IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JS1076/2013

In the matter between:

FOOD AND ALLIED WORKERS UNION **First Applicant**

KHUMALO, S AND OTHERS **Second to further Applicants**

and

EARLYBIRD FARM **First Respondent**

PHAKISA CORPORATE SERVICES (PTY) LTD **Second Respondent**

Heard: 21 to 25 May 2018, and 29 June 2018

Delivered: 9 January 2019

JUDGMENT

MABASO, AJ

Introduction:

[1] The applicants declared an unfair dismissal dispute against the respondents ,in terms of section 191(5)(b)(iii)[1] of the Labour Relations Act[2] (LRA), claiming that the second to further applicants respectively, were dismissed by the respondents, therefore, asking this Court to make an order declaring such dismissals to be substantively and procedurally unfair. Consequently, that an order be made that the respondents reinstate all those individual applicants that were dismissed by them, alternatively that the respondents be ordered to pay the individual applicants a just and equitable compensation. This trial lasted for six days, with the last day reserved for closing arguments.

Background facts

[2] It is common cause that on 24 April 2013, the individual applicants were involved in an unprotected industrial action[3] which lasted for less than three hours.[4] However, I have to take into account that the determination herein is the fairness of the dismissal and I prefer to use the dictum in *Transport and Allied Workers Union of South Africa obo Ngedle and Others v Unitrans Fuel and Chemical (Pty) Ltd Limited*[5] as a yardstick in this matter,where the majority held thus, in respect of sanction where a strike was unprotected,

> "Dismissal as a sanction for misconduct is a sanction of last resort. It has sometimes been referred to as the "death penalty". This is said in the light of the harsh consequences it may have on an employee who is dismissed. For that reason, ***dismissal is only appropriate as a sanction for dismissal in those cases where the misconduct of which the employee is guilty is one that at least the employer considers to render a continued employment relationship intolerable or unacceptable***." (Own emphasis)[6]

[1] (5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved—(b)
the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is—…the employee's participation in a strike that does not comply with the provisions of Chapter IV…"
[2] Act 66 of 1995 as amended.
[3] Pre-trial minutes, page 114, para 2.45.
[4] Ibid, pages 115 to 124.
[5] 2016 (11) BCLR 1440 (CC).
[6] At para 173.

[3] This *dictum*, reminds me that security of employment is a human rights issue, thus for employers to impose dismissal as a sanction, such should be done where the issue of trust has been properly considered.[7]

The Parties:

[4] The first applicant is Food and Allied Workers Union (the union), the Second to Further applicants (individual applicants) are the members of the union and were employed by the first and second respondents respectively, the first respondent is Earlybird Farm (Standerton) a division of Astral Operations Limited (the first respondent), the second respondent is Phakisa Corporate Services (Pty) Ltd (the second respondent). The latter provides the former with labour, therefore, is classified as a Temporary Employment Services (TES) .

The issues to be decided:

[5] Following the exchange of the pleadings between the parties, they proceeded to file the pre-trial minutes wherein it was agreed that this Court is required to determine the following issues:

5.1 Whether the strike was as a result of unjustified conduct on the part of the first respondent in allegedly failing to ***adequately address and investigate***[8] the various allegations of intimidation and victimisation perpetrated against the union's members by individuals within the management structure of the first respondent (***Issue A***);

5.2 Whether the second respondent dismissed 110 employees for participating in the strike (***Issue B***);

[7] See *Sidumo and another v Rustenburg Platinum Mines Limited and Others* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ;(2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC).

[8] Court's own emphasis.

5.3 Whether the dismissed employees, by the second respondent, were members of the first applicant.[9]

5.4 Whether the respondents failed to issue ultimatums which are in compliance with item 6 (2) of the Code of Good Practice of the LRA;[10] (***Issue D***);

5.5 Whether the first respondent failed to contact an official of the union at the earliest opportunity to discuss the cause of action ii intended to adopt and refused to afford the union official an opportunity to advise the individual applicants on the contents of the ultimatum and to encourage them to return to work; ***(Issue E)****;*

5.6 Whether the respondents did not give the individual applicants a fair disciplinary hearing (***Issue F***);

5.7 Whether the sanction of dismissal imposed on the individual applicants who were dismissed was the appropriate sanction **(*Issue G***), and

5.8 If the dismissal is found to be unfair, what is an appropriate sanction **(*Issue I***)?

The pleadings and evidence:

Issue B

[6] The second respondent, in the statement of response, denied that it dismissed 110 of the individual applicants. In the pre-trial minutes, parties agreed that the second respondent was to state as to which individual applicants were not dismissed. During the first day of the trial, the second respondent, submitted the list (their names are:L Lephoto, N.E .Moloi,V

[9] This was abandoned by the second respondent during the trial. Therefore, no pronouncement is made herein. (***Issue C***).

[10] Item 6(2) of the Code of Good Practice reads: (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.

Masango,L Mofokeng,L Mazibuko,P Motaung, Z Msomi,M Ndaba,M Nhlapho,S Radebe,S Sauhatsi, L Shabangu, N Shabangu, P Tsotetsi, T Tsotetsi, F Xolani, G D Tsotetsi, and Z I Dhlamini.) of all the individual applicants which dismissal was in dispute. The representative for the union and individual applicants, Mr Kuane, promised to take instructions on this issue and counter it by calling them as witnesses.

[7] In any dismissal disputes, if the dismissal is in dispute, the first question to be determined is whether an employee was dismissed or not. In terms of section 192(1)[11] of the LRA, the onus of proof is upon such employee to establish the existence of the dismissal. If such employee fails to show that there was a dismissal, then the court will not have jurisdiction to adjudicate the dismissal dispute of such employee.

[8] In *casu*, at the commencement of the trial, Mr Kuane had made an undertaking to secure the presence of all those in the list as they are based in Standerton in the Province of Mpumalanga, to confirm that they were indeed dismissed. However, on day three, this Court was advised by Mr Kuane that he was unsuccessful in locating them. Therefore, without the evidence of those individual applicants, I conclude that this Court has no jurisdiction to hear their claim.

[9] The following facts, are common cause based on the evidence adduced before this Court.

<u>The first unprotected strike</u>

[10] In February 2013, the union addressed a petition to the first respondent wherein accusations of *inter alia,* a lack of the safety of the employees and prioritising production instead of the safety of the employees were made against Messrs Heinrich Steinbach (Mr Steinbach) and Jaco Herbst (Mr Herbst). The latter worked as a shift manager.[12] The first respondent's Human Resource Managers were being accused of failing to resolve grievances

[11]Section 192. Onus in dismissal disputes. - (1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.
[12] Consolidated Bundle of Documents, page 11(The petition item 1.5).

which have been outstanding throughout the year.[13] Other allegations, including that of discrimination against the individual managers were made. In the petition, the union on behalf of the employees, concludes by, saying:

> "all employees demand that all the managers mentioned [in the petition] must go within seven days unless [the individual applicants] take action. Enough is enough"

[11] On 28 February 2013, the Human Resource Executive, Mr Fredrick Michiel Snyman (Mr Synman) responded to the petition acknowledging that the allegations were serious, however, said they were unsubstantiated, and asked that any aggrieved employee should submit evidence by following internal grievance and disciplinary procedures to allow the first respondent to investigate and if necessary take corrective action. The union was urged to support the allegations. None of these demands, in the petition, were referred to either the Commission, for Conciliation, Mediation and Arbitration (CCMA) or this Court for arbitration and/or adjudication taking into account that they are unfair labour practice[14] and discrimination[15] related matters.

[12] On 22 March 2013, the individual applicants embarked on an unprotected strike. Three ultimatums were issued directing the individual applicants to return to their workstations, but they failed to heed to this call Mr Phillip Nkosi a union official[16] attended at the first respondent's premises to engage with the union members who were on strike. Initially they refused to go back to work, and later, about three hours later, agreed to return to work but put forth *inter alia*, a condition that no employee will be disciplined for participating in the unprotected strike, and that no further instances of intimidation and/or

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[14] 191. Disputes about unfair dismissals and unfair labour practices.- (1) (a) If there is a dispute about… an unfair labour practice… the employee alleging the unfair labour practice may refer the dispute in writing to—
(i)a council, if the parties to the dispute fall within the registered scope of that council; or
(ii)the Commission, if no council has jurisdiction.
(b) A referral in terms of paragraph (a) must be made within—
(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.

[15] Employment Equity Act No. 55 of 1998.

[16] Reference to 'the official' in this judgment shall be reference to Mr Phillip Nkosi.

victimisation of the employees will occur. Indeed, the first respondent did not institute disciplinary proceedings against the individual applicants.

Engagement after the first unprotected strike and the second unprotected strike

[13] On 3 April 2013, the official had a meeting with the representatives of the first respondent, which included Mr Sandile Bande (Mr Bande) to discuss the petition. Later on, an investigation into the contents of the petition was conducted by Mr Snyman who then issued a report in that: the allegations in the petition had no merits, suggesting that the allegations as contained were baseless, as some of them were previously addressed by the first respondent and/or alternatively resolved. It was common cause between the parties that, in reaching the conclusion that he reached, Mr Snyman did not interview any of the first applicant's members who had made the allegations, but only *" raised the allegations with those who were directly or indirectly implicated by the grievances in the petition*."[17]

[14] On 18 April 2013, a meeting was held between the representatives of the union and the first respondent. During this meeting, the official advised Mr Snyman that he was biased on his findings, therefore, its members *"will do what they need to do"*.Heretofore these utterances, the union had written a letter to the first respondent indicating that its members were *"ready for action".*

[15] As a result of this utterance, the first respondent warned the official of the consequences of the possible unprotected strike. Between 18 and 24 April 2013, the first respondent sent correspondence to the union alerting it that it has been brought to its attention that there is a second unprotected strike that is planned by the individual applicants and warned it of the consequences thereof. In total, there are seven letters sent to the union by the first respondent between the date of the Synman's report and the date of the strike. A day before the second strike commenced, on 23 April 2013, the first respondent, through its attorneys of record, sent another letter warning the

[17] Pre-trial minutes, at page 112, para 2.36.

union of the consequences of an unprotected strike action. The relevant excerpts from the latter letter are as follows:

> "our client is in possession of information evidence which indicates that you and your members planning to embark upon unprotected strike action on **24 April 2013.**"

And

> " our client is furthermore in possession of information which indicates that **[the official]** this is an actual fact involved in the planning of the unprotected strike and is inciting your members to embark on the unprotected strike action."[18]

[16] On the eve of the second strike, on 24 April 2013 at 7:42 am , Mr Snyman sent an SMS to theofficial partly reads thus, ***"[the official] we have again received information that your members intend proceeding with the unprotected strike this morning at 10 AM Standardton****. Please be sure to advise your members against breaking the law and to instead referred their disputes to the relevant forum as is required.Your urgent assistance herein would be appreciated…"(Own emphasis)*

The second strike

[17] Indeed, on 24 April 2013 around 10:00, approximately three hours after the SMS to the official, the individual applicants who were working day shift, based at the Further Processing Plant left their workstations and proceeded to congregate at an open field within the premises of the first respondent. Their manager issued an ultimatum to return to work by no later than 11:30, but they refused to do so, which then resulted in them being suspended. At the Primary Processing Plant, the individual applicants based there also left their workstations.

[18] At approximately 10h00, some of the individual applicants who were employed by the second respondent left their workstations and embarked on an unprotected strike. At approximately 10h30, the first ultimatum advising

[18] Court's emphasis.

them to return to work by no later than 12h15 was issued. This ultimatum warned those employees that they might be disciplined which might result in dismissal. However, they failed to comply with the ultimatum.

[19] The official responded to the SMS by attending at the first respondent's premises , at the Primary Processing Plant, and spoke with Mr Bande . The latter informed the official that he could not be allowed onto the premises as Mr Snyman's authorisation was required and he had not received same. The official contacted Mr Snyman asking that he be allowed onto the premises in order to address employees and to provide advice on their action, but Mr Snyman did not allow him to do so. Instead, Mr Bande allowed the official to meet with the shop stewards at the gate. Meaning the official was not allowed onto the premises to directly address the individual applicants, who were still within the premises. The official after engagement with the shop stewards communicated with Mr Snyman that:

> "proposed that an independent investigator be appointed by company in order to arrive at an unbiased outcome in the investigations to the allegations against the first respondent's managers. Synman indicated to Nkosi that the outcome was final and that the matter would not be revisited."[19]

[20] The nightshift workers commenced their shift at 17h15, some of the individual applicants who were on duty stopped working at approximately 20h00 and congregated at the open space area. Again the official was contacted by Mr ande, and he proceeded to the first respondent's premises but was once again refused access inside the premises. Around 20h15, Mr Bande attempted to issue an ultimatum to all employees which they refused to take. The ultimatum ended up being read out to the employees and they were informed that they were expected to return to work within 10 minutes failing which, action was to be taken against them. However, the employees failed to comply with the ultimatum and were later suspended. These individual employees were involved in the strike for less than 40 minutes before they could be suspended.

[19] Pre-trial minutes, page 116 to 117 at para 2.53.

[21] On the same date, the individual nightshift applicants, less than three hours after reporting for duty, left their workstations and stopped working. At approximately 17h30 they were issued with an ultimatum that they must return to work by 18h00, however, these employees did not return to work. Their reason for stopping work was to *"show solidarity with the day shift which had been suspended earlier that day".* At around 19h10 the second respondent issued a notice of lock out, and at approximately 19h45, the employees were then issued with suspension letters.

[22] It is not in dispute that the dismissal relates to unprotected strike action and that the notice to attend the hearing was issued. The disciplinary hearings took place on 6, 7, 20 and 21 May 2013. Those who were found guilty were dismissed.

Viva voce evidence

[23] The first witness for the first respondent was Mr Bande, whose evidence is summarised as follows: He worked for the first respondent as a Human Resource Manager, his responsibilities included general human resource functions such as industrial relations, recruitment and employment equity matters. He confirmed that the first respondent is a designated employer who regularly submitted the Employment Equity Reports to the Department of Labour. He draws this Court attention to a letter dated 16 January 2013 from the Department of Labour confirming that the first respondent submitted its final report for the year 2012. He also contended that the union was aware of this compliance. Moreover, there was no complaining that at some stage the first respondent failed to comply with this regulation. He rejected the allegations of discrimination and nepotism within the first respondent as alleged by the individual applicants in the petition.

[24] He confirmed that one of the former shopstewards of the union, Mr Johnny Nkosi was dismissed by the first respondent having been found guilty of malicious damage to the property of the first respondent as he had removed security cameras that had been installed in the changing room in order to avoid stock theft which was in high volumes at the time. Mr Nkosi declared an unfair dismissal dispute to the CCMA and following arbitration, his dismissal

was found to be procedurally and substantively fair. The union approached the Human Rights Commission relating to the issue of cameras.

[25] Mr Bande testified that the same applicants before this Court are the ones that participated in the first unprotected strike on 23 March 2013.

[26] The union, after the first strike, submitted a detailed petition to the first respondent. This latter petition had grievances that had been launched. The first respondent communicated with the union proposing a meeting which was to take place on 18 April 2013. The union confirmed its availability by way of a letter. In the same letter, the union states:

> " 4.Whatever, you come up with be informed that we are not going to tolerate any biased if any
>
> 5. Our members made it clear that on the 18th April 2013 is the final if not resolved they are ready for any action."

[28] Mr Bande further testified that a report by Mr Snyman was issued and concluded that following an in-depth investigation to the allegations made by the union, there were insufficient grounds to suspend any of the managerial team alleged to be involved in the allegations. The Snyman report was communicated to the union on 18 April 2013, as scheduled. According to the pre-trial minutes, the official informed Mr Snyman that he was biased and its members *"will do what they need to do".* The union was warned that should the union members engage in any further unprotected strike action they will be disciplined. Mr Bande testified that during this meeting, the official was extremely annoyed and unhappy, and according to the minutes of this meeting, the official even said: they are not scared of anything. Following this meeting, he sent a letter to the union again notifying it of the rumour that an unprotected strike action was planned.

[29] It was his evidence further that in March/April 2013 the first respondent was not doing well financially as in the previous year, the employees got zero increase on their salaries, and the state of poultry industry was not good as their competitors such as Rainbow were retrenching.

[30] During cross-examination by Mr Kuane, it was put to Mr Bande that one of the issues raised by the petition was that one of the applicants, Ms NR Radebe (Ms Radebe) submitted doctor's notes from a medical practitioner which among other things confirmed that she has nervous lesions which strive under moist conditions and increase in size and number and the doctor requested the first respondent to *" consider urgently changing the environment and allowing this patient to work in the dry environment"*. She was moved to a suitable area, but despite this, Mr Herbst advised Ms Radebe to report back to a place which is considered not suitable and that should she fail to do so, she was not to be paid.

[31] In the statement of case, the individual applicants among other things, stated that members of the union were ill-treated by the first respondent's management and victimised. It is common cause between the parties that in March 2012 an email correspondence was sent to other managers by the Production Manager, Processing Plant, where Ms Radebe had been transferred, and part of this email read thus:

> "After her first hearing Sandile Bande made the decision to transfer her to another department. **From there [Ms Radebe] went all over the show**. The third and last hearing she was found guilty on all three charges by the chairman made **the mistake to give [Ms Radebe] another opportunity to shunt us around.** Sholay I honestly think that we have to take the final root (sic) and that is incapacity. I sent her home in order to be back at your office at 9:00. Jaco said that he will speak to Antonia about her. **I sincerely hope that we can get rid of [Ms Radebe] this time."**[20]

[32] Another example of a grievance launched, is one of Mr Mhlinza who submitted it to Human Resource on 25 May 2012 wherein he alleged that he approached Mr Linden Ross for a signature and the response of the latter was an insult where Mr Ross said *"voetsek".* Moreover, Mr Bande confirmed that that grievance was not attended to.

[33] Mr Bande further confirmed that the grievance that was lodged by one Zondo on 20 December 2012 was not attended to, and he could not give any

[20] Court's emphasis.

reasons as to why this was not attended to. When he was asked as to whether he still believes that there was nothing wrong with the conduct of the first respondent, his answer was that,

> "we employed almost over 1000 employees and then we are citing three grievances, that definitely yes, does not look like they were attended, yes So I don't think would change my response as to say the conduct of the employer was unbecoming ".

This answer by Mr Bande simply means that the concerns of three people are not important.

[34] The next witness was Mr Snyman and in his evidence he confirmed that it was brought to his attention that the individual applicants had intended to embark on an unprotected industrial action and this resulted in the dispatching of the SMS referred to above. He confirmed that the reason for sending the SMS was that he wanted the official's intervention. During the meeting that was held on 18 April 2013, the official had indicated that he was not satisfied with the outcome and proposed that an investigator be appointed and this was not accepted by him.

[35] Mr Heinrich Steinberg denied the individual applicants accusations against the first respondent. This witness was not cross-examined.

[36] Mr Clement Magcai, testified for the second respondent. He confirmed that the second respondent is a TES. None of the second respondent's employees complained to him about any allegations of ill-treatment from the first respondent.

[37] Mr Pieter Nienaber, another witness for the second respondent, whose evidence can be summarised as follows: He confirmed that the night shift started at 16h30 and they went on the work stoppage at 17h20, the morning shift started at 6h30. At approximately 10am, the individual applicants in that shift left their workstations as mentioned above. He personally issued ultimatums to the day shift employees directing them to return to their workstations. Once he had handed out the ultimatums to the employees , they threw them in the air and started dancing on them. It was his evidence further

that even if the employees were given more time, they had no intention of abandoning their action. He confirmed that both individual applicants employed by the first and second respondents stood together at the two respective plants (PPP and FPP). When he was asked whether there was any demand caused by the individual applicants to the second respondent's property on the day of the strike, he said that the employees were not satisfied with the outcome "from the petition" This evidence confirms that the issue was about the Synman's report.

[38] Mr Mosotho Enoch Matshami's evidence was that in 2013 he was the Managing Director of the second respondent, however, he was never notified of any problems between its employees and the first respondent.

[39] Ms Nomsindiso Mlanzi (Ms Mlanzi) testified for the individual applicants. Her evidence was that there was a practice of discrimination at the first respondent, for example, employees were working in different sites based on their race. She denied that the strike was premeditated. During cross-examination when it was put to her that the only demand that was put forth by employees was that managers should be dismissed, she answered that it was one of the demands. Moreover, she said that for them to return to work" we *were demanding the dismissal of the managers, however, we also wanted the employer to look at whatever was contained in that particular petition."*

[39] Ms Mlanzi confirmed that the Snyman report further advised that the employees have a right to refer the dispute to the CCMA should they feel aggrieved by the outcome but said the employees were not aware of their rights to approach the CCMA. During cross-examination, she was not asked any questions relating to the evidence which Mr Bande made concessions on, that is, the instances relating to Ms Radebe and Mr Zondo.

[40] The official testified that he works as a Provincial Organiser within the union, was servicing union's members of the first respondent. The issues contained in the petition were raised during a general workplace meeting by the members.

[41] Mr Nkosi, further testified that the first respondent failed to take action against the employees within seven days after the submittal of the petition. He further stated that he submitted a second petition on 22 March 2013. On 17 April 2013 he sent a letter to the first respondent confirming the meeting that was to take place the following day, and in this letter, at paragraph 5 he says that the members were “ready for any action”. He testified that the reason for him to write this type of the letter was because the employees’ grievances were not attended to and they did not know what else they could do.

[42] On 18 April 2013, he attended the meeting where Mr Snyman had to give them a report. According to him, this report is not answering the grievances of the employees from the initial petition. After the outcome, a debriefing took place with the employees, in this meeting the tripeptide alliance of the ruling political party in this country and community members were present. There was outrage as a result of the Snyman report. However, there was no resolution that was made that the employees will partake in an unprotected strike action. I must mention that this was not on a par with the submission by Mr Kuane during cross-examination on Mr Bande, where it was put to him that a resolution to strike was made. According to him, he was not aware that the employees were to embark on an unprotected strike on 24 of April 2013.

[43] On 24 April 2013, he received an SMS from Mr Synman about a planned strike. He then proceeded to the first respondent, when he arrived he found Mr Bande at the gate, but he was not allowed to get inside the premises ,meaning he was denied access to see the employees and Mr Synman also denied him access. He ended up speaking to the shop stewards.

[44] During cross-examination when he was asked as to what he meant by saying “*enough is enough”*, he answered that he referring to his intention to refer the dispute to the CCMA.

[45] Ms Nomsa Mbele testified that she was employed by the second respondent working at the first respondent. She confirmed that she attended the meeting on 21 April 2013 where the Snyman report was discussed. According to her, the resolution of the meeting was that both delegates from COSATU and ANC were to accompany the employees to the first respondent in order to try to

resolve those issues. During cross-examination, when a question was posed to her as to why the issues that were of their concern were not referred to the CCMA, she started crying. When I inquired as to why she was crying, she said the questions reminded her of a certain incident where at one stage they were made to wash their faces where boots are normally washed. This part of the evidence was not put to any of the witnesses of the respondents.,

Evaluation and applicable legal principles

Issue A

[46] Section 213 of the LRA defines a strike as:

> "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."

[47] In the opening statement, it was submitted on behalf of the applicants that the second respondent supplies the first respondent with labour and the management of the first respondent supervises and manages the employees of the second respondent. In the pre-trial minutes, the parties agreed that the second respondent's business is the provision of labour related solutions including the provision of employees to the first respondent. Moreover, the evidence of Mr Pieter Nienaber, which I have dealt with *supra*, was that the individual applicants stated that their concern was about the Synman report. The afternoon shift employees went on strike in solidarity with the day shift employees. Clearly, there was one purpose which was to remedy the concerns that had been raised by the first respondent's employees. It is not in dispute that the employees of the first respondent on behalf of the individual applicants delivered a petition wherein they asked the first respondent to remedy their grievances and as a result of the Snyman report all the individual applicants reported for duty on 24 April 2013 but later withdrew their services as a result of this report. The night shift employees stopped working as they

were in solidarity with the day shift employees. Furthermore, on the pleadings before me, parties are not in dispute that all the remaining individual applicants embarked on an unprotected strike. I am satisfied that there was a strike which did not comply with the requirements of the LRA. Therefore, the individual applicants committed acts of misconduct.

[48] The Code of Good Practice, items 6(1) is applicable herein. It is common cause between the parties that the individual applicants were involved in the strike which was not in compliance with the requirements of the LRA. As the action of the individual applicants is an unlawful withdrawal of services that they were employed for, it is therefore up to the employees to give an explanation for their unlawful conduct. This in short means the employees must show that the first respondent's conduct was unjustifiable. However, despite the misconduct been committed it is not automatic that the dismissal of this nature would be regarded as fair. What needs to happen is to determine the substantive fairness of the dismissal, which includes the seriousness of the contravention of the LRA, and whether there was any attempt made by the individual applicants to comply with the LRA.

[49] The employer will still have the onus to prove that the dismissal was fair. As it was pointed out by the Labour Appeal Court (LAC) in the matter of *National Union of Mine Workers of South Africa* (*NUMSA) and Others v CBI Electric African Cables*[21] 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

[21] [2014] 1 BLLR 31 (LAC); (2014) 35 ILJ 642 (LAC) at para 29.

> 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."

[50] As this Court has been asked to decide whether or not there is substance in allegations of intimidation and victimisation against the individual applicants which have been perpetrated by certain individuals within the management of the first respondent. I deem it prudent at this stage to define the word intimidation in terms of Intimidation Act[22]. This word is defined as *"without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind, or persons in general, to do or to abstain from doing any act or to assume or to abandon a particular standpoint".* The LAC in *Adcock Ingram Critical Care v CCMA and Others[23]*, quoted with approval and expanded the definition of intimidation as:

> "In the Shorter Oxford English Dictionary "intimidate" is defined as "Terrify, overawe, cow. Now esp. force to or deter from some action by threats or violence."

[51] Whereas the definition of victimisation is action of making somebody suffer unfairly because one does not like something that such person has done.

[52] In *casu,* Ms Radebe exercised her rights by approaching a medical practitioner after feeling that her health was not okay. She submitted a medical report to the management of the first respondent about her conditions which the doctor proposed that she must be moved from the area that she was working at to a different area due to her medical condition. She was moved to a conducive environment as per the doctor's medical report, but later without any medical report suggesting that her condition had changed, Mr Herbst wanted her to go back to the old position which the doctor had recommended that was not conducive for her health, and was told that failure to go back to this position would result in her not to be paid. Clearly this was intimidation. She lodged a grievance against Mr Herbst on 15 May 2012 as a result of this threat. This grievance relates to threats allegedly made by Mr

[22] Act 72 of 1982 as amended.
[23] [2001] 9 BLLR 979 (LAC).at para 19.

Herbst against her and among other things that she was told that failure to return to the previous position would carry disciplinary consequences. The first respondent's approach was the one of making her to suffer instead of accommodating her and attending to her grievance.

[53] Unfortunately, this grievance was not attended to as confirmed by Mr Bande. The email correspondence referred to *supra* is a clear indication that there was a plot to get rid of her, as the email ends by saying *"I sincerely hope that we can get rid of her this time".* The first respondent has not presented any evidence as to what Mr Herbst was suggesting when saying that Ms Radebe had to be *"rid of"*. Looking at the entire email, clearly, there is only one answer which is that she was being victimised for not complying with the instruction and a plot to dismiss her was being perpetuated by management. Moreover, no explanation was tendered as to why her grievance was not attended to despite being delivered in May 2012 until the date of the strike.

[53] Mr Mhlinza's grievance relating to an insult hurled at him by Ms Linden Ross after asking for a signature, was also not attended to. I am therefore satisfied that Mr Mhlinza was being victimised.

[54] In respect of accusations of racial discrimination as contained in the petition, and Ms Mbele's testimony of ill treatment mentioned *supra,* have no substance, being guided by the principle in *President of the RSA and others v South African Rugby Football Union and Others*[24] , as no compelling evidence was presented during the trial bywitnesses (Ms Nomsidiso Mlanzi (Ms Mlanzi); the official and Ms Nomsa Mbele,)for the individual applicants despite the first respondent accused of racial discrimination. No version of racial discrimination was put to the witnesses of the respondents during cross examination. For example, Ms Mlanzi makes allegations that Mr Herbst was harassing her, the environment within the first respondent was discriminatory in that white employees work upstairs .This version was also not put to the

[24] 1999 (10) BCLR 1059 (CC).

witnesses of the respondents to comment on, for example, Mr Herbst was accused of discrimination but was not even cross examined.

[55] However, it is my view that for a party who has a burden of proof, in this case the individual applicants, to show the requirements of 6(1) (c) of the Code of Good Practice on strike, does not have to prove all the allegations levelled against the employer, the first respondent herein, if some are shown to have merits then the conduct of the first respondent can be classified as "unjustified conduct".

[56] However, Mr Bande acknowledged that there were grievances that were not attended to despite being acknowledged by the Human Resource Department. For example, when Ms Mhlinza approached Ms Ross to sign off documents she was told to *"voetsek"*. This grievance was received by the Human Resource Department on 25 May 2012 but was not attended to. Mr Zondo's grievance lodged on 20 December 2012, was not attended to. Mr Bande confirmed that it was a concern that these grievances were not immediately or ever attended to at all. Although according to him this was a drop in the ocean as he said there were too many grievances out of more than 1000 employees.

[57] It is my view that as much as the first respondent regarded this grievance as a drop in the ocean, to the individual applicants clearly, this was not the case hence they lodged a petition and incorporated therein the same issue .Taking these into consideration and the fact that Mr Snyman also failed to do a proper investigation as he did not even interview Messrs Mhlinza, Radebe and Zondo despite having all the information with him, rendered the individual applicants rejection of his report justifiable.

[58] As I have indicated above, there were some valid concerns raised by the individual applicants. I now need to determine what was the demand by the individual applicants which led to the strike. Simply put: was the demand only that management should be dismissed. In paragraph 83.1 of the individual applicants' statement of case, it is stated that *"the strike was in response to unjustified conduct on the part of the company in failing to* adequately address

and investigate the various allegations of intimidation and victimisation, perpetrated against the union's members by individuals within the management structure of the company". I have further taken into account what the official told Mr Snyman as stated above the evidence of Ms Mhlinza and the evidence of Mr Pieter Nienaber and conclude that the demand was not only about the dismissal of the management but the individual applicants wanted issues in the petition to be adequately investigated as Mr Snyman had failed to do that.

[59] During cross-examination by Mr Kuane, the issues revolved around the failure to properly attend to the issues raised in the petition however, the issues that he pressed on were the ones that are mentioned in this judgment above which Mr Bande conceded. However, during the examination in chief of the witnesses of the applicants which some of them testified that there were other issues such as the one of the *"hole in the toilet"* and that individual employees were asked to wash their faces where gumboots are normaly washed , they cannot be accepted, since such versions were not put to the witnesses of the respondents.[25]

[60] Therefore since most of the evidence of the first respondent was not disputed nor put to the witnesses during cross-examination I, therefore, conclude that the only issues that the individual applicants were challenging which were justifiable were the ones that were conceded by Mr Bande. The demand for the dismissal of certain individual managers of the first respondent was not a valid demand, as those managers have rights too.

<u>Issues D and E, and whether the strike was premeditated</u>

[61] Item 6(2), for the sake of brevity I quote it as follows,

> '(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

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[25] *Id n* 24 at**. paras 59 and 61**.

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**.'

[62] Landman J, in *National Union of Mine Workers and Others v Gold Field Security Limited*[26] emphasizing the need to engage an outsider or a union official, during an unprotected strike said this,

> "The Code's insistence on a union representative is a concrete illustration of the principle that outside intervention is most desirable. This is so because the protagonists in the heat of a strike are often unable to appreciate precisely the consequences of their action or what the right thing to do may be. A dose of reality may be required, and as this, at least from the employer's perspective, is not being exhibited within the group, it must be injected from outside. Who better than a trusted union official or indeed office-bearer? Sometimes the group might not even have the presence of mind or think it necessary to invoke the assistance of a higher level of the union. Mr Matsotso was in contact with Mr Mohlaba, the regional organiser, but he did not think to discuss the crisis with him".

[63] Turning to the issue of the ultimatum, and whether the individual applicants were afforded sufficient time, the Constitutional Court by Minority in *South African Transport Workers Union obo Ngedle and Others v Unitrans Fuel and Chemical (Pty) Ltd*[27] summarised the principle of sufficient time in strike-related matters and held that:

> "The time period conferred by an ultimatum must be viewed in the context of whether the ultimatum provided an adequate opportunity for the workers involved to engage with its contents and respond accordingly. This is in line with item 6(2) of the Code encompassing the audi alteram partem principle, which extends into the terrain of unprotected strike action. **Further, the importance of conferring an adequate period of time for both parties to**

[26] (J890/97) [1998] ZALC 128 (18 December 1998).

[27] 2016 (11) BCLR 1440 (CC); [2016] 11 BLLR 1059 (CC); (2016) 37 ILJ 2485 (CC) at para 65.

the dispute to "cool-off" must be emphasised. **An adequate cooling-off period ensures that an employer does not act in anger or with undue haste and that in turn the striking workers act rationally having been given the opportunity to reflect**."

[64] I am aware that each case has to be decided based on its facts and circumstances, and what this Court said in *NUMSA and others v Pro Roof Cape (Pty)* Ltd[28] and the LAC's decisions in *Plaschem (Pty) Ltd v CWIU*[29] in respect of the period of time. However, the circumstances of this case and those authorities are not the same as I have highlighted above and below.

[65] One of the contested issues in this matter is whether the strike was pre-meditated or not. The respondents argued that the strike was pre-mediated and on the other hand the applicants are saying the negative. In determining this issue, I need to apply an inference principle, taking into account that the appropriate assessment is one of the balance of probabilities, and not a reasonable doubt (which is applicable in criminal cases). The elementary logic herein is that the inference sought to be drawn must be more probable than any other.[30] In my view, if there is an issue in dispute, and one party presents facts in support of that issue whereas the other party merely denies the opponent's evidence but fails to place evidence before the court runs a risk of an adverse finding against him.

[66] In *casu*, the respondents presented evidence that on 18 April 2013, the meeting was held between the official and Mr Snyman wherein the latter presented his report, and the official not being pleased with the outcome said the union members "*will do what they need to do*". On 21 April 2013, the meeting was held between the individual applicants, the officials of the union, the ANC, COSATU, SACP and SANCO where this issue was discussed. During cross-examination, the union representative put it to Mr Bande that the decision was taken there to embark on strike action. On the eve of the strike, it was brought to the first respondent's attention that the strike was to take place on the same date, this resulted in Mr Snyman sending an SMS to the

[28] [2005] 11 BLLR 1126 (LC).
[29] (1993) 14 ILJ 1000 (LAC).
[30] See *R v Blom* 1939 AD 188.

official as mentioned above. It is common cause that the individual applicants abandoned their work stations on 24 April 2013.

[67] Based on these uncontested facts, I conclude that the only inference to be drawn is that the strike was premeditated, as the individual applicants presented no evidence to counter these facts. I have also taken into account, that during cross-examination, Mr Van der Merwe on behalf of the second respondent asked the witness for the applicants if they are allowed to enter with cell phones in the plants and the witness answered 'no'. Therefore, the question is how did it happen that both plants decided at the same time, in the morning, to go on strike? The answer is that this can only happen if the strike was pre-planned. The night shift was also following the same plan, taking into account the version that was put that the strike was planned during the tripartite alliance meeting on 21 April 2013.

[68] As I have concluded that the strike was premeditated, this was not the first strike wherein the same individual applicants were involved, and there were letters that were communicated to the union warning them about the consequences of the strike and encouraging it to refer the dispute to the relevant forum but it failed to do so. Without any doubt, the evidence points to the fact that, the planning of the strike involved the union, there was an attempt that was made by Mr Snyman to the official of the union to meet and discuss the issues and the latter attended at the first respondent's premises and shop stewards did communicate with the official, moreover the members were asked to leave the premises which they should have used that opportunity to communicate with the union, but they refused to do so until they were suspended. Therefore, I conclude that the respondents were justified in not fully complying with the requirements of section Code 6(2) of the Code of Good Practice.

[69] Be that as it may, I am of the view that the "cooling off period" given to the employees to reflect on their conduct was too short, meaning they were not given a fair opportunity to apply their mind to the consequences of embarking on an unprotected strike action and also, taking into account that the official did not address them in person but was communicating with the shop

stewards, therefore giving employees less than an hour and the night shift was given less than 30 minutes, to apply their mind, which period is not enough.

Issues G and I (Aggravating and mitigating circumstances)

[70] As I have indicated above, a strike action is not a licence to dismiss without taking into account the surrounding circumstances. .A number of considerations has to be taken into account. Firtstly, the first respondent, in respect of the issues of Ms Radebe and Mr Mhlinza committed acts of victimisation and intimidation; and secondly, that the cooling off period given to individual applicants was not enough, however attempts made to communicate with the union (which looks like there was only one official who was assigned to deal with the first respondent) was enough and the failure of the respondents to issue ultimatums to the union after the commencement of the strike but instead sent them to the individual applicants is excusable given the circumstances.

[71] Now I have to determine whether the sanction of dismissal imposed on the second to further applicants was appropriate considering the fact that the strike lasted for less than three hours and the fact that the strike was not violent.

[72] At the same time, what aggravates the conduct of the individual applicants, *inter alia*, is that no attempts were made to comply with the provisions of the LRA, the employees have not acknowledged their misconduct, the first respondent lost R482 000 in production due to the unprotected strike, this was not the first unprotected strike by the individual applicants relating to the same issues. The strike was well planned by the individual applicants, as a result of the conduct of the first respondent and they demanded that certain managers of the first respondent be dismissed within seven days.

[73] I have taken into account the submission by the respondent's representatives that because there are allegations of racial discrimination that were made against the first respondent such justify dismissal. Mr Boda referred me to authorities both of this Court and of the LAC in respect of racial discrimination

cases. As this Court is alive to acts of racism within and outside the employment sphere, my view is that each and every case has to be determined on its own merits and circumstances. For example, the argument of the first respondent's representative is extinguished by the Constitutional Court in the matter of *Duncanmec (Pty) Limited v Gaylard NO and Others*[31] where Jafta J, for the Court said,

> "[48] There is no principle in our law that requires dismissal to follow automatically in the case of racism.
>
> And
>
> "[49] Realising that the law did not support the proposition that every employee guilty of racism should be dismissed, Duncanmec's legal representative changed course and urged this Court to lay down such rule to facilitate the eradication of racism in the workplace. This invitation should be declined because such a rigid rule would be inconsistent with the principle of fairness which constitutes the benchmark against which dismissals are tested."

[74] As much as I conclude that the sanction of dismissal was harsh taking into account the mitigating factors as mentioned above, I am of the view that the reinstatement would not be an appropriate relief under the circumstances, taking into account that the two issues that were presented before me in respect of victimisation and intimidation were not persuaded by the union and individual applicants to the relevant forum such as the CCMA but instead opted to engage in two unprotected strike actions. I have also taken into account that looking at the petition, the number of allegations that were made against the first respondent are sensitive but not proven. Furthermore, having heard the testimony of the witnesses of the applicants, clearly in their view, this is not the end of the case as they still believe that the first respondent has committed a number of discriminatory acts although most of the versions were not put to the witnesses of the respondents, as I have mentioned above. Mr Kuane, on behalf of the applicants during opening statements mentioned that the issues between the parties are dated as far back as 2010. Moreover, the

[31] 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC); 2018 (6) SA 335 (CC); (2018) 39 ILJ 2633 (CC).

entire circumstances of this matter do no support a possibility of a harmonious working relationship. Therefore, an order of both either reinstatement or reemployment will not be proper under the circumstances. I am of the view that compensation would be an appropriate relief. In awarding compensation as I do *infra*, I have noted that both parties did not approach Court with clean hands. The actions of the individual applicants are reprehensible, but equally so are those of the respondents.

[75] In the premises, I make the following order:

Order

1. All the individual applicants whose names are listed in paragraph 6 of this judgment, as submitted to this Court by the second respondent, were not dismissed.

2. The dismissal of the remaining individual applicants by the first and second respondents was procedurally unfair.

3. The dismissal of the remaining individual applicants by the first and second respondents was substantively unfair.

4. The first and second respondents are ordered to pay each of the dismissed employees compensation equivalent to four (4) months salaries calculated at the date of dismissal.

5. Each party to pay own costs.

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S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr S Kuane, the union official

Instructed by: Food and Allied Workers Union

For the First Respondent: Adv Boda SC

Instructed by: Werksmans Attorneys

For the Second Respondent: Advocates H A Ven Der Merwe and M Morake

Instructed by : Senekal Simmonds Inc.