card was deactivated, she went back to the hostel, where she stayed. On 13 October, she

⁷⁰ Transcript of 30 June 2015, p. 429, line 17 – p. 430, line 5.

⁷¹ Transcript of 30 June 2015, p. 431, lines 10 – 21.

⁷² Transcript of 30 June 2015, p. 431, line 21 – p. 432, line 3.

⁷³ Transcript of 30 June 2015, p. 433, lines 6 – 13; **see also** p. 433, line 19 – p. 434, line 12.

⁷⁴ Transcript of 30 June 2015, p. 444, line 13 – p. 445, line 4.

⁷⁵ Transcript of 30 June 2015, p. 445, line 14 – p. 446, line 4.

stayed at home.

[114] On 14 October, there were cars which were taking food to the workers who were at the stockpile (G80) and she then also went at the stockpile. She went to the stockpile because she wanted to hear the feedback from Andrew Loots as the other employees were also waiting there to hear the feedback. She wanted to hear the feedback first hand.⁷⁶

[115] She went to the stockpile on 14th and remained there until the 16th when she was arrested. According to her, forty seven (47) employees were arrested at the stockpile. After she was released on bail, she did not receive any communication from the employer. She received a message from the union that she was due to appear on her appeal.⁷⁷

[116] Prior to receiving the notice of appeal from the union, she never received any notification entailing her charges. In essence, she testified that she received nothing from the employer pertaining to the disciplinary inquiry.⁷⁸

[117] She attended the appeal and she was represented during the appeal proceedings by NUM. She disputes the fact that the appeal record indicates that she was afforded an opportunity to present her defence.

[118] The witness was cross-examined. Fundamentally, her cross-examination revealed the following:-

118.1 she participated in the unprotected strike as she was arrested by the police while being there;

118.2 she was represented during the appeal proceedings and there was no challenge pertaining to the substantive component of her dismissal;

⁷⁶ Transcript of 30 June 2015, p. 446, lines 10 – 25.

⁷⁷ Transcript of 30 June 2015, p. 447, line 14 – p. 448, line 5.

⁷⁸ Transcript of 30 June 2015, p. 448, lines 12 – 25.

118.3 she was aware of the demand of the employees and supported the aforesaid demand.

The evidence of Mr Thue

[119] When the unprotected strike commenced, he was operating under B shift. When he arrived at work on 3 October 2012, he noticed a group of employees waiting at the employer's gate. His clock card was not working as it was deactivated.

[120] They went to the office of Mr Loots in order to obtain a feedback. They were told by Mr Loots that the workers had taken possession of the employer's equipment and they are at G80 dump. He was not aware of the employees' demand as he was on sick leave.

[121] The witness testified that Mr Loots asked him and other employees to go to G80 dump in order to speak with the other employees. He went to G80 and met with the employees who informed him that they were waiting for a feedback from the employer. He then decided to stay over at G80 with the rest of the employees who were engaged in the unprotected strike. His justification is that there was no transport to take him back to the hostel.

[122] He left the premises of the employer on 5 October 2012 as Mr Loots has informed them that they were not a recognised union and there was nothing more forthcoming from the employer.⁷⁹

[123] His next interaction with the employer, it was during the appeal proceedings. He was represented by a union official. He was taken through the appeal record with the emphasis that the chairperson did not sign the minute.

[124] The witness was cross-examined. The cross-examination revealed the following:-

⁷⁹ Transcript of 1 July 2015, p. 456, lines 4 – 24.

- 124.1 the witness denied the obvious, that there was a strike at the time when he went to the G80 dump;⁸⁰
- 124.2 the witness was confronted with his statement he made during the appeal proceedings which is on bundle 4, page 1363 where it is recorded that *"I joined the strike on the 3 October 2012 and pulled out on the 5 October because the General Manager did not want to talk to us as delegates"*. This statement clearly demonstrates that the employee was part of the individuals who were involved in the unprotected strike. I do not accept the employees explanation that he wrote what he was told to write by Mr Van Der Merwe as there is no evidence justifying such an assertion;
- 124.3 furthermore, the witness was confronted with this document and asked whether at any stage did he inform his representative that he did not agree with the contents of same and the witness answered no;⁸¹
- 124.4 he was aware of the employees' demand of R15 000 increment, as recorded in the memorandum. Furthermore, he supported the needs of other employees, pertaining to the R15 000 increment demand;⁸²
- 124.5 the witness was confronted with the transcript of the appeal which also clearly indicated that he accepted the statement which he made and furthermore that he joined the unprotected strike voluntarily.⁸³

The evidence of Mr Kies

[125] He was employed as a Plant operator at level Grade 2. On 3 October 2012, he was operating under shift C. He was supposed to commence his night duty. When he arrived at the company, he heard a lot of rumours from people who

⁸⁰ Transcript of 1 July 2015, p. 459, lines 3 – 17.

⁸¹ Transcript of 1 July 2015, p. 460, lines 5 – 8.

⁸² Transcript of 1 July 2015, p. 462, lines 2 – 9.

⁸³ Transcript of 1 July 2015, p. 463, line 1 – p. 465, line 4; **see also** p. 466, line 19 – p. 467, line 23.

were outside the gate. He was told that there was a shift that was camping at G80 and awaiting to hear feedback from the company.⁸⁴

[126] After hearing about these rumours, he called his leader at work, Mr Nicky Beukes. Despite other people saying that their cards were deactivated, he discovered that his card was in fact active. However, he went back home.⁸⁵

[127] Before going back home, he went to the turnstile in order to test that his card was active, he realised that it was active, however, he did not go inside the employer's premises, as he chose to stand outside.⁸⁶

[128] He received an SMS from his leader informing him that they were not going to work, on that particular day. He decided to go back home. On 4 October 2012, he went to the Respondent's premises. He stood outside the employer's premises and nothing happened.

[129] He was part of the delegation which attended the meeting with the employer. He was told by the employer that there were employees who were holding and keeping the employer's machines at G80 dump. He testified that he was informed that the employer received a letter of demand from the employees who were operating under shift B.⁸⁷

[130] After the meeting, he was escorted outside the gate by Mr Marius.

[131] He went to G80 at the request of Marius in order to discuss with the other employees. They returned from G80 around 18:00.⁸⁸

[132] He testified about the events at G80 and stated that while they were discussing with the employees, the management decided to leave them there and told them

⁸⁴ Transcript of 1 July 2015, p. 468, line 21 – p. 469, line 14.

⁸⁵ Transcript of 1 July 2015, p. 469, line 23 – p. 470, line 9.

⁸⁶ Transcript of 1 July 2015, p. 470, lines 20 – 25.

⁸⁷ Transcript of 1 July 2015, p. 474, line 24 – p. 476, line 5.

⁸⁸ Transcript of 1 July 2015, p. 477, lines 13 – 25.

that they will fetch them the next day.⁸⁹

[133] The witness was referred to the transcript of the appeal proceedings. He contradicted what was contained in the appeal record. He confirmed that he was represented by NUM during the appeal proceedings. He confirmed that he signed the document starting from page 1542.⁹⁰

[134] The witness was cross-examined. The witness was evasive and argumentative. He sought to dispute even things which he admitted, during evidence in chief, for instance:-

134.1 he refused to accept that there were employees at G80 who were holding the employer's machinery at ransom;⁹¹

134.2 he sought to deny the obvious evidence of Ms Maruping who testified that the workers were misbehaving and claimed that he did not hear that, despite the fact that he was at all material times, sitting, in court;⁹²

134.3 as the court, I had to intervene in order for the witness to answer the questions.⁹³

[135] In addition to his evidence, under cross-examination, the witness's evidence revealed the following:-

135.1 it was demonstrated to him that the version put to the other witnesses that he only went to the employer's premises on the 8th of October 2012, is in fact incorrect as the record of the proceedings demonstrate that on the 7th of October 2012 he was part of the delegation that held a meeting with the management of the Respondent;⁹⁴

⁸⁹ Transcript of 1 July 2015, p. 478, lines 18 – 22.

⁹⁰ Transcript of 1 July 2015, p. 484, lines 2 – 19.

⁹¹ Transcript of 1 July 2015, p. 487, lines 10 – 19.

⁹² Transcript of 1 July 2015, p. 487, lines 1 – 9.

⁹³ Transcript of 1 July 2015, p. 488, lines 5 – 10.

⁹⁴ Transcript of 1 July 2015, p. 491, lines 11 – 20; **see also** p. 491, line 21 – p. 492, line 2.

135.2 he was referred to the minute on page 257 and it was put to him that it recorded the accurate events of what transpired during the aforesaid meeting. The witness, without furnishing any plausible explanation, distanced himself from what was recorded in the minute;⁹⁵

135.3 it was put to the witness that *"In fact, you must take responsibility for all the employees that were dismissed because of your action that you took as a leader and as part of the delegation, all these employees that are sitting here, you are responsible for their dismissal. Would you like to comment on that?"*. The witness responded as follows *"That is your views. There is nothing that I can say"*.

The evidence of Mr Meyer

[136] He was employed by the Respondent as a grader. On 3 October 2012, he was operating under shift D. He went to work on 2 October 2012, at night, his shift ended in the morning of 3 October 2012. When he commenced his shift on 2 October 2012, he started working at G80 dump.⁹⁶

[137] While he was working, he saw the trucks being parked at G80. He stopped working as the trucks occupied the area where he was supposed to work. He saw employees who gathered at G80 who were saying that they were waiting for feedback from Mr Loots.⁹⁷

[138] He remained at G80 dump from the 3rd until the 6th October 2012. He was asked whether while they were at the G80 dump, did anyone inform him of what was happening and furnished him with any reasons for what was happening, he answered that *"I do not remember"*. On 6 October 2012, he decided to leave

⁹⁵ Transcript of 1 July 2015, p. 495, line 12 – p. 500, line 23; **see also** p. 500, line 25 – p. 501, line 7; p. 502, line 24 – p. 506, line 19 (*"Yes, I see that, hence I said that I am not happy with the Minutes and also some things that comes from that ..."*).

⁹⁶ Transcript of 1 July 2015, p. 508, lines 3 – 4.

⁹⁷ Transcript of 1 July 2015, p. 509, lines 6 – 20.

G80 and walked away from G80.⁹⁸

[139] On 6 October 2012, he walked from the G80 dump towards the mine gate. He attempted to clock out, his card was deactivated. He told the security that his card was deactivated and he was taken to Mr Loots. Mr Loots asked him how many employees were at G80 and he responded that there were approximately 300 employees at the G80 dump. After 6 October 2012 when he left the employer's premises, he never went back to the compound.

[140] On 15 October 2012, they were called at Mangala Lodge to attend a meeting. However, when he arrived at that meeting, he was told that he was not required in that meeting. He was informed about his dismissal by a call he received from Human Resources (HR). He was referred to a document on page 653. He was represented by NUM during the appeal. He was taken through the document like other witnesses, he disputed the contents of the appeal record.⁹⁹

[141] The witness was cross-examined and his evidence during cross-examination, revealed the following:-

141.1 for the three days that he spend at the G80 with his colleagues, he did not say a word as he was sitting alone;¹⁰⁰

141.2 furthermore, he testified that for the period of three days even when the management provided food to the employees who were at G80, he did not eat anything;¹⁰¹

141.3 he confirmed that he knew about the memorandum and the fact that the employees were waiting for the feedback when he went to the G80 dump;¹⁰²

⁹⁸ Transcript of 1 July 2015, p. 510, lines 2 – 23.

⁹⁹ Transcript of 1 July 2015, p. 516, lines 2 – 25.

¹⁰⁰ Transcript of 2 July 2015, p. 520, lines 1 – 8.

¹⁰¹ Transcript of 2 July 2015, p. 520, lines 11 – 14.

¹⁰² Transcript of 2 July 2015, p. 521, lines 14 – 18.

141.4 he attempted to dispute that there was a strike and sought to proffer a very evasive answer;¹⁰³

141.5 he was referred to a document on bundle B, page 658. It was identified as a statement which the witness submitted during the appeal proceedings. It was demonstrated to this witness that during the appeal proceedings and as evident in his statement submitted during the appeal, nowhere has he intimated that he was not supposed to be found guilty of the misconduct that he was charged with. He sought to distance himself from his statement which was submitted during the appeal proceedings.

The evidence of Mr Moruti

[142] On 3 October 2012, he was operating under shift A. His shift was not working on 3 October 2012. They were all off duty and it was supposed to resume its duties on Friday, 5 October 2012. He was able to access the employer's premises through the vehicle gate. He went to attend the normal briefing sessions. However, they did not take place, as other employees did not arrive.¹⁰⁴

[143] He was informed that there were workers who were at G80 and waiting for the feedback from the employer. He was aware of a memorandum which was despatched to the employer around issues concerning SARS and issues pertaining to money. He got a lift from one Bongani Sibuso and they went to G80 dump in order to join other employees.¹⁰⁵

[144] From the 5th to the 8th of October 2012, he was together with other employees at G80 waiting to hear from management and there were no news forthcoming from the employer.¹⁰⁶

¹⁰³ Transcript of 2 July 2015, p. 523, lines 15 – 19.

¹⁰⁴ Transcript of 2 July 2015, p. 538, line 13 – p. 539, line 6.

¹⁰⁵ Transcript of 2 July 2015, p. 541, lines 1 – 10.

¹⁰⁶ Transcript of 2 July 2015, p. 541, lines 11 – 18.

[145] The witness confirmed that during the appeal hearing, he was represented by NUM. He was taken through the appeal record like other witnesses who disputed what was reflected in the appeal record.¹⁰⁷

[146] The witness was cross-examined, his cross-examination revealed the following:-

- 146.1 the witness conceded that he was at G80 and waiting for the employer to address them;¹⁰⁸
- 146.2 furthermore, the witness conceded that they were discussing issues pertaining to money with the employer;¹⁰⁹
- 146.3 he conceded that he was at the employer's premises from 5 to 11 October 2012;¹¹⁰
- 146.4 it was put to the witness that *"you do confirm that you, Mr Khoto, Ms Maruping and others were there as a joint delegation to represent the workers' interests and your own, correct?"*. The witness answered *"The meetings that I attended, they were there"*;¹¹¹
- 146.5 the witness was taken through various minutes. He distanced himself from the contents of the minutes;¹¹²
- 146.6 the witness was taken through the appeal transcript. He admitted that he was part of the employees who were gathering at G80 dump. However, he denied that there was ever a strike;¹¹³

¹⁰⁷ Transcript of 2 July 2015, p. 543, line 20 – p. 547, line 11; **see also** p. 547, lines 12 – 23.

¹⁰⁸ Transcript of 2 July 2015, p. 555, lines 2 – 5.

¹⁰⁹ Transcript of 2 July 2015, p. 555, lines 6 – 10.

¹¹⁰ Transcript of 2 July 2015, p. 556, lines 4 – 5.

¹¹¹ Transcript of 2 July 2015, p. 560, lines 5 – 8.

¹¹² Transcript of 2 July 2015, p. 560, line 10 – p. 562, line 19.

¹¹³ Transcript of 2 July 2015, p. 563, lines 11 – 23.

146.7 he, like other witnesses sought to distance themselves from what was said about them in the appeal record.¹¹⁴

The evidence of Mr Tsheko

[147] He was operating under shift B on 3 October 2012. When he attended his shift, he found employees standing in the employer's gate. They were saying that their access cards were not working. When he went to the briefing session, he was told that the D shift was still on site and they were gathering at the G80 dump. Mr Loots informed them that the mine was closed that is the reason why they were unable to access the mine by using their access cards.

[148] He then decided, as a safety representative, to go to G80 in order to write a report pertaining to safety. When they arrived at G80, they found that the situation was safe.¹¹⁵

[149] He was not aware of the court order issued by the court on 5 October 2012. The first time he heard about the court order was during these proceedings. He was referred to file 5, page 1855 where his reasons for the appeal were recorded. Like other witnesses, he distanced himself from what was stated in the appeal record.¹¹⁶

[150] The witness was cross-examined, his evidence during cross-examination, revealed the following:-

150.1 it was put to him that the version which was put to Mr Matthee was different to what he testified before the court. In particular, it was demonstrated to him that it was never put to Mr Matthee that he went to G80 in order to discharge his responsibilities as a safety

¹¹⁴ Transcript of 2 July 2015, p. 564, line 10 – p. 567, line 21; **see also** p. 568, line 20 – p. 570, line 5; p. 570, line 6 – p. 571, line 20.

¹¹⁵ Transcript of 2 July 2015, p. 579, line 10 – p. 580, line 13.

¹¹⁶ Transcript of 2 July 2015, p. 583, line 20 – p. 585, line 9; **see also** p. 585, line 21 – p. 586, line 16.

representative;¹¹⁷

150.2 he was referred to the appeal record on bundle B, file 5, page 1860, he distanced himself from what was recorded in his appeal record and sought to justify the contradictions by saying that no one translated to him in Tswana language.

Was there an unprotected strike

[151] From having listened to the evidence adduced on behalf of the Respondent and the Applicants, it has indeed become common cause that the Applicants were engaged in an unprotected strike.

[152] The evidence of the Respondent's witnesses, to wit, Matthee, Aucamp and Malander was not challenged in any material respect pertaining to the fact that the Applicants were engaged in an unprotected strike.

[153] In addition, the Applicants' own witnesses, in their oral testimony confirmed the following:-

153.1 there was a collective agreement already in existence when the employees made a further demand for their salaries to be increased with R15 000;

153.2 the employees from shifts A, B, C and D were camping at the G80 dump awaiting a response from management pertaining to their demand as captured in the memorandum including other SARS matters;

153.3 all the employees that testified found themselves, voluntarily so, at the G80 dump even though some of them sought to proffer an untenable contradictory version to the effect that they were either requested to be representatives of the striking employees and/or that they were at the

¹¹⁷ Transcript of 2 July 2015, p. 588, lines 1 – 9.

G80 at the instance of the employer and/or that they were at G80 as they were waiting for a report back from the employer;

153.4 the Respondent's property including machinery were held by the Applicants until such time that the Respondent sought the intervention of the South African Police Services.

[154] In addition, the evidence adduced during these trial proceedings demonstrates that:-

154.1 the recognised union, NUM was chased away when it sought to intervene in relation to the unprotected strike;

154.2 COSATU was unable to prevail over the employees as they continued with their unprotected strike even when amnesty was sought on their behalf;

154.3 the Respondent obtained two court orders which were disregarded by the Applicants as they continued with their unprotected strike.

[155] In fact, the legal teams representing the parties in these proceedings, during oral argument adopted a reasonable and sensible approach by conceding that there was an unprotected strike which led to the dismissal of the Applicants.¹¹⁸

[156] In terms of section 65(3) of the LRA, no person may take part in a strike action if that person is bound by a collective agreement that regulates the issue in dispute.

[157] I am therefore satisfied that the overwhelming evidence adduced during these proceedings demonstrates that the employees were engaged in an unprotected strike.

¹¹⁸ NUM obo 18 Applicants' heads of argument, p. 8, para 19 – p. 10, para 19.11; **see also** Respondent's heads of argument, p. 4, para 11 – p. 6, para 21; Heads of argument of the 91 Applicants represented by Adv Tutu, paras 2.1, 2.6, 3.2 and 4.5.

Did the Applicants before court participate in the unprotected strike

[158] The evidence of Mr Malander remains largely unchallenged and not contradicted.

[159] He testified with reference to annexures H, I and J. His testimony clearly revealed the following:-

- 159.1 the employees who participated in the unprotected strike were identified through the attendance register, the clock system and the access control system;
- 159.2 furthermore, the employees who participated in the unprotected strike were identified through the list received from the South African Police Services which contained the names of the employees who were arrested;
- 159.3 furthermore, the witnesses who testified before this court furnished evidence to the effect that the employees who were operating under shifts A, B, C and D were participating in the unprotected strike, in particular the evidence of Ms Maruping;
- 159.4 the record of the appeal clearly identifies the employees who participated in the unprotected strike and in fact, all the Applicants before the court did not deny during the appeal that at one stage or the other they were at G80 dump in support of the demand in the memorandum.

[160] I am therefore satisfied that the Applicants before this court participated in the unprotected strike and there is no credible and/or convincing evidence adduced by the Applicants and/or on behalf of the Applicants demonstrating the contrary facts.

Did the Applicants receive the notices pertaining to the disciplinary inquiry

[161] It is important to highlight from the onset that prior to the Applicants being dismissed, NUM was engaged on a number of occasions as the evidence reveal. This evidence was not challenged.

[162] Furthermore, the unchallenged evidence of Mr Matthee reveals the following:-

- 162.1 the employer distributed the disciplinary inquiry notices by means of helicopter, bulk SMS messages, through the notices attached to the food parcels and continuous broadcast on the local Kurara radio station;
- 162.2 fundamentally, prior to the disciplinary inquiry, NUM through unchallenged correspondence sought a postponement on behalf of all the Applicants. This clearly demonstrates that NUM and/or its members were aware of the time, venue and date of the disciplinary inquiry. The only way to know of these facts can only be through having perused the notice of the disciplinary inquiry;
- 162.3 those employees who chose to honour the disciplinary inquiry notice, did appear before the chairperson the disciplinary inquiry as they were aware of same by having served or received the relevant notice;
- 162.4 the evidence of the chairperson of the disciplinary inquiry was largely not challenged pertaining to his finding that he was satisfied that the Applicants were duly notified of the disciplinary inquiry;
- 162.5 during the appeal proceedings, the Applicants did not raise any objection pertaining to the fact that they were totally unaware of the disciplinary proceedings which preceded their dismissals.

[163] I therefore find that the Respondent followed a fair disciplinary process and that the Applicants were given notice of the disciplinary inquiry which preceded their

dismissals. The Applicants at their own peril decided or were advised, unfortunately so, not to attend the disciplinary inquiry which their union was well aware of same and no formal postponement application was not even pursued before the chairperson of the disciplinary inquiry.

[164] Furthermore, all the Applicants were afforded a right to appeal. They participated through their union in the appeal process. There is no challenge advanced pertaining to the fairness or otherwise of the appeal process. The appeal body after having considered all relevant information arrived at a decision it did having regard to the statements and submissions made on behalf of the Applicants.

[165] The Applicants' dismissals were procedurally fair.

Was the dismissal substantively fair

[166] What the Applicants cannot challenge is the fact that the unprotected strike cost the employer serious damage. This evidence was not, at all, challenged in any significant manner.

[167] The Respondent lost significant amounts of money as a result of an unprotected strike which could have been avoided had the Applicants respected the bargaining processes and respected the already existing collective agreement.

[168] The misconduct charges which led to the Applicants being dismissed are of a serious nature, as Mr Matthee testified that the unprotected strike was marred with violence, lawlessness and seizure of massive earth-moving machinery. In addition, he testified that the unprotected strike was marred with violence.

[169] In fact, all the parties in their written submissions acknowledges the fact that the strike was marred with acts of intimidation, threats and violence. This is also evident from the cross-examination of the Respondent's witnesses.

[170] The Respondent suffered losses amounting to R140 million per day as the operations of the mine totally stopped.

[171] There were two court interdicts which the Applicants simply undermined and proceeded with an illegal and unprotected strike.

[172] The Applicants defied their own union as they chase the union officials away from the employer's premises when the union sought to intervene.

[173] The Applicants persisted with their unlawful conduct even during the circumstances when their federation (COSATU), sought to intervene in order for the employees to be granted amnesty which the Respondent was willing to entertain and has offered to the employees.

[174] The trust relationship and the employer/employee relationship was broken down irretrievably as a result of this illegal, unreasonable and most damaging unprotected strike which the Applicants participated in under circumstances where a collective agreement was already, in place.

[175] The Applicants sought to deny even obvious facts that they were engaged in an unprotected strike. The Applicants demonstrated contempt on the court orders made by this court pertaining to their illegal conduct.

[176] The Respondent despite the damages it has suffered, it sought to accommodate the Applicants by offering them amnesty without having to dismiss any of them as participants in an illegal strike. The Applicants still persisted with their illegal and unjustifiable conduct.

[177] Furthermore, I am not persuaded that there is any merit in the case advanced by the Applicants that their dismissals constituted an inconsistent application of a rule, policy or code of the Respondent. There is no evidence advanced supporting such a conclusion.

[178] I therefore find that the Applicants' dismissals were substantively fair and that the sanction of dismissal was reasonable in the light of the circumstances of this case and the evidence adduced by the parties during these proceedings.

[179] As a result, I make the following order:-

179.1 the dismissals of the Applicants are procedurally fair;

179.2 the dismissals of the Applicants are substantively fair;

179.3 each party to pay its own costs.

MOKOENA AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the 18 Applicants: Adv M.Z. Makoti and Adv S. Kunene

Instructed by: Mothobi Attorneys

For the 91 Applicants: Adv L.S. Tutubalang

Instructed by: Mathibane Mere Attorneys

For the Respondent: Adv A. Mosam and Adv R. Itzkin

Instructed by: Edward Nathan Sonnenbergs Attorneys