



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS375/13

In the matter between:

**FOOD AND ALLIED WORKERS' UNION
E MALAHLELA & OTHERS**

**First Applicant
Second and Further Applicants**

and

MARULHA LANDGOED (PTY) LTD

Respondent

Heard: 26 to 27 July 2016

Delivered: 24 January 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] The First Applicant, The Food and Allied Workers Union (FAWU), challenges the procedural and substantive fairness of the dismissal of its members, the Second to Further Applicants (the individual applicants), who were dismissed by the Respondent on 2 April 2013 on the grounds of participation in an unprotected strike action. The industrial action took place at the Respondent's farm in Hectorspruit, Mpumalanga.

- [2] The Applicants challenge the fairness of the dismissals on three grounds, viz, that the unprotected strike was in response to unjustified conduct by the Respondent; that the Respondent failed to contact FAWU prior to the dismissals, and further that the Respondent selectively re-employed dismissed employees. A further claim that the dismissals were automatically unfair was abandoned at the commencement of the proceedings.
- [3] The applicants seek retrospective reinstatement, alternatively just and equitable compensation. The Respondent opposed the Applicants' claim.

Preliminary issues:

Locus standi:

- [4] The Respondent raised an objection pertaining to the authority of FAWU and its attorneys of record, Cheadle Thompson and Haysom Inc (CTH), to act on behalf of most of the individual applicants. It is common cause that FAWU initially referred a dispute in respect of 91 employees dismissed. Twenty (20) of these were its members at the time of their dismissal. The issue of *locus standi* pertains to the remainder of the dismissed employees, whom the Respondent contends that FAWU and CTH are not entitled to represent them as they were not union members at the time of the dismissal.
- [5] In respect of the remaining 71 individual applicants, two bundle of documents containing copies of powers of attorney and membership forms were submitted on the morning of the trial. The Respondent disputed the copies in respect of 33 powers of attorney on the grounds that;
- 5.1. The documents were completed only during June and July 2016, long after the institution of these proceedings, and at the time that CTH had no authority to be involved in the matter.
- 5.2. Most of the documents were defective on various grounds, including that they were not signed, dated, or witnessed, or that the name of the individuals is not indicated. The Respondent contends that these defects were fatal.

5.3. The Respondent further held the view that the wording of the power of attorney did not make provision for the institution of proceedings in the Labour Court in the present circumstances. It contends that the wording merely reflected the authority to prosecute the proceedings, but not on behalf of the other individual applicants.

[6] In response to the above objections, it was submitted on behalf of the Applicants that there was no requirement necessitating the provision of power of attorneys for the individual applicants, as they were able to simply attend Court and to confirm that they had indeed mandated their representatives to act on their behalf. Furthermore, with respect to the errors pointed out in the in the completion of the power of attorney documents, it was submitted that these documents should be accepted as valid in their form, and that to the extent that they were completed by the individual applicants, this should be indicative of their intention to grant CTH valid powers of attorney.

Evaluation: Re - Locus standi:

[7] The starting point is that when this dispute was initially referred to the Commission for Conciliation Mediation and Arbitration (CCMA) by FAWU in April 2013, it was referred as; '*FAWU on behalf of Ernest Mahlalela & others*'. Attached to the referral form was a list of the dismissed employees¹. A certificate of outcome issued on 21 May 2013 was in respect of '*FAWU obo Mahlalela Ernest & 97 others*'². I did not understand the Respondent's case to be that the issue of *locus standi* was raised at the CCMA prior to the certificate of outcome being issued, and to that end, *albeit* that is not the issue, the individual applicants' claim is properly before the Court.

[8] A second factor is that the claim was brought by FAWU on behalf of the individual applicants whom it claimed to be their members. It can be accepted that FAWU brought the claim in accordance with its rights in terms of section 200 of the Labour Relations Act³. As to whether it was for an employer to

¹ Pages 64 – 73 of the Consolidated Bundle of Documents

² Page 75 of the Consolidated Bundle of Documents

³ "200. **Representation of employees or employees**

concern itself with the union membership status of an employee, Sutherland JA in *Macdonald's Transport Upton (PTY) LTD v AMCU & others*⁴ held *inter alia* that;

- a) It was not the employer's business to concern itself with whether membership dues were up to date or any other aspect of the relationship between individual employees and their union, or to interfere with the internal decisions of a trade union as to whom to allow to become a member;
- b) An employee who appears before the Labour Court represented by a union pursuant to Section 161(c) of the LRA, need not have been a member at the time of that employee's dismissal. If that be so, the relationship between union and a purported member in such proceedings is not dependent, in the least, on a history of membership⁵;
- c) Except as regards the need for a union to prove membership for collective bargaining purposes, the relationship between a union and its members is a private matter. To interfere with the private contractual relationship of other persons, a stranger would have to demonstrate some sort of delictual harm.

[9] In line with the above authority⁶, and to the extent that FAWU claims that the individual applicants are its members and had furnished membership forms in

(1) A registered *trade union* or registered *employers' organisation* may act in any one or more of the following capacities in any *dispute* to which any of its members is a party -

- (a) in its own interest;
- (b) on behalf of any of its members;
- (c) in the interest of any of its members.

(2) A registered *trade union* or a registered *employers' organisation* is entitled to be a party to any proceedings in terms of *this Act* if one or more of its members is a party to those proceedings.

⁴ (2016) 37 ILJ 2593 (LAC) at paras 39 - 45

⁵ In reference to *Transport and General Workers Union and Others v Coin Security Group (Pty) Ltd* (2001) 22 ILJ 968 (LC) at [160] – [161]

⁶ See also *AMCU v Patcon Construction and Civil Engineering Contractors (PTY) LTD Case No: D 1489/17*
(Delivered on 13 December 2017)

that regard, it is therefore not necessary for the individual applicants to have specifically given CTH powers of attorney to act on their behalf. Once CTH was properly on record as FAWU's attorneys of record, and the individual applicants were properly before the court as represented by FAWU, that should be the end of the matter. I am therefore satisfied that FAWU, and by implication, CTH, have the necessary *locus standi* to represent all the individual applicants that are properly before the Court.

- [10] It follows from the above that it would not be necessary to deal with the validity of the powers of attorney. A point that needs to be made however is that to sustain the Respondent's argument in that regard would lead to both unfairness and absurdity. The individual applicants allegedly not belonging to FAWU at the time of the dismissal cannot be left in the lurch and are indeed entitled to be represented by it. To hold otherwise would then imply that these individuals would have to be excluded from these proceedings, and to then authorise someone or some other attorney in respect of the same matter. If this is the route that the Respondent intended, I fail to appreciate the logic and reasoning behind it, in that all that will eventually take place after the finalisation of this matter, is a re-run of the same issues at some point in the future in this very Court.

Dispute between the parties:

- [11] The events leading to the dismissal of the individual applicants are largely common cause as can be gleaned from the parties' signed pre-trial minutes. In summary;

11.1 The Respondent is in the business of farming bananas, pineapples and sugar cane. Prior to the dismissals, it had a workforce of 510 employees. During the latter part of 2012 and early 2013, there was significant unrest within the farming sector particularly in the Western Cape region. The Respondent was however not affected by these events at the time.

- 11.2 Pursuant to the labour unrest in the farming sector, '*Sectoral Determination 13 for the Farm Worker Sector*'⁷ was amended, in terms of which the minimum hourly wage in the sector was increased from R7.61 to R11.66 with effect from 1 March 2013.
- 11.3 As at the time of publication of the amendments, the Respondent's employees worked 8 hours per day. Their contracts of employment provided for 7 hours per day. When the amendments were published, the Respondent took a decision not to apply for exemption, but to reduce the number of working hours per day to 7, and paid the employees at the increased rate.
- 11.4 The Respondent duly advised its employees of that decision in a meeting called by its Farm Manager, Mr Giep Joubert. That decision was to be implemented with immediate effect.
- 11.5 There was discontent amongst the employees related to the reduction in working hours. This had resulted in unprotected strike action on 7 March 2013. One of the Respondent's owners, Jaycee Rousseau (Rousseau) approached the employees who had gathered within the premises. Rousseau, without attempting to find out what the problem was, simply told the employees that if they did not commence their duties immediately, they would be charged for participating in an unprotected strike. The employees remained in the area.
- 11.6 At about 09h30, Anton Engelbrecht (Engelbrecht), a representative of Landbou Werkgewers Organisasie (LWO), an employer organisation of which the Respondent was a member, posted a written ultimatum on the walls near where the employees were gathered. He left after informing the employees to return to work by 10h00. The employees stayed put.
- 11.7 At some stage, Engelbrecht returned and informed the employees to elect five representatives amongst themselves to speak to

⁷ Government Gazette, 5 February 2013

management. None of the employees had volunteered out of fear that they may be victimised. At about 11h00, members of the SAPS arrived at the premises and convinced the employees to elect representatives to speak to management. This was after Engelbrecht had insisted on the election of representatives, failing which he had indicated that no discussions would take place with the employees. The employees ultimately elected the five representatives and dispersed at about 13h00.

- 11.8 On 8 March 2013, the employees again arrived at the Respondent's premises but refused to report for duty. The five representatives elected the previous day continued to talk to management, with Mr Ernest Mahlalela, the Second Applicant, acting as their spokesperson. Mahlalela spoke with Engelbrecht and informed him that the employees would not go back to work until they had received feedback.
- 11.9 The employees were given until 07h30 to return to work. Mahlalela and the other representatives then gave feedback to the employees, who had in turn still refused to go back to work until they had dispersed at about 14h00 and left the premises.
- 11.10 On 11 March 2013, the employees again gathered outside of the Respondent's premises and refused to return to work. Mr Justice Shakoane, a FAWU official was called by one of the employees to intervene and attended at the premises. Shakoane spoke to Engelbrecht, Joubert and other managers of the Respondent. He thereafter addressed the employees and requested that they return to work, which they did.
- 11.11 Prior to the employees returning to work, ultimatums had been issued during the course of the strike which were ignored. Upon the employees having returned to work, they were all subsequently issued with final written warnings.

- 11.12 Other than the final written warnings, the Respondent also took a decision to institute disciplinary action against a group of 23 employees, whom it had identified as having committed misconduct during the unprotected action of 7 and 8 March 2013. These employees were given notices on 20 March 2013 in terms of which they were advised that disciplinary hearings would be held on 26 March 2013.
- 11.13 After the Respondent had identified some of the employees for discipline, a majority of employees refused to work until the charges against those employees were dropped. Normal work operations however continued until the morning prior to the disciplinary hearing of 26 March 2013, when other employees again demanded that the Respondent should withdraw the charges against their colleagues or charge all of them as they had all participated in the strike.
- 11.14 Shakoane again attended at the farm in the morning of 26 March 2013. He was not allowed to represent the employees at the disciplinary hearings and had left soon thereafter. The hearings continued in the employees' absence.
- 11.15 At about 14h00, Engelbrecht issued notices of suspension in respect of all employees, and also copies of a notice to attend a disciplinary enquiry. He had read out from the copies and given them to Mahlalela. This was in response to the strike action of that day. The employees were suspended until 2 April 2013 when they were required to attend a disciplinary enquiry.
- 11.16 On 2 April 2013, all the employees notified of the hearings had attended. They were represented by another Union official, Mr Catholice Moraba. Malahlela had testified on behalf of all the employees. A decision was taken on 4 April 2013 in terms of which all the employees were found guilty. Letters of dismissal followed on 5 April 2013.

- 11.17 The employees were advised to return on 8 April 2013 to re-apply for their positions should they so wish. They were given forms to complete and advised to return the following day to re-apply for their positions. Most of the dismissed employees were re-employed and had returned to work. Some of the individual applicants had not re-applied for their positions.

The evidence on behalf of the Respondent:

[12] The evidence of Mr Anton Engelbrecht, an official of LWO on behalf of the Respondent is summarised as follows;

- 12.1 He had previously discussed the Respondent's options regarding the amendments to the sectoral determination during February 2013, which included seeking an exemption, which the Respondent was not keen to pursue.
- 12.2 He had communicated the Respondent's decision to the employees at a meeting held with them on 26 February 2013, and had further advised them that the changes were to be implemented with immediate effect. His address to the employees which was in Afrikaans was translated into iSiswati by Mr Moses Mamiza, the Respondent's Human Resources officer. Mamiza in his testimony had confirmed Engelbrecht's version in this regard.
- 12.3 According to Engelbrecht, the employees understood what they were told, and had asked questions for clarity. They had not raised any problems at the time. Engelbrecht nonetheless confirmed that the purpose of that meeting was simply to advise the employees of the changes to be implemented.
- 12.4 In justifying the changes, Engelbrecht further testified that the employees' employment contracts provided that they would be required to work 7 hours. Prior to the amendments, the employees however worked 8 hours per day because there was sufficient extra production to enable the additional hour per day. The practice was

that in summer the employees worked 8 hours per day whereas in winter they reverted to the 7 hours per day. His contention was that reverting to 7 hours per day was not a change to the employees' contract of employment;

- 12.5 Rousseau on 7 March 2013 informed him of the strike action at the farm. When he arrived, he found that the employees were indeed on strike and holding placards. He had approached the employees and requested them to appoint five representatives who could negotiate with management on their behalf. Despite their reluctance, the ultimately did. During the strike, an ultimatum was issued which the employees had ignored. A second ultimatum issued failed to yield any results. Later in the day the employees had dispersed and left the premises.
- 12.6 On 8 March 2013 the strike had continued. Engelbrecht testified that he was threatened when he attempted to enter the premises. Another ultimatum was then issued, imploring the employees to return to work on 11 March 2013;
- 12.7 According to Engelbrecht, he had contacted Shakoane of FAWU on 7 March 2013 to attend to the strike. Shakoane arrived at the premises only on 11 March 2013. Following from Shakoane's intervention, the employees had returned to work;
- 12.8 The Respondent had decided to charge the 23 employees for their conduct during the unprotected strike. Engelbrecht denied that the Respondent had unilaterally changed the terms and conditions of the employees' employment as there was no reason why the new sectoral determination could not be implemented in line with the employees' contracts of employment;
- 12.9 Between 11 and 26 March there was relative peace as employees continued with their normal duties. During that period, discussions according to Engelbrecht were held with the employees, who were

also informed of final written warnings issued to them on 19 March 2013 for their participation in the unprotected strike action;

- 12.10 A decision to institute disciplinary enquiries against 23 employees was taken on 20 March 2013. The disciplinary action related to those employees' conduct during the unprotected strike. The enquiries were scheduled to take place on 26 March 2013.
- 12.11 Shakoane according to Engelbrecht had attended the hearings in the morning but was rude and had left hurriedly as he had other business to attend to in Komatipoort. Shakoane allegedly said that he would not take part in the hearings and had subsequently addressed the employees gathered outside the venue where the enquiries were held, and thereafter told them to leave.
- 12.12 According to Engelbrecht, the disciplinary enquiries did not proceed on 26 March 2013 but were postponed to 28 March 2013. He was involved as a witness, and the subsequent enquiry resulted in the summary dismissal of the individuals involved;
- 12.13 Notices of suspension and to attend a disciplinary enquiry in respect of all other employees were subsequently issued after they had ignored the final ultimatum. Following the enquiry on 2 April 2013, the other employees, including the individual applicants were dismissed. Engelbrecht holds the view that the dismissals were appropriate as the employees were given warnings and reasonable period within which to comply with the ultimatums, which copies were also faxed to the offices of FAWU. He could not however provide evidence to prove that the copies were indeed faxed to the Union;
- 12.14 Under cross-examination, Engelbrecht conceded that the employees were merely informed of the Respondent's decision in respect of the sectoral determination, and that there were no consultations held with them prior to the decision being implemented. He further conceded that management had refused to discuss anything with the employees on 08 March 2013 whilst they were on strike;

12.15 In regard to the final written warning issued after the strike of 7 – 11 March 2013, Engelbrecht conceded that these were issued without inviting the Union to make representations.

[13] The evidence of Mr Giep Joubert (Joubert), one of the directors of the Respondent is also summarised as follows;

13.1 It was not viable to pay the increased wages as per the sectoral determination and maintain the 8-hour system, as this would have resulted in an increase in labour costs in the region of R4 million per year. These increased costs could have led to retrenchments which the Respondent sought to avoid, or at worst, could have led to the closure of the farm as it would not have been possible to absorb such a high increase.

13.2 The workforce in 2013 consisted of about 500 employees and the Respondent was unable to sustain the 8 hours per day system. The workforce as at the time of these trial proceedings consisted of 300 employees, and the Respondent had since reverted to the 8 hours per day system.

The evidence on behalf of the Applicants:

[14] Ernest Mahlalela (Mahlalela), the Second Applicant was employed by the Respondent as a general farm worker for a period of two years prior to his dismissal. His testimony was that;

14.1 He was elected as one of the employee representatives during the strikes in 2013, as the employees were unhappy with the Respondent's decision to reduce their working hours;

14.2 Joubert had sometime in March 2013, called the employees to a meeting and informed them of a reduction in working hours, and an increase in their hourly rate to R11.66. The employees were not afforded an opportunity to ask questions at that meeting in regard to the new changes and had thereafter left and resumed their duties.

- 14.3 Employees nonetheless kept complaining about the changes and had decided to confront management in the morning of 7 March 2013 as a group since they did not have representatives (FAWU did not have elected shop stewards on the farm). Rousseau met and informed them that even though he acknowledged that there was a problem with the changes, it was for the employees to decide whether they wanted to go back to work or continue with their unprotected strike action. He further informed the employees that management would implement 'no work, no pay' in respect of those that did not want to go back to work.
- 14.4 The employees had not planned to go on strike, and after Rousseau had addressed them, they then decided not to go back to work, specifically since Rousseau did not want to listen to their concerns.
- 14.5 Mahlalela confirmed that Mamiza had interpreted what Engelbrecht had said. He however contended that Engelbrecht also refused to entertain their questions, and simply told them that they were on unprotected strike;
- 14.6 Mahlalela confirmed that after Engelbrecht spoke to them, he also told them to return to work before 08h00. The employees nonetheless refused to go back to work as their complaints had not been addressed. At 08h00, Engelbrecht came back to where the employees were gathered, said nothing, and simply pasted copies of an ultimatum on a wall and left. The ultimatum required of the employees to return to work by 08h30.
- 14.7 At some point Engelbrecht came back and requested them to choose 5 representatives amongst themselves to talk to management. The employees were hesitant to nominate representatives to act on their behalf, as they were afraid that they could be victimised and ultimately dismissed, as it had happened in the past.
- 14.8 It was only after the members of the South African Police Service got involved and informed them to choose five representatives that they

had agreed to do so. Whilst the five representatives were having discussions with management, the employees were then told to leave the Respondent's premises.

- 14.9 Mahlalela was one of the five representatives chosen by the employees to represent them in their meeting with Engelbrecht. Engelbrecht told them that the employees should all go home and that the five representatives should meet with management the following day. At about 13h00, the five representatives reported back to the other employees and everybody thereafter dispersed. The following morning the employees had reported for duty and waited for Engelbrecht at the entrance of the premises as they had been instructed not to enter the premises the previous day.
- 14.10 When Engelbrecht arrived and upon the employee representatives confronting him, he refused to speak to them, telling them that he had nothing to say to them as the employees were still on strike. He told them that he would only speak to them if the employees went back to work before 0h900.
- 14.11 The five representatives went back to the employees to give a report back. Mamiza approached the representatives and informed them that Engelbrecht would only speak to them once all the employees had returned to work by 09h30. Upon receipt of the news, the employees refused to go back to work. The employees left the premises at about 14h00.
- 14.12 Mahlalela had then called Justice Shakoane of FAWU to intervene. Shakoane attended to the matter on Monday (11 March 2013) as he had promised. He met with Mamiza in the latter's office. Engelbrecht, Rousseau and Joubert joined them. In that meeting, Engelbrecht explained that the employer could not continue paying the employees for an 8-hour day, hence the decision taken. He also informed them that the employees had been issued with written warnings for the

strike on 7 and 8 March 2013 due to the unprotected strike and failure to heed ultimatums.

- 14.13 Shakoane had informed management that he would not accept the warnings because the employees were never informed of any intended disciplinary action. At that stage, Engelbrecht then told Shakoane and the employees to leave as they were not listening to him. The representatives and Shakoane then left to address the workers and upon their advice, the employees resumed their duties.
- 14.14 Upon the employees going back to work, 23 of them including Mahlalela and the other representatives were subsequently called to management offices where they were issued with a list of charges, with the disciplinary hearing being scheduled for 26 March 2013. Five charges for participating in an unprotected strike action were levelled against them.
- 14.15 There was unhappiness among the employees about the selective disciplinary action taken against some of them and not the group as a whole. Shakoane was also informed of these turn of events. All the workers decided that they would not work unless the charges were withdrawn against their colleagues.
- 14.16 On 26 March 2013 Shakoane arrived at the premises with the intention of representing those facing disciplinary action. He was however informed that no external representatives were permitted at the hearing and therefore he could not represent them. When Shakoane was barred from representing the employees, a scuffle between him and Joubert ensued after the latter physically pushed him. Shakoane returned the favour, resulting in Mahlalela having to separate them. Mamiza then told Shakoane and the other representative to leave the building. They then went outside and addressed the workers who had gathered outside the hearing room and informed them of what had just taken place.

- 14.17 Engelbrecht also came outside, read from a document and informed the workers that those employees who were charged had been found guilty and that a trust relationship between them and the Respondent had broken. Engelbrecht did not say anything about sanction. He then told the other employees to go back to work. At about 14h00, notices of suspension were then issued to all employees and were informed to come to a hearing on 2 April 2013.
- 14.18 On 2 April 2013, the hearing had commenced, and the employees were represented by another union official, Catholice Moraba. The employees were informed of their dismissal on 4 April 2013. On 5 April 2013 the employees were finalising the paperwork in regard to the termination of their services when they were told that those that wanted to re-apply for their posts should come back on 8 April 2013.
- 14.19 All the dismissed employees had re-applied for their positions except Mahlalela and others, including the four other representatives. Malahlela's contention was that he did not apply as he knew that he was 'enemy number 1'.
- [15] Under cross-examination, Mahlalela conceded that in terms of his contract of employment, he was required to work 7 hours. He nonetheless contended that he worked 8 hours, and only in the winter season did the employees work less hours. He conceded that management had informed the employees that they were on unprotected strike. He denied however that they were informed of the consequences. Mahlalela denied that the employees were issued with final written warnings for participation in an unprotected strike in the first strike. He nonetheless conceded that the employees went on unprotected strike on 26 March 2013 and were issued with ultimatums which they had ignored.
- [16] Shakoane of FAWU also testified on behalf of the applicants. His testimony was that;
- 16.1 He was contacted by the employees on 11 March 2013 at about 06h00 and informed of strike as the Respondent had reduced their

working hours. At the time there were approximately 130 FAWU members employed by the Respondent.

- 16.2 FAWU did not have a recognition agreement with the Respondent and had not previously engaged with it about any aspects other than organisational rights. FAWU after the dismissals no longer had a presence at the Respondent.
- 16.3 He denied ever being contacted by the Respondent during the strike, and reiterated that he attended at the farm only after he was called by the employees. He confirmed that the meeting with Engelbrecht, Mamiza and others took place where it was explained to him that the reduction in hours came about as the Respondent could not afford the increase.
- 16.4 Shakoane testified that there was relative peace between 11 and 25 March 2013. The problems however surfaced when management wanted to discipline the 23 employees. The other employees' attitude was that the charges against the 23 employees should be withdrawn, or that the Respondent should charge all the employees as they had all participated in the strike action.
- 16.5 On the morning of 26 March 2013 he had arrived at the premises in order to represent the 23 employees at the disciplinary enquiry. Engelbrecht informed him that he should leave as the shop stewards could represent the other employees. This was even though the five representatives had also been charged.
- 16.6 Soon thereafter, Joubert also told Shakoane to leave and had approached him and pushed him out of the office. Shakoane realised that Joubert had a firearm on his person. He left the office and addressed the employees before leaving. He denied that he was rude or disrespectful towards the Respondent's management when he was told to leave. He further denied that he was in a hurry to attend to another meeting, as his sole purpose of coming in was to represent the employees at the enquiry.

16.7 Shakoane denied ever receiving any copies of ultimatums. He testified that he had not raised the employees concerns with the Respondent prior to 26 March 2013 because of Joubert's attitude.

The issues to be decided:

[17] In determining whether the dismissal of the individual applicants was fair, the Court is called upon to consider five issues, viz;

- (a) Whether the individual applicants had participated in the unprotected strike as a result of unjustified conduct on the part of the Respondent in unilaterally reducing their working hours in order to avoid paying the minimum wages determined in the amendment to the sectoral Determination for the farming sector on 5 February 2013;
- (b) Whether the dismissal of the individual applicants was substantively and procedurally unfair because the Respondent selectively re-employed some of the dismissed workers but refused to re-employ them following the dismissal of the employees for the same reason;
- (c) Whether the Respondent failed to contact an official of FAWU at the earliest opportunity to discuss the course of action it intended to adopt;
- (d) Whether the Respondent failed to afford the individual applicants sufficient time to reflect on the ultimatums that were issued and to respond to those ultimatums; and
- (e) Whether in the circumstances, the dismissals of the individual applicants were substantively and procedurally unfair.

The legal principles:

[18] Two separate strike actions took place at the farm. The first was between 7 and 11 March 2013, and the second on 26 March 2013. The strike actions in question being unprotected, the starting point is section 68(5) of the Labour Relations Act, which provides that:

'Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.'⁸

[19] The relevant guidelines in Schedule 8 are those to be found in Items 6(1) and (2), which provide that:

- '(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including —
- (a) the seriousness of the contravention of this Act;
 - (b) attempts made to comply with this Act; and
 - (c) whether or not the strike was in response to unjustified conduct by the employer.
- (2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.'

⁸ See also *NUPSAW v National Lotteries Board* [2014] 7 BLLR 621 (CC) at para 69 where Froneman J held that;

"Employees have a constitutional right to strike. The [Labour Relations] Act regulates the manner in which that right can be exercised. There is no obligation on employees to use the regulated dispute-resolution procedures under the Act, but there are consequences if they do not. If they start by using these regulated procedures, but then abandon them and simply stop working, they are not committing a crime. They are, in that sense, still acting "lawfully". But that "lawfulness" does not afford them the benefits of a protected strike under the Act. By failing to adhere to the Act the strike becomes unprotected, and an employer will be in a position to take disciplinary steps against them for not coming to work."

[20] In *NUMSA v CBI Electric African Cables*⁹, the Labour Appeal Court held that it was apparent from the provisions of section 68(5) of the LRA that a Judge called upon to determine the fairness of a dismissal effected on the ground of participation in an unprotected strike should consider, in addition to Item 6 of the Code, the provisions of Item 7. These regulates dismissals for misconduct more generally, and also requires the determination of whether the dismissal of the employees was appropriate for the contravention of any relevant rule or standard¹⁰.

Substantive fairness:

(i) *Was the strike in response to unjustified conduct by the Respondent?*

[21] Central to the Applicants' case is that the Respondent unilaterally reduced the employees working hours from 8 to 7 hours, and that this decision had a far-reaching impact as it affected the employees' income and working conditions. It was submitted on their behalf that because of the impact of that decision, the Respondent ought to have taken appropriate and constructive steps in raising it with the employees and should have been open to discussions on it or alternatives to it.

[22] It was submitted on behalf of the Respondent on the other hand that there could be no suggestion that the strike action was provoked, as all that was

⁹ [2014] 1 BLLR 31 (LAC) at paragraphs 26 - 28

¹⁰ See paragraph 29 - 30 where Zondo AJA (as he then was) held that;

"In my view the determination of substantive fairness of the strike-related dismissal must take place in two stages, first under item 6 when the strike related enquiry takes place and secondly, under item 7 when the nature of the rule which an employee is alleged to have contravened, is considered. It follows that a strike-related dismissal which passes muster under item 6 may nevertheless fail to pass substantive fairness requirements under item 7. This is so because the illegality of the strike is not "a magic wand which when raised renders the dismissal of strikers fair" (*National Union of Mineworkers of SA v VRN Steel* (1991) 12 ILJ 577 (LAC)). The employer still bears the onus to prove that the dismissal is fair."

And,

"In his work Grogan expresses the view that item 6 of the Code is not, and does not purport to be, exhaustive or rigid but merely identifies in general terms some factors that should be taken into account in evaluating the fairness of a strike dismissal. He therefore opines that in determining substantive fairness regard should also be had to other factors including the duration of the strike, the harm caused by the strike, the legitimacy of the strikers' demands, the timing of the strike, the conduct of the strikers and the parity principle. I agree with this view as the consideration of the further factors ensures that the enquiry that is conducted to determine the fairness of the strike-related dismissal is much broader and is not confined to the consideration of factors set out in item 6 of the Code."

done was to simply revert to the employees' 7 hours' work in accordance with the employees' contracts of service.

- [23] The Applicants nonetheless contended that the issue was not about the parties' contractual rights, but about how the Respondent conducted itself in the circumstances and whether this led to the strike.
- [24] It is my view an important consideration in this case was that two separate incidents precipitated the unprotected strike actions. The first related to the reduction in working hours, which was conveyed to the employees on 26 February 2013. No action was taken by the employees between that date and 7 March 2013 when they had embarked on industrial action. That action had continued until 11 March 2013 and after the intervention of Shakoane. In my view, once the employees had returned to work on 11 March 2013, that was the end of the matter. They were thereafter issued with final written warnings on 19 March 2013. The validity of these final written warnings was not an issue for the Court to consider.
- [25] The decision to reduce the working hours having been communicated to the employees on 26 February 2013, and the strike action having commenced on 7 March 2013, it is my view that it cannot be said that the first strike was provoked by any unjustified conduct on the part of the Respondent. There was nothing spontaneous about that strike action¹¹. Mahlalela confirmed that the decision was conveyed to the employees on 26 February 2013, and I did not understand his version to be that they did not understand what it was that was conveyed to them. This is distinguishable from whether the employees accepted what was conveyed to them.
- [26] I accept that the purpose of the meeting of that day was merely to convey the decision rather than to consult the employees or have any discussions surrounding it. I further accept that the employees were clearly aggrieved by that decision and the manner in which it was conveyed to them. The employees nonetheless had ten days to reflect on it, and the only invariable

¹¹ *Mndebele and Others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)* (2016) 37 ILJ 2610 (LAC) at para 34

conclusion to be reached is that the unprotected strike was indeed planned and was not by all accounts, a knee-jerk reaction to any unjustified conduct on the part of the Respondent. Within the ten days in question, the employees had an opportunity to reflect on their options, which included either lodging grievances or referring a dispute to the CCMA. They nonetheless chose to embark on an unprotected strike. To conclude on that issue, the first strike action did not result in the dismissal of the employees, including the 23 identified for separate discipline as shall further be demonstrated in this judgment.

[27] The second issue that precipitated the unprotected strike action was the suspension and intention to discipline 23 employees identified as allegedly having committed acts of misconduct during the strike action of 7 – 11 March 2013. Flowing from these intended disciplinary steps as announced on 20 March 2013, other employees in sympathy with their colleagues went on strike, demanding that the charges against their colleagues be withdrawn.

[28] It was submitted on behalf of the Applicants that the Respondent's conduct in this regard was unjustified in that;

- a) The employees had complied with the ultimatums and should thus have not been charged¹²
- b) The employees were correct in questioning the Respondent's decision to arbitrarily charge some of them when the entire workforce had embarked on a strike

[29] It was common cause that between 12 – 20 March 2013 there was relative peace on the farm. This was despite the fact that the Respondent had issued final written warning to employees who had participated in the strike action of 7 – 11 March 2013. After notices to attend an enquiry were issued to the 23 identified employees on 20 March 2013, other employees refused to work until the charges against their colleagues were withdrawn. Six days later 26 March 2013, and on the date of the disciplinary hearings in respect of the

¹² In reference to *MM & G Engineering (Pty) Ltd v NUMSA* 2005 ILJ 1326 (LAC)

23 employees, other employees again went on strike in sympathy. Two ultimatums were issued on 26 March 2013, and it is not correct as submitted on behalf of the Applicants, that these ultimatums were adhered to.

- [30] Having ignored the two ultimatums, the employees were subsequently issued with notices of suspension, with disciplinary enquiries being scheduled for 2 April 2013. The question of whether the second strike of 26 March 2013 was provoked need to be considered within the context of whether in identifying the 23 employees for discipline in respect of the strike of 7 – 11 March 2013, the Respondent adopted an indefensible position, and/or acted either unlawfully, unacceptably or unreasonably.
- [31] It is trite that discipline in the workplace is a management prerogative, and even in circumstances where a strike was protected, the employer is entitled to institute disciplinary proceedings against individuals who are alleged to have committed acts of misconduct during that strike. Thus, any disciplinary action in that regard would not be in respect of the (protected) strike action itself, but the conduct accompanying that strike. This is so, in that it is expected of employees who embark on strike action, to conduct themselves and their strike activities in a peaceful and civilised manner.
- [32] In this case, the 23 employees were identified as having allegedly committed acts of misconduct during the strike of 7 – 11 March 2013, including violence, hostility and intimidation. They were duly issued with notices on 20 March 2013 to attend the disciplinary enquiry scheduled for 26 March 2013. Other employees were clearly aggrieved by these turns of events and it was only on the date of the hearing that they had went out on a full-scale strike in sympathy with their colleagues.
- [33] It was held in *National Union of Metalworkers of SA and Others v Lectropower (Pty) Ltd*¹³ that an employer's decision to summarily dismiss shop stewards and without a hearing merely because of the latter being viewed as 'troublemakers' after they had lodged a grievance constituted unjustified conduct. In this case, and inasmuch as the employees had always been

¹³ (2014) 35 ILJ 3205 (LC).

suspicious that the Respondent would target their representatives, it was not only the representatives that were selected for discipline, but also other ordinary workers alleged to have been involved in acts of misconduct. The strike action therefore of 26 March 2013 was not spontaneous in the light of the notices having been issued to the 23 employees on 20 March 2013. I can only conclude that the strike action was planned to coincide with the disciplinary proceedings scheduled for 26 March 2013. Since it was management's prerogative to discipline its employees for conduct during strike action, it cannot by all accounts be said that the Respondent acted unfairly, unreasonably or provocatively in identifying the 23 employees for discipline. This issue is however separate from whether there was substance to the charges against the 23 employees.

(ii) *Non-compliance with the provisions of the LRA:*

- [34] It has already been indicated that the two separate strike actions were unprotected, with no attempt by the Applicants to comply with the provisions of the LRA. This omission should weigh heavily against the Applicants, in view of participation in an unprotected strike being considered misconduct.
- [35] Whilst the first strike action may have been a learning curve for the employees, it does not appear that they learned anything from it. It further appears that the employees, despite the consequences of their actions having been made clear to them by the Respondent and Shakoane on 11 March 2013, failed to appreciate those consequences.
- [36] The first strike took place over three days. On the common cause facts, the first ultimatum was issued on the first day of the strike at 09h30. Engelbrecht having pasted the written ultimatum on the walls next to where the employees had gathered, also spoke to the employees, informing them that they should return to work by 10h00. That ultimatum was ignored, and the employees left the premises at 13h00.
- [37] On 8 March 2013, and after the employees had elected representatives to speak to management, they again refused to report for duty, insisting that they would only do so once they had received feedback from their representatives.

The representatives went back to the employees and reported that management wanted them to go back to work by 07h30 failing which there would be no discussions with the representatives. Again, the employees refused to report for duty and left the premises at 14h00.

- [38] On 11 March 2013, the employees again refused to report for duty. It was only when Shakoane intervened that the strike had ended. It was further common cause that all the employees on strike on 7 and 8 March 2013 were issued with final written warnings. Engelbrecht conceded that those warning were issued without inviting the Union to make representations. The validity of those warnings was not challenged at the CCMA, and whether it was fair or not for the Respondent to have issued them is not an issue for the court to determine.
- [39] With the second strike of 26 March 2013, it has already been concluded that it cannot be said that it was in response to any unjustified conduct on the part of the Respondent. To the extent that the employees were issued with a final written warning in respect of the first strike, there is nothing, contrary to contentions made on their behalf, that they were *bona fide* in their actions. This is even moreso on the evidence of Mahlalela, who had testified that upon the 23 employees being issued with notices, he had contacted Shakoane, who had advised him that employees should not go on strike as he would attend to the matter on 26 March 2013.
- [40] The disciplinary action against the 23 other employees was something within the Respondent's prerogative to institute. There is nothing to suggest that the Respondent had acted unlawfully, unreasonably or irrationally in taking those disciplinary steps. The 23 employees were duly notified of the disciplinary enquiry and had attended that enquiry. As to whether the charges against them were to be proven is something else. I will revert to this issue later in the judgment in the light of the confusion surrounding the status of those disciplinary proceedings. On the whole however, and in the light of all these factors, there is no basis for a conclusion to be reached that the dismissals of the employees were substantively unfair.

Procedural fairness:

- (i) *Was FAWU contacted and did the ultimatum comply with the provisions of Item 6(2)?*

[41] In view of the conclusions reached in respect of the first strike action, the focus on procedural fairness in this case is whether the ultimatum issued on 26 March 2013 complied with the requirements of Item 6 (2) of Schedule 8, and whether the Union was properly contacted prior to the dismissals being effected. Submissions were made on behalf of the Applicants in regards to the issue of whether the Union was contacted, whilst nothing much was said about the ultimatums issued on 26 March 2016.

[42] The purpose of an ultimatum within a strike context has received attention by the Labour Appeal Court in various instances. Not so long ago, the Labour Appeal Court in *Mndebele and Others v Xstrata South Africa (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)*¹⁴ reiterated that;

‘The code does not suggest how the ultimatum should be distributed, or require that it must be in writing. Furthermore, it states that the issuing of an ultimatum is not an invariable requirement. The purpose of an ultimatum is not to elicit any information or explanations from the employees but to give them an opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not. The ultimatum must be issued with the sole purpose of enticing the employees to return to work, and should in clear terms warn the employees of the folly of their conduct and that should they not desist from their conduct they face dismissal. Because an ultimatum is akin to a final warning, the purpose of which is to provide for a cooling-off period before a final decision to dismiss is taken, the audi rule must be observed both before an ultimatum is issued and after it has expired. ...’

¹⁴ (2016) 37 ILJ 2610 (LAC) at para 27. See also *Modise v Steve's Spar Blackheath* [2000] 5 BLLR 496 (LAC) at para 73 where it was held that:

‘The purpose of an ultimatum is to give the workers an opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not.’

[43] In *Mveltrans (Pty) Ltd t/a Bojanala Bus Services v Pule and Others*¹⁵, it was held that;

“It is beyond cavil that the purpose of an ultimatum is to get workers who are participating in unlawful industrial action back to work. Although the participation in an unprotected strike remains a serious misconduct, workers can avoid the ultimate sentence, which is dismissal, by complying with an ultimatum. Those who comply with the ultimatum may not be dismissed, because compliance is an act of atonement. Those who do not comply may be dismissed, after being heard, because non-compliance is an unacceptable act of defiance, especially where the employer had obtained a court order declaring the strike illegal and therefore unprotected. It has been said that an ultimatum is as much a means of avoiding a dismissal as a prerequisite to affecting one”¹⁶ (Authorities omitted).

[44] In this case, Mahlalela confirmed that at the time that the other employees had gathered outside or near the hearing room on 26 March 2013, Engelbrecht came and read a document to them and told them to go back to work. Malahlela’s contention that the employees were not on strike as they had simply gathered and had not sung any songs, picketed, carried weapons or damaged property is clearly fallacious. Strike action merely requires of employees not to perform their normal functions when they are lawfully required to do so, or any form of conduct that falls within its definition under section 213 of the LRA¹⁷. Thus, any strike action need not be accompanied by the singing of songs, damage to property or any such conduct. In fact, any form of misconduct during strike action should be met with appropriate disciplinary measures, irrespective of whether the strike was provoked or not.

[45] Malahlela had nonetheless confirmed that an ultimatum was issued which the employees had ignored. Mamiza also confirmed that the ultimatum was read and translated to the employees. Shakoane also confirmed that he saw a copy of an ultimatum. In the bundle of documents were two ultimatums. The

¹⁵ (JA 72/13) [2014] ZALAC 63 (23 October 2014)

¹⁶ At para 55

¹⁷ “**strike**” means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a *dispute* in respect of any matter of mutual interest between employer and *employee*, and every reference to —work in this definition includes overtime work, whether it is voluntary or compulsory;

first, '*Second Ultimatum To Resume Duties*' required of the employees to resume their normal duties at 09h30 on 26 March 2013, whilst the second titled '*Final Ultimatum To Resume Duties*' required of the employees to resume their normal duties at 14h00. Furthermore, the ultimatums advised the employees that the strike was unprotected; that neglect to adhere to the ultimatum could result in serious steps being taken; and further that the failure to adhere to the ultimatum could lead to a dismissal. There can be no doubt that the ultimatums clearly complied with the requirements contemplated in Item 6 (2) of Schedule 8.

- [46] According to Engelbrecht, the final ultimatum was issued at 10h00. When the ultimatum was not complied with, it was followed promptly at 14h30 with notices of suspension of all employees who had participated in that strike on that day. It is significant to note that the dismissals as a consequence of the strike action of 26 March 2013 were not summary. The notices issued required all the employees to present themselves at a disciplinary enquiry scheduled for 2 April 2013. The employees were charged with participation in an unprotected strike, and gross insubordination for ignoring the ultimatum.
- [47] The Applicants contend that the dismissal was unfair as the Respondent failed to contact FAWU before taking a decision to dismiss the striking employees. They challenged the Respondent's contention that FAWU was contacted on two occasions via e-mail when the two ultimatums were sent. Shakoane, who had testified that he was the only union official at the local FAWU offices at the time disputed that copies of the ultimatums were received. He had nonetheless confirmed that he had seen a copy from one of the employees in respect of one of them issued on 26 March 2013 whilst still at the premises, even though he was not personally given a copy.
- [48] In its submissions, the Respondent correctly pointed out that it is required of an employer prior to dismissing employees on strike, to contact a trade union official at the earliest opportunity and discuss disciplinary action it intends to implement before issuing a final and fair ultimatum to employees¹⁸. Since it

¹⁸ See *National Union of Mineworkers & Others v Billard Contractors CC and Another* (2006) 27 ILJ 1686 (LC)

has been concluded that the ultimatums complied with the requirements of Item 6 (2) of Schedule 8, I am not satisfied that the Respondent had demonstrated that FAWU was contacted on 26 March 2013 and properly informed of its intended action prior to issuing a final ultimatum.

[49] Shakoane was at the premises on 26 March 2013 to attend to the disciplinary enquiry in respect of the 23 employees. To the extent that he had confirmed that he had seen a copy of the ultimatum on that date, it can only be assumed that it was issued whilst he was still at the premises to attend to the disciplinary enquiry in respect of the 23 employees. The letter allegedly addressed to FAWU sent by fax on that date stated that an attempt was made to give Shakoane a copy and that he had refused to accept or discuss it with the Company. This allegation was nonetheless not canvassed with him during his cross-examination, which merely focussed on whether the fax was received or not, after Shakoane had conceded that the fax number allegedly used belonged to FAWU.

[50] At the same time however, and the onus being upon the Respondent to demonstrate that indeed the fax was sent through and received, Engelbrecht confirmed that there was no such proof on file. Engelbrecht had further conceded under cross-examination that after the ultimatums were issued whilst Shakoane was at the premises, he made no attempt to call him to discuss those ultimatums or the Respondent's intended action. In the light of the above factors, I am satisfied that the Respondent failed to contact the FAWU prior to issuing the ultimatums or even thereafter. This failure proved critical in that Shakoane had always proven himself to be cooperative and influential, and there is no suggestion that he would have been unable to convince the employees to go back to their normal duties. Upon his intervention on 11 March 2013, the employees had ended their strike, and the Respondent clearly failed to take that into account. This omission is damaging to the Respondent's case that it had acted procedurally fairly in dismissing the employees.

- [51] On the evidence of Engelbrecht, Joubert and Mamiza, the disciplinary enquiry in respect of the 23 employees charged with misconduct during the strike action of 7 – 11 March 2013 did not take place on 26 March 2013 as scheduled due to the strike action. Engelbrecht further testified that the enquiry was postponed to 28 March 2013, after which the 23 employees were dismissed. The record of that disciplinary enquiry¹⁹ does not however indicate an outcome even though the 23 employees were not in attendance. Engelbrecht's testimony that the 23 employees were dismissed on 28 March 2017 is not supported by any documentation. That evidence was even more confusing given his contention that the 23 employees could not have been dismissed with the rest of the other employees.
- [52] Engelbrecht's evidence in respect of the 23 employees is further not supported by the notices of suspension or to attend a disciplinary enquiry issued on 26 March 2013 after the final ultimatum was ignored. Mahlalela was one of the 23 employees identified for separate discipline. The notices of suspension and to attend a disciplinary enquiry were nonetheless issued to '*Ernest Mahlalela and 494 others*'. The only conclusion to be reached is that the disciplinary enquiry of 28 March 2013 in respect of the 23 employees did not reach an outcome, whilst that of 26 March 2013 was postponed. Thus, contrary to what is recorded in the outcome of the disciplinary hearing held on 2 April 2013 in respect of all the employees²⁰, it is therefore not correct that the 23 were found guilty in their absence on 26 March 2013. If this was the case, then there would have been no need to reconvene their disciplinary enquiry on 28 March 2013 or to charge them together with others on 26 March 2013.
- [53] At the disciplinary enquiry of 2 April 2013, all the employees notified had attended and were represented by another FAWU official, Catholice Moraba. Mahlalela had testified on behalf of all the employees. A notice of dismissal was issued on 4 April 2013, in respect of '*Ernest Mahlalela and 494 others*'. This therefore implies that the 23 other employees were dismissed with the other employees. On the evidence before the Court, it can further be

¹⁹ Pages 11 – 21 of the Consolidated Bundle of Documents

²⁰ Pages 62 – 63 of the Consolidated Bundle of Documents

concluded that the 23 employees were dismissed for participation in an unprotected strike and gross insubordination, and not for misconduct in respect of the 7 – 11 March 2013 strike action. The Applicants did not raise any challenges in respect of the disciplinary enquiry leading to the ultimate dismissal, and notwithstanding the chairperson's incorrect conclusions in respect of the 23 employees, it cannot be said that the enquiry itself was flawed.

- [54] To conclude on the issue of procedural fairness then, the two ultimatums issued on 26 March 2013 complied with the requirements in Item 6(2) of Schedule 8. The Respondent nonetheless failed to contact the Union prior to issuing the final ultimatum or dismissing the employees. The individual applicants were afforded an opportunity of a disciplinary enquiry, which the fairness thereof they did not contest. Thus other than the failure to contact the Union, the dismissals were procedurally fair.

Selective re-employment:

- [55] It was common cause that upon the dismissal of a majority of the Respondent's employees on 5 April 2013, they were informed to come back on 8 April 2013 to re-apply for their positions. All of the dismissed employees except Mahlalela, 'Lerato', Phumzile Mfuma, Bongani Mlambo, Nompumelelo Thabethe re-applied.
- [56] Mamiza's involvement in the selection and re-employment of the dismissed employees was limited to compiling the forms and the list of those employees that had applied. It was not for him to decide who to re-employ as that decision was left to management. He could not shed light on what criteria was used to select dismissed employees for re-employment, other than to state that those that had re-applied were re-appointed, whilst those that did not were not considered. Furthermore, all that he knew was that the best employees were taken back.

- [57] The parties were *ad idem* that selective dismissal and re-employment of employees is not *per se* unfair as circumstances may justify such action²¹. The parties further agreed that it would constitute a dismissal within the meaning of section 186 (1) (d) of the LRA when an employer dismissed a number of employees for the same or similar reason and offered to re-employ some but not others. It is equally accepted by the parties that if the re-employment is carried out in an unfair, irrational, discriminatory and subjective manner would it be considered unfair.
- [58] It was submitted on behalf of the Respondent that in the light of the charges against the individual applicants, their conduct and subsequent breach of a trust relationship, selective re-employment was justified. The Applicants on the other hand argued that the Respondent failed to demonstrate that it had applied some objective criteria or what that criteria was.
- [59] The submissions made on behalf of the Applicant clearly have merit in the light of the evidence of Mamiza. On his version, he did not know what criteria was applied and he assumed that only those that had applied were re-appointed. However, there were 495 employees dismissed on 4 April 2013. Other than the five that had not applied for their position as attested to by Mahlalela, it is unlikely that a further 186 of the original applicants would not have applied for their positions.
- [60] In these proceedings, the Respondent failed to demonstrate who had not re-applied, who had re-applied and was appointed, and those that had re-applied and were not appointed. There was no evidence placed before the Court as to what criteria, if any was applied in processing the applications. It is not sufficient for the Respondent to simply make a blanket statement that those that were not re-employed had either not re-applied or had committed some form of misconduct other than participation in the strike. There was no evidence presented in these proceedings as to who amongst the individual applicants had committed misconduct during the strike of 26 March 2013.

²¹ *Rickett & Colman (SA) (Pty) Ltd v CWIU* 1991 12 ILJ 806 (LAC)

- [61] The findings of chairperson of the disciplinary enquiry held on 2 April 2013 merely indicated that all the employees were charged with participation in an unprotected strike and insubordination (for refusal to adhere to the ultimatum). Even if on Mamiza's version only the best of the employees were re-employed, it is not known what is meant by 'Best', and how that was determined. To this end, it is concluded that the Respondent's decision to re-employ some of the dismissed employees and not others was purely arbitrary, and thus unfair.

Conclusions:

- [62] In the light of the issues for consideration before the Court, it was common cause that the strike action of 26 March 2013 led to the dismissal of the individual applicants. At the time of the dismissal, the individual applicants had valid final written warnings on their records. I have concluded that the individual applicants' participation in the strike in question was not as a result of unjustified conduct on the part of the Respondent, and that in fact, the strike was planned. The same conclusions pertain to the strike action of 7 – 11 March 2013.
- [63] It has already been concluded that prior to issuing the final ultimatum on 26 March 2013, and prior to instituting disciplinary proceedings against the individual applicants, the Respondent equally failed to contact FAWU, contrary to the guidelines set out in Item 6 (2) of schedule 8 of the Code of Good Practice. Inasmuch as the Respondent failed in this regard, I am satisfied that the ultimatum issued to the employees complied with the guidelines set out in Item 6 (1) of Schedule 8.
- [64] Other than the issue of the Union not having been contacted, it was common cause that the final ultimatum was issued at 10h30, imploring the employees to return to work by 14h00. In my view, they had sufficient time to reflect on their actions, to digest issues and where necessary, to seek advice before making the decision whether to heed the ultimatum or not. Significant in this case is that there can be no doubt that the individual applicants knew the

consequences of their conduct, same having been made clear to them by Shakoane on 11 March 2013.

- [65] It was further common cause that prior to the dismissal, the individual applicants were afforded an opportunity of a disciplinary hearing. In these proceedings, the Applicants had not raised any issues in regard to that disciplinary enquiry. Other than the errors I had pointed out in the Chairperson's findings, I have no reason to believe that the disciplinary enquiry was flawed.
- [66] What needs to be determined ultimately is whether a sanction of dismissal was appropriate in the circumstances. In line with the approach in *CBI Electric African Cables*²², the guidelines set out in Item 7 of the Code of Good Practice must be considered. Other guidelines to be considered are those enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*²³. Equally so, factors to consider within the context of strike dismissal include the duration of the strike, the harm caused by the strike, the legitimacy of the strikers' demands, the timing of the strike, the conduct of the strikers and the parity principle²⁴.
- [67] Applying the above principles to the facts of this case, I am bound to conclude that the sanction of dismissal was appropriate for the following reasons, some of which are worth repeating;
- (a) The two strike actions were unprotected, with no effort being made to comply with the provisions of the LRA;
 - (b) In both instances, the strikes were not spontaneous but were clearly planned;

²² supra

²³ at para 78, where it was held that;

'In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.'

²⁴ *CBI Electric African Cables* at para 30

- (c) The individual applicants were issued with final written warnings on 19 March 2013 for participation in the unprotected strike action of 7 – 11 March 2013. Their Union official, Shakoane had warned them about the consequences of their actions. The same message was conveyed to them by management on various occasions, including through various ultimatums since 7 March 2013 and also on 26 March 2013.
- (d) Within a week of being issued with final written warnings, the employees had again embarked on an unprotected strike. This was in circumstances where Shakoane had again warned them on 29 March 2013 not to embark on any action as he would attend to the matter. Any suggestion in the light of these factors that the individual applicants deserve further progressive discipline is misplaced.
- (e) It is accepted that the final strike was only for one day and was peaceful. This however cannot be a mitigating factor since the individual applicants had been warned against the folly of embarking upon such action.

Relief:

- [68] It has been concluded that the Respondent failed to comply with the guidelines set out in Item 6 (2) of Schedule 8 in that it failed to contact FAWU prior to the issuing of the final ultimatum on 26 March 2013. Furthermore, it was found that the selective re-employment of some of the dismissed employees was not based on any objective criteria. These factors on their own however in the light of the other findings made elsewhere in this judgment cannot entitle the individual applicants to a reinstatement. To this end, relief by way of compensation is deemed appropriate.
- [69] It is trite that any amount of compensation to be awarded for a dismissal that is unfair is the subject of a discretion to be exercised by the court. Such compensation must be just, equitable and reasonable in the circumstances, considering all relevant facts and circumstances. In this case, and in the light of the factors pointed out in paragraph 65 above and elsewhere in this judgment, it is deemed just and equitable to order compensation equivalent to

two months' salary to be payable to the individual applicants as identified in the Applicants written heads of argument marked "A".

Costs:

[70] Having taken into account the requirements of law and fairness, and further in view of the applicants being partially successful, it is concluded that a cost order is not warranted in this case.

Order:

[71] In the premises, the following order is made;

1. The dismissal of the individual applicants was substantively fair but procedurally unfair.
2. Each of the individual applicants identified in the Applicants' written heads of argument marked "A" is awarded compensation in a sum equivalent to 2 (two) months' salary, to be calculated at their rate of remuneration as applicable on the date of their dismissal.
3. There is no order as to costs.

E. Tlhotlhemaje,

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicants: Adv. T Manchu

Instructed by: Cheadle Thompson & Haysom Inc.

On behalf of the Respondent: Adv. PSAJ Jacobz

Instructed by: Barnard Inc.

LABOUR COURT