



(1) REPORTABLE: **YES**
(2) OF INTEREST TO
OTHER JUDGES: **YES**
(3) REVISED: **YES**

1 September 2026

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JS 272 / 22

In the matter between:

NEAWUSA obo SETABELA AND 63 OTHERS

Applicants

and

BOTHAVILLE MILLING (PTY) LIMITED t/a

THUSO MILLS

Respondent

Heard: 25 to 27 May 2026

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 1 September 2026

Summary: Strike dismissal – s 187(1)(a) – whether secondary strike protected – dispute *in casu* limited to only determining whether strike protected – not required to determine whether dismissal for unprotected strike action unfair

Secondary strike action – s 66(2) considered – primary strike protected – s 66(2)(a) complied with – notice requirement in s 66(2)(b) considered –

requirements of s 66(2)(c) considered

Secondary strike action – s 66(2)(b) considered – applicants required to prove respondent received strike notice – evidence and expert evidence considered – applicants failing to prove respondent received strike notice – conduct of respondent inconsistent with having received strike notice – no strike notice in terms of s 66(2)(b) received by employer – notice requirement essential and not complied with – secondary strike unprotected

Secondary strike action – s 66(2)(c) considered – essential requirement that strike must have effect on business of primary employer – respondent and primary employer competitors – secondary strike has no effect on business of primary employer – no commercial relationship existing between the employer parties – primary requirement of s 66(2)(c) not fulfilled by applicants – strike unprotected

Secondary strike action – evidence relating to commercial relationship between respondent and primary employer considered – applicants' evidence improbable, insufficient and lacking in credibility – evidence of respondent establishing no commercial relationship with competitor exists – applicants failing to prove any nexus between businesses – secondary strike unprotected

Dismissal – s 187(1)(a) not applicable *in casu* – employees dismissed for participation in unprotected strike – dismissals not automatically unfair – claim dismissed

JUDGMENT

SNYMAN, AJ

Introduction

- [1] The current case is somewhat unusual. It concerns a dispute brought by the applicants to this Court on the basis that the individual applicants were automatically unfairly dismissed in terms of section 187(1)(a) of the Labour

Relations Act (LRA)¹ for participation in a protected secondary strike. This is not something one would often see. In addition, the dispute has been crystallised down to only relating to whether the dismissal was automatically unfair. There is no further and alternative case, which one mostly finds in strike dismissals cases, that even if the strike was unprotected, the dismissal was nonetheless substantively and / or procedurally unfair. This case thus stands or falls on the application of section 187(1)(a).

- [2] So, what I must decide in this case is well defined and straight forward, as it was undisputed that the individual applicants indeed participated in secondary strike action on 2, 3 and 4 November 2021. The only issue for determination is whether the strike qualified as being protected as a secondary strike under section 66 of the LRA, with specific regard to sections 66(2)(b) and 66(2)(c). If the answer is the affirmative, then the case must be decided in favour of the applicants. But if it is answered in the negative, then that is the end of the matter for the applicants.
- [3] The individual applicants were dismissed on 17 November 2021 and 1 December 2021 (the two shop stewards were dismissed later). Through the applicant union, the applicants challenged that dismissal as an automatic unfair dismissal, first to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation, and then to this Court for adjudication in terms of section 191(5)(b) of the LRA. The dispute was referred to this Court by way of a statement of claim filed on 21 April 2022, in terms of which the applicants prayed for retrospective reinstatement of the individual applicants as consequential relief. The applicants also applied for condonation for the late filing of the statement of claim. The claim was opposed by the respondent by way of an answering statement filed on 4 May 2022. The respondent did not oppose the applicants' condonation application. Condonation was ultimately granted by Baloyi AJ on 5 September 2023.
- [4] As touched on above, and in a pre-trial minute dated 4 September 2024, the parties agreed on three pertinent issues for the Court to decide. First, was the dismissal of the individual applicants an automatic unfair dismissal as

¹ Act 66 of 1995 (as amended).

contemplated by section 187(1)(a) of the LRA.² Second, did the respondent receive the notice from the applicant union concerning the commencement of the secondary strike. And third, was the nature and extent of secondary strike reasonable in relation to the possible direct or indirect effect on the businesses of the respondent and / or the primary employer.

- [5] The matter came before me on trial over three days from 25 to 27 May 2026. In the trial, in which the applicants commenced leading evidence, the applicants called as witnesses Tsiliso Lenepa (Lenepa), the General Secretary from NEAWUSA, Benjamin Sithabela (Sithabela), one of the dismissed employees who was a shop steward, Thado Sidwell Lithabeng (Lithabeng), also a dismissed employee and former shop steward, and Johannes Khohlokoane (Khohlokoane), a former employee of LFC Milling. The applicants also called a rebuttal witness at the conclusion of the trial, being Johannes Dlamini (Dlamini), a former employee of the respondent who had worked as a dispatch clerk until 2024. The respondent in turn called an expert witness in information technology, Verner Bartlett (Bartlett), the CEO of the respondent being Arnold Steyn (Steyn), the operations manager Cornelius Griesel (Griesel), and the dispatch manager Frederick Els (Els).
- [6] At the conclusion of the trial on 27 May 2026, the parties indicated that they would prefer to file written closing argument. Accordingly, I granted an order on such date in terms of which I reserved judgment, and afforded the parties until 12 June 2026 to file their written heads of argument. These heads of argument were filed by both parties accordingly. I will now proceed to decide this matter by first setting out the relevant facts.

The relevant facts

- [7] Other than two core disputed factual issues, which I will specifically deal with later in this judgment, the bulk of the evidence and what transpired in this matter were largely common cause, or undisputed. For ease of reference, I will

² Section 187(10(a)) reads: 'A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is – (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV ...'.

refer to all the individual applicants in this case as '*the employees*', and the applicant union as '*NEAWUSA*'.

- [8] The respondent conducts business as a maize mill, operating in the milling industry. The employees were employed by it in various capacities in the operations at its mill. It is common cause that they were dismissed on 17 November 2021 and 1 December 2021 (the two shop stewards were later dismissed), for the reason of having participated in unprotected strike action. The respondent's business is situated in Bothaville in the Free State.
- [9] In this instance, NEAWUSA was involved in a strike at another employer in the milling industry, being LFC Milling (LFC). The respondent and LFC are about 80 kilometres apart, as LFC was situate in Wesselsbron the Free State. The respondent and LFC are direct competitors in the milling industry competing for the same customers and producing the same product. There existed no other business relationship between the respondent and LFC, other than them being competitors in the same industry. The strike embarked upon by NEAWUSA and its members at LFC was a protected strike and concerned wages and conditions of employment of the members of NEAWUSA employed at LFC.
- [10] The strike at LFC commenced on 14 June 2021, and endured for a protracted period of time, without the issues in dispute being resolved. As a result, NEAWUSA then sought to mobilise its members employed at the respondent to embark upon secondary strike action in support of the employees at LFC. It was common cause that on 27 September 2021, a notice was sent by Lenepa to the respondent, indicating that NEAWUSA and the employees were contemplating embarking upon a secondary strike in support of the employees at LFC. It is important for the purposes of this judgment to have exact regard to what this notice reflected.
- [11] Firstly, the notice of 27 September 2021 was not a notice informing the respondent of the commencement of secondary strike action. Rather, and from its content as a whole, it appears to be some kind of forewarning of future intentions. It states that the respondent's employees '*will embark on the sympathetic strike in respect with the LFC Milling in Wesselsbron due to the*

attitude of that employer for not having an interest of resolving the current wage strike' (sic). The notice further records that 'This notice serves to make you aware that after seven (7) days from today the 27th September 2021, should LFC management continue to display their stubbornness, the union (Neawusa) will again notify you of the commencement date and time of the secondary strike' (emphasis added).

- [12] According to NEAWUSA, it subsequently did send a notice to the respondent on 25 October 2021 giving seven days' notice in terms of section 66(2)(b) of the LRA, in which the respondent was notified that the employees would embark upon secondary strike action as from 1 November 2021. Whether this notice was received by the respondent is one of the core issues in dispute *in casu*. The respondent has pleaded that this notice, which was discovered by NEAWUSA as part of its supporting documents in this case, was never sent to it and / or was never received by it. Thus, according to the respondent, other than the forewarning of 27 September 2021, it was given no notice of commencement of secondary strike action as contemplated by section 66(2)(b). This dispute will be specifically dealt with later in this judgment.
- [13] It was common cause that the employees embarked upon secondary strike action as from 2 November 2021, and not 1 November 2021 as indicated in the disputed notice of 25 October 2021. For all the reasons set out in this judgment, I need not consider what consequence this may have to the protected nature of such strike. It became apparent from the testimony that the employees on 2 November 2021 in fact left the premises of the respondent and went to the premises of LFC to picket there.
- [14] The commencement of the strike on 2 November 2021 prompted an immediate reaction from the respondent. In a letter sent to NEAWUSA on the same day, the respondent only referred to the notice from NEAWUSA of 27 September 2021. It was indicated in the letter of 2 November 2021 from the respondent that: '*... the employer therefor places it on record that the union and the unprotected striking employees failed to comply in terms of the LRA section 66(2)(b), by not notifying the employer of the proposed secondary strike at least seven days prior to its commencement as depicted by the union communique dated 27-09-2021, the union (Neawusa) will again notify you of*

commencement date and time of the secondary strike.' This letter further recorded that it had to be considered as a formal ultimatum to NEAWUSA and the employees that the employees cease their unprotected strike action, and return to work at 10h00, or face disciplinary action with dismissal as a possible outcome. The letter also requested an urgent meeting with NEAWUSA for the purposes of it providing the respondent with proof of notice of the strike and for a discussion regarding the provisions of section 66(2)(c) of the LRA.

- [15] The respondent on 2 November 2021 issued an ultimatum to the employees themselves. This ultimatum also referred to there having been no proper notice of the strike, that the strike was unprotected, and that the employees were required to resume their duties at 10h00 that same day. It was stated that if the employees failed to adhere to the ultimatum, they would face disciplinary action and possible dismissal. A second ultimatum was issued on 3 November 2021, repeating the contents of the first ultimatum and indicating that if the employees failed to resume their duties by 14h00 that same day, they would face disciplinary action and possible dismissal.
- [16] NEAWUSA and the employees did not adhere to the letter / ultimatums of 2 and 3 November 2021. The employees remained on strike on 2, 3 and 4 November 2021. Then, on 4 November 2021, NEAWUSA sent a letter to the respondent, indicating that a decision had been taken to withdraw the secondary strike, and that the employees would resume their ordinary duties on 5 November 2021.
- [17] In a response on 5 November 2021, the respondent confirmed that it noted the letter from NEAWUSA, however it regarded the strike action that had been embarked upon as being unprotected, that the employees would be subjected to disciplinary action, and that pending such disciplinary action they would be suspended.
- [18] This letter from the respondent on 5 November 2021 resulted in a further exchange or correspondence between the parties on 5 November 2021. NEAWUSA, in an answering e-mail on the same date stated that the respondent was interpreting the LRA '*irrelevantly*', the union had followed the correct procedure, that the respondent had been notified of the strike '*more*

than once', and that the respondent's conduct was an '*unlawful attack*' on its members. The respondent replied, indicating that it repeated what it had already said and that disciplinary action against the employees would proceed.

- [19] Disciplinary action against the employees duly followed, with the employees being charged with participating in unprotected strike action. The employees were then subjected to disciplinary hearings. Considering what is in issue in this case, I need not consider the particulars relating to these disciplinary proceedings, other than saying that pursuant to these disciplinary proceedings, the employees were dismissed. The applicants then referred an automatic unfair dismissal dispute to the CCMA on 17 December 2021. The dispute was unsuccessfully conciliated on 10 January 2022, and then referred to the Labour Court, leading to the matter now before this Court on trial.

Analysis

- [20] As touched on above, at the heart of this matter lies section 66(2) of the LRA. This is because it is common cause that NEAWUSA and the employees embarked upon secondary strike action in support of the primary strike embarked upon by NEAWUSA and its members employed at another employer, being LFC. Secondary strike action is only permitted where all the requirements of section 88(2) have been fulfilled. If these requirements are not all fulfilled, the strike would be unprotected. And because the employees were dismissed for this very strike, their dismissal would not be automatically unfair if the strike was unprotected. The above said, section 66(2) reads:

'No person may take part in a secondary strike unless –

- (a) the strike that is to be supported complies with the provisions of sections 64 and 65;
- (b) the employer of the employees taking part in the secondary strike or, where appropriate, the employers' organisation of which that employer is a member, has received written notice of the proposed secondary strike at least seven days prior to its commencement; and
- (c) the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.'

- [21] It was common cause that the primary strike at LFC was a protected strike. As such, the first requirement under section 66(2)(a) has been fulfilled. Next, the notice requirement under section 66(2)(b) becomes relevant. This issue is very much in dispute between the parties. What was placed before me in evidence by the applicants is a written notice by NEAWUSA dated 25 October 2021 to the respondent, giving the respondent notice of commencement of secondary strike action in support of the strike at LFC, with such strike to commence on 1 November 2021. I was also provided with a document that reflected that this notice was transmitted by e-mail (proof of service), to three e-mail addresses, being: (1) [a\[...\]](#); (2) [a\[...\]](#) and (3) [p\[...\]](#).
- [22] It is true that the e-mail addresses [a\[...\]](#) and [a\[...\]](#) are the work and personal e-mail addresses, respectively, of Steyn, whilst the e-mail address of [p\[...\]](#) is the work e-mail address of Griesel. These are indeed also the same e-mail addresses used in the forewarning notice provided to the respondent on 27 September 2021, which the respondent acknowledged it indeed received. However, and where it comes to the notice of 25 October 2021, the respondent was adamant that no such notice was provided to it and in particular, it never received such notice at any of these e-mail addresses.
- [23] With it specifically being in dispute that the respondent received the notice of 25 October 2021, the onus would be on NEAWUSA and the employees to prove that the respondent did receive the notice. In this regard, the proof of email transmission documents at best provided what would be *prima facie* proof that the notice was received by the respondent, however this is not conclusive proof of receipt, especially where receipt is specifically disputed. In *Edgars Consolidated Stores (Pty) Ltd v Kalanda and Others*³ the Court dealt with a proof of telefax transmission report when communications were still sent by telefax, and said:

‘The document in and by itself, and on the face of it, certainly does not provide conclusive proof that the applicant had been notified of the arbitration set-

³ [2007] 7 BLLR 632 (LC) at para 15. See also *Mega Burger v Commissioner Louw NO and Another* (2000) 21 ILJ 1375 (LC) at para 6; *Northern Province Local Government Association v Commission for Conciliation, Mediation and Arbitration and Others* (2001) 22 ILJ 1173 (LC) at para 46; *Gay Transport (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2011) 32 ILJ 1917 (LC) at paras 16–17.

down. The commissioner, at the time of deciding to proceed with the arbitration in the absence of that party, was, in my view, not justified in assuming that he may do so on the documents or evidence before him. Particularly as the applicant's allegation that it had not received this notice of set-down stood uncontested, I believe that the commissioner, in addition to ignoring this uncontroverted fact, in the rescission application again relied on the transmission slip as conclusive proof that the applicant had been notified of the arbitration set-down. This amounts to a reviewable misdirection.'

[24] What used to be done by telefax is now done by email. And similarly, e-mail transmission documents, which establish that an email was successfully sent to a recipient e-mail address, are now provided by parties as proof that a document was sent and received by e-mail. But just as was the case with the former telefax transmission reports, this kind of proof of transmission is only *prima facie* proof of receipt by the email recipient, and where receipt is disputed by the recipient, it remains incumbent on the sender to prove receipt. The easiest way to overcome this difficulty is for the sender to, immediately following the transmission of the e-mail, obtain a receipt acknowledgement from the recipient, either by way of return e-mail or by obtaining telephonic confirmation of receipt.

[25] Therefore, where the receipt of the notice is specifically disputed by the respondent, as was done *in casu*, and in the absence of any actual receipt acknowledgment of the notice by the respondent, it remains incumbent on NEAWUSA to prove it was received by the respondent. To only prove that it was successfully sent is insufficient, as section 66(2)(b) specifically prescribes receipt of notice by the employer. As held in *Bowley Steels (Pty) Ltd v 10 Sterling Road (Pty) Ltd*⁴:

'... Unless the method of email delivery and the email address is agreed delivery of a letter as a notice by email is not the same as delivery to a chosen physical *domicilium*. In a case where email is used as a method but was not agreed upon, the party giving notice would bear the onus of proving actual receipt and in this case that the late Mr Gerke received (not necessarily personally) same on behalf of the first respondent ...'

⁴ 2017 JDR 1203 (GJ) at para 15.

[26] In *SA Transport and Allied Workers Union v Natro Freight (Pty) Ltd*⁵ the Court dealt with strike action under section 64(4) of the LRA, which concerns the right to embark upon strike action pursuant to the referral of a dispute to the CCMA / bargaining council relating to a unilateral change in conditions of employment. It is a requirement, in terms of this provision, that such a referral must be served on the employer, in order for the right to strike to accrue. In *Natro Freight*, the employer disputed having received any such referral, even though it was undisputed that it had been referred to the bargaining council. This being the case, the Court reasoned as follows in finding that the applicant in that case had not proven that the employer received the referral:⁶

‘... The applicant was settled with the onus of proving that it effected service of the referral in question. The applicant was confronted with a difficulty that its faxing machine would not endorse the fax number of the intended recipient on its fax report. The applicant asked that I draw an inference that there was proper service. It relied on the undisputed fact that the respondent received the referral faxed to it, also on 27 February 2006, by the applicant, concerning the mutual interest matter, which referral had similarly not been endorsed. The approach by the applicant, in this regard, is oblivious of human error which could account for an omission to fax the referral in question to the respondent. In my view, it is not the only reasonable inference to draw from the facts that service of the referral was properly executed.’

[27] The Court in *Mohube v Commission for Conciliation, Mediation and Arbitration and Others*⁷ dealt with a case concerning the receipt of a CCMA set down notice being disputed, which notice was sent by way of e-mail to a party. It was contended that the notice of set down was sent to the party’s attorney, however the attorney testified that he had never received such a notice, and submitted his personal computer for inspection in confirmation of such testimony. The Court decided as follows in this respect:⁸

‘... No one from the CCMA was called to prove how the notice was sent and no technical evidence was led about the functionality and reliability of the

⁵ (2006) 27 ILJ 1725 (LC).

⁶ Id at para 21.

⁷ (2023) 44 ILJ 1683 (LAC).

⁸ Id at para 29.

system. Reliance was merely placed on entries in or the contents of the CCMA file and nothing else. At best, that could only have been prime facie proof that the email had been directed to a particular address, but not conclusive proof that it had been received by the intended recipient.'

[28] Thus, in order to determine whether the applicants have discharged the onus that rested on them to prove that the respondent received the notice of 25 October 2021, it is necessary to first consider the oral evidence submitted by the parties in this regard. It is already at this juncture that the applicants' case faces some difficulty. Lenepa, NEAWUSA's general secretary that testified, only relied on the proof of transmission documents referred to earlier as basis to establish receipt of the notice by the respondent. But he never testified that he had personally sent the same, nor was testimony given by anyone at NEAWUSA as to the functioning of NEAWUSA's e-mail system (server) and that it was apparent from its email system(server) that the email was actually successfully transmitted to the recipient e-mail addresses. There are many reasons why an e-mail that may be reflected as being sent could not have been received by a recipient. A common example is that it is blocked by the recipient e-mail server because of security or spam protocols. But there are many other instances as well. The point is that NEAWUSA needed to lead testimony to the effect that its e-mail server was functioning properly and successfully transmitted the notice to the recipient email addresses, and that there was no delivery failure notification received on such server. But no such testimony was presented. The crisp point is that dispatch is not always equal to receipt, which is the approach adopted by the applicants.

[29] The respondent however pertinently dealt with this issue in its evidence. It called an expert, being Bartlett. In terms of clause 14 of the pre-trial minute, it was agreed that any party wishing to call an expert witness must file an expert notice at least 20 days before trial. On 17 March 2026, the respondent filed an expert notice relating to the testimony of Bartlett. The notice indicated that he was an IT systems technician and Microsofat 365 administrator. The notice set out all his qualifications and experience. The notice also specifically recorded that his area of expertise included experience in Microsoft 365 e-mail administration, e-mail tracing and the analysis of enterprise e-mail systems. In particular, the notice set out what Bartlett would testify about. This should have

alerted NEAWUSA about what would be said by the expert, and that would surely be the opportune moment for it to ensure that it presents its own contradictory expert testimony in this respect.⁹ At the very least, it was forewarned what the respondent was going to do, as justification for its contention that it never received the notice of 25 October 2021. NEAWUSA failed to take any steps to contradict this. What Bartlett therefore has to say where it came to his expert findings remain uncontradicted.¹⁰ In *S v Seyisi*¹¹ the Court said:

‘... As pointed out above a court is entitled to be guided by the evidence of an expert. In the absence of a challenge to expert evidence that prima facie establishes the relevant facts a court is entitled to rely upon it to convict. In this case there was no challenge to his expertise, or to the grounds upon which he expressed the opinion that the prints corresponded. ...’

[30] As to the actual evidence by Bartlett, he testified that he conducted a comprehensive search of the respondent's e-mail server in respect of all e-mails received on the two dates concerned, being the first notice of 27 September 2021 and the second notice of 25 October 2021. In particular, Bartlett focused on any e-mail that emanated from the NEAWUSA domain, and would be received at the two work related e-mail addresses of the respondent referred to earlier, on the respondent's e-mail server. He found the e-mail from the NEAWUSA domain of 27 September 2021 and confirmed that it was received at the e-mail addresses. However, and where it came to the e-mail of 25 October 2021, he could find no trace of any e-mail having been received from the NEAWUSA domain on 25 October 2021. He also investigated Steyn's private G-Mail account and similarly could find no trace of the e-mail ever being received on 25 October 2021.

[31] Bartlett was extensively cross-examined by the applicants' counsel, however this did not yield the result counsel wanted. In this cross examination, Bartlett

⁹ As said in *SB Guarantee Company (RF) (Pty) Ltd v Tshavhungwe* 2024 JDR 0855 (GP) at para 9: ‘... The plaintiff has provided the evidence of an expert which is not gainsaid. The defendant would have been better advised to obtain the services of his own expert ...’.

¹⁰ Compare *Kangra Coal (Pty) Ltd v Minister of Minerals and Energy and Others* (2021) 42 ILJ 2234 (LC) at para 22; *National Union of Mineworkers and Others v Grogan NO and Another* (2007) 28 ILJ 1808 (LC) at para 58.

¹¹ 2012 JDR 1775 (SCA) at para 13.

pointed out that once the e-mail was received on the server, the user receiving the e-mail was unable to completely delete it. He also explained that the search tools he used, as indicated in his expert report, would identify the e-mail concerned if it was received, in any log file, which included any deleted item folder. The system would also reflect if any e-mail had been deleted. And as stated above, the applicants could put up nothing to contradict any of this evidence. The best the applicants' counsel could do was to make unfounded statements that Bartlett was not qualified enough, which is simply not a legitimate basis to challenge his evidence, considering all his undisputed relevant qualifications.

[32] Steyn testified that he had received, at his e-mail addresses, the notice of 27 September 2021. He explained that the letter of 2 November 2021 was sent to NEAWUSA precisely because the only notice received was the one of 27 September 2021, which was not a strike notice. He was asked under cross examination why he did not answer the notice of 27 September 2021, and he explained that considering the content thereof, it had nothing to do with the respondent and did not require anything from the respondent, so there was no need to answer it. He was adamant that only the notice of 27 September 2021 was ever received. Griesel testified that the 'production' e-mail address was his e-mail address, and he received the notice of 27 September 2021, however he received no notice on 25 October 2021. He consistently reiterated his version in this regard under cross examination. On the basis of a credibility assessment, there would be no reason not to accept this testimony of Steyn and Griesel.

[33] Accordingly, if the *viva voce* evidence is considered, it is my view that the applicants have failed to prove that the respondent received the notice of 25 October 2021. As opposed to the evidence of Lenepa that relied only on the proof of transmission documents on 25 October 2021 and the fact that the respondent had received the notice of 27 September 2021 at the same e-mail addresses, the respondent substantiated its version by undisputed expert evidence and the testimony of Steyn and Griesel, which testimony was corroborated, consistent, and should be preferred.

- [34] But it is not just about relying on oral evidence by witnesses in establishing whether the respondent received the notice of 25 October 2021. It is always about evaluating that oral evidence against the inherent probabilities. The proper approach is aptly illustrated by the judgment in *Cohen and Another v Lench and Another*¹² which concerned whether a party had actually received a notice to remedy a breach of contract that would then form the basis of the right to cancel the contract. This is comparable to the purpose for a notice under section 66(2)(b), as such notice is the basis to exercise the right to pursue a secondary strike. The Court in *Cohen supra* held:¹³ *'It is convenient first to evaluate the evidence and decide whether it was established by the sellers - who bore the onus - that the Cohens probably received the notice, and only then to turn to the legal issues, to the extent that they remain relevant'*. After considering oral evidence by the parties on the issue of whether the notice was received, the Court importantly said:¹⁴ *'Oral evidence can only be properly evaluated by testing it against the inherent probabilities, and the failure to do so constitutes a misdirection'*.¹⁵
- [35] There are certainly important inherent probabilities that support the version that the notice of 25 October 2021 was never received by the respondent. The first can be found in the respondent's letter of 2 November 2021, sent immediately when the strike started, and in which it was specifically stated that the only notice received from NEAWUSA was the notice of 27 September 2021. The respondent pertinently said that the notice of 27 September 2021, which was the only notice it had, was not a strike notice, as such notice itself reflected that an actual notice will be issued if NEAWUSA and the employees decided to embark upon a *'sympathy strike'*. The employees were given an ultimatum to return to work that same day or face disciplinary action and possible dismissal, for the very reason that it contended there was no strike notice. This letter of the respondent, penned at the time, is entirely consistent with the version of the respondent that it did not receive the strike notice.

¹² 2007 (6) SA 132 (SCA).

¹³ *Id* at para 8.

¹⁴ *Id* at para 9.

¹⁵ In that case, the Court ultimately found (there being several apposite comparators to the case *in casu*), after a comprehensive consideration of the probabilities, the recipient had not received the notice, and the probabilities supported the oral evidence in this respect.

- [36] How did NEAWUSA then answer this letter of 2 November 2021? One would surely expect a simple and straight forward answer to the effect that the respondent was incorrect that no notice was given, and then referring to the notice of 25 October 2021 and perhaps even attaching a further copy thereof to a response. This would be important, considering the ultimatum given and the clear indication that the employees faced discipline and possible dismissal. How hard can it be to simply contradict the clear position conveyed by the respondent? But instead, NEAWUSA does not answer it at all, and on 4 November 2021 simply withdraws the strike without more.
- [37] When the respondent reiterated its position with regard to no strike notice having been received, by way of its further letter of 5 November 2021, NEAWUSA does answer on 5 November 2021 disputing this, and saying that the respondent was notified of the strike '*more than once*'. But what is tellingly absent from this response is any particularity as to any such alleged further notice given. Again, one would have expected specific reference to the notice of 25 October 2021, considering its importance, and the providing of a copy thereof with proof of transmission, at the very least, having regard to what was at stake and what was being contended. The absence of NEAWUSA doing so, in my view, is consistent with the probability that no notice was sent on 25 October 2021 to the respondent.
- [38] I however do not have to decide if NEAWUSA indeed sent the notice of 25 October 2021, even though I believe this is doubtful. All I need to decide is if the respondent received the notice of 25 October 2021. I am convinced that it never received such notice, which I believe is established by the *viva voce* evidence to be preferred and the inherent probabilities. The notice of 27 September 2021 does not qualify as a proper strike notice, for the simple reason that NEAWUSA itself avers in such notice that it is not a strike notice and that if a strike is to be embarked upon, proper notice will be given. The notice of 27 September 2021 in any event does not reflect any date the strike is due to commence, which is required for it to be a valid strike notice.¹⁶ In *City*

¹⁶ See *County Fair Foods (A Division of Astral Operations Ltd) v Hotel Liquor Catering Commercial and Allied Workers Union and Others* (2006) 27 ILJ 348 (LC) at paras 43 – 44.

of *Matlosana v SA Local Government Bargaining Council and Others*¹⁷ the Court had the following to say, which is directly apposite *in casu*:

‘... Significantly, there was a substantial lapse of time between the original notice and the notice under consideration. The union apparently realized the need to give seven days’ notice and has undertaken to do so. A fresh notice is required in any event because the date for commencing the strike on 4 August 2008 has passed ...’

- [39] For all the aforesaid reasons, I conclude that the applicants have failed to comply with section 66(2)(b) of the LRA, in that the respondent never received valid notice of the commencement of the secondary strike, as required by such section. For this reason alone, the secondary strike would be unprotected, and the applicants’ claim in this matter must fail.
- [40] I will however also deal with the issue of whether the applicants have complied with section 66(2)(c) of the LRA. In *Association of Mineworkers and Construction Union and Others v AngloGold Ashanti Ltd t/a AngloGold Ashanti & Others*¹⁸ the Court held that: ‘... *Embedded in s 66(2)(c) are at least six substantive requirements that regulate secondary strikes. These requirements operate as internal or built-in limitations on the right to participate in a secondary strike ...*’. The Court gave a detailed exposition of all six these requirements, which I do not intend to repeat in detail in this judgment, and will only refer to the essentials.
- [41] The first important requirement articulated in *AngloGold Ashanti* is that the secondary strike must have an effect on the business of the primary employer. In fact, the Court said: ‘... *Having an effect on the primary employer is the baseline threshold requirement for a secondary strike. A secondary strike that can have no effect, that is entirely altruistic and amounts to ‘mindless exercises of worker solidarity for the sake of nothing but worker solidarity’, is impermissible*’.¹⁹ For the reasons to follow later in this judgment, the applicants fail at this very first ‘*baseline*’ hurdle, actually rendering any further

¹⁷ (2009) 30 ILJ 1293 (LC) at 1298B-D

¹⁸ (2022) 43 ILJ 291 (CC) at para 74.

¹⁹ *Id* at para 75.

consideration of the requirements under section 66(2)(c) unnecessary. As pertinently said in *AngloGold Ashanti*:²⁰

‘It follows that if a secondary strike is incapable of having any effect whatsoever on the business of a primary employer, that would not be reasonable. That would be the end of the enquiry. For, the most basic requirement to qualify for a lawful secondary strike will not have been met. ...’

[42] Next, the Court in *AngloGold Ashanti* dealt with the words ‘*possible*’ and ‘*indirect*’ used in section 66(2)(c). Whilst the Court recognized that this set the bar low and wide for a lawful secondary strike, what was envisaged was something more than notional, and once again, something capable of having an actual effect or influence on the business of the primary employer.²¹

[43] Further, the Court in *AngloGold Ashanti* held that the effect of the secondary strike must be ‘*on the business*’ of the primary employer. According to the Court, this meant that there must be some nexus between the business of the primary employer and the secondary strike, and by extension, the secondary employer and its employees.²² Again, this requirement goes back to the baseline requirement that the secondary strike is reasonably capable of influencing the business of the primary employer,²³ and this link must always be proven. The Court however recognized that often the relationships between the players in a particular industry could be complex, and said that any ‘*hard and fast ‘one size fits all’ principles about what is proportional and reasonable*’ should be avoided.²⁴

[44] The next requirement is that the effect of the strike must be directed at the business of the primary employer, and not the secondary employer.²⁵ A strike directed at the business of the secondary employer would actually be primary in nature and would have to comply with all the requirements for a primary strike. However, and even where the strike is not aimed at the business of the

²⁰ Id at para 87.

²¹ Id at para 76.

²² Id at para 77.

²³ The Court gave examples where there existed a substantial commercial connection between both businesses, or where these existed a supplier-customer relationship establishing a significant mutual interdependence.

²⁴ Id at para 79.

²⁵ Id at para 80.

secondary employer, the impact the strike may have on the secondary employer comes into the equation in deciding whether the nature and extent of the secondary strike is reasonable in relation to the effect that the secondary strike may have on the business of the primary employer.²⁶ The Court in *AngloGold Ashanti* succinctly held:²⁷

‘... omitting the words ‘and the secondary employer’ at the end of s 66(2)(c) distinguishes the primary and secondary employers. In relation to the primary employer, the secondary strike must have an effect. In relation to the secondary employer, the secondary strike must be proportional, even if it has an effect on the primary employer. Importantly, the omission imbues s 66(2)(c) with a degree of flexibility that invites judicial intervention to determine reasonableness case by case.’

[45] And lastly, as to what may be considered to be reasonable or unreasonable in the above context, involves, according to the Court in *AngloGold Ashanti*, a value judgment.²⁸ Factors relevant in conducting this value judgment include the duration and form of the strike, the number of employees involved, their membership of trade unions, their conduct, and the sector(s) in which the primary and secondary strikes occur. The Court summarized the position as thus:²⁹

‘The phrase ‘in relation to’ in s 66(2)(c) unambiguously anticipates a comparison. The comparators are firstly, the secondary strike and business of the primary employer, and secondly, the secondary strike and business of the secondary employer. The standard prescribed for comparison is reasonableness. Thus, the phrase ‘reasonable in relation to’ imports proportionality in assessing reasonableness. Conceptually, proportionality and reasonableness often converge but not necessarily. In balancing the right to strike with the rights of primary and secondary employers, all factors must be considered to determine, not just proportionality, but ultimately, reasonableness. For reasonableness is the standard or attribute to which the LRA aspires for secondary strikes because the right to strike is constitutionally entrenched. ...’

²⁶ Id at para 81.

²⁷ Id at para 84.

²⁸ Id at para 86.

²⁹ Id at para 88.

[46] Turning now to the case *in casu*, I believe that NEAWUSA was very much alive to the difficulty it was facing where it came to establishing that a secondary strike at the respondent would have any effect at all on the business of the primary employer, being LFC. It is my view that what actually happened is that NEAWUSA and its members employed at the respondent (the employees), under the direction of NEAWUSA, acted purely in worker solidarity with the NEAWUSA members employed at LFC, which is not what is contemplated by section 66(2)(c). It is only after the fact, when the shoe then pinched and the employees were dismissed, that a purported commercial relationship between the respondent and LFC was contrived. More on this next.

[47] As stated earlier, it was undisputed that the respondent and LFC were direct competitors in the milling industry. There was no preceding commercial relationship of any kind between them. The one was never a supplier to or customer of the other. If anything, a strike at one would benefit the other, as there would be an opportunity to supply more customers not being supplied by the competitor because of the strike. As a general proposition therefore, and with the respondent and LFC being nothing else but direct competitors, a secondary strike at the respondent can have zero effect on the business of LFC. The Court in *Transnet SOC Ltd v SA Transport and Allied Workers Union*³⁰ held as follows:

‘Dealing, firstly, with TFR, the applicant has shown that Transnet Freight Rail and the primary employers are in fact competitors. They both transport goods and it is a business strategy of Transnet Freight Rail that it should lure business away from the primary employers. As was observed by Bhoola J in *Coca Cola Fortune (Pty) E Ltd v FAWU & others*, in such a case, the possibility of the secondary strike having an effect on the primary strike is remote, or is not one that is contemplated by s 66(2) (c).’³¹

³⁰ (2013) 34 ILJ 1281 (LC) at para 46.

³¹ The Court was referring to *Coca Cola Fortune (Pty) Ltd v Food and Allied Workers Union and Others* (2010) 31 ILJ 1855 (LC) at para 13. See also the judgment of the Labour Court in *AngloGold Ashanti Ltd and Others v Association of Mineworkers and Construction Union and Others* (2019) 40 ILJ 1552 (LC) at para 264, which judgment was upheld by the Constitutional Court.

- [48] The absence of the existence of any commercial relationship or nexus between the businesses of the respondent and LFC is actually evident from the notice sent by NEAWUSA to the respondent on 27 September 2021 itself. In this notice, it is pertinently said that the employees would be embarking upon a ‘*sympathetic*’ strike in respect of the LFC employees because of the ‘*attitude*’ of LFC where it comes to resolving the issues in dispute relating to the strike there, which was attitude was labeled as ‘*stubbornness*’. There is no indication of what other impact or effect the strike may have on LFC. In fact, and considering the ultimate case conjured up by the applicants to try and establish such an effect, I would have expected this to be made apparent in the notice itself, considering its purpose. Albeit in the context of a strike notice under section 64(1)(b), the Court in *Road Accident Fund v National Union of Metalworkers of SA and Others*³² explained: ‘... *Part of the purpose of a strike notice is to give the employer a clear indication what it must agree to if it wishes to avert the impending strike. The strike notice in question was devoid of factual content regarding the nature of the demands ...*’. Therefore, the notice of 27 September 2021, written at the time when the secondary strike was first contemplated, reveals the true reason for the secondary strike, being worker solidarity, without indicating any effect the strike would have on LFC.
- [49] Nonetheless, despite what may be said or not said in the notice of 27 September 2021, the applicants always needed to prove, in evidence, the ‘*baseline*’ requirement that the secondary strike would have an effect on the business of LFC. Whether the applicants have proven this starts with considering the case as pleaded. In this respect, the applicants, in their statement of claim, raised two contentions. The first is that the primary employer, LFC, had on the second day of the secondary strike asked to meet to NEAWUSA to possibly resolve the strike, intimating that the secondary strike motivated LFC to act in this manner. And secondly, it was pleaded that LFC was getting some of its maize production to be milled at the respondent, put in bags of LFC at the respondent, and then transported back to LFC.
- [50] First and foremost, the applicants led no evidence at all about LFC being motivated by the secondary strike to meet with NEAWUSA to resolve the

³² (2024) 45 ILJ 2059 (LC) at para 38.

ongoing strike there. As such, it is an allegation that remains unproven, falls to be rejected, and need not be considered further. Instead, what the applicants focused on, in presenting evidence, is the issue of the respondent allegedly milling some of maize of LFC, bagging it in LFC bags, and then transporting it back to LFC. I have little hesitation in rejecting this case of the applicants as well, for the reasons to follow.

[51] The appropriate point of departure in deciding this issue is yet again the notice of 27 September 2021. That notice was sent almost three months after the strike at LFC started. If the respondent had indeed been milling maize for LFC, bagging it in LFC bags and transporting it to LFC, I have no doubt at all that this would have prominently featured in this notice and would have been raised far earlier. On the probabilities, I am quite sure that NEAWUSA would have complained to the respondent that it was milling and bagging for LFC to support it during the strike, and if it did not stop this, a secondary strike at the respondent will follow. But all the notice refers to is the attitude and stubbornness of LFC in not resolving its dispute with NEAWUSA and its member employed at LFC. To amplify this probability, even if one considers the notice of 25 October 2021 just as it reads (irrespective of whether it was sent or received), it similarly makes no mention at all of the respondent milling, bagging and delivering maize for LFC. Considering that according to NEAWUSA this was the very notice that notified the respondent of commencement of the secondary strike, it was surely expected that such an important issue be contained therein, and a demand be made that it ceases. When Lenepa was asked under cross examination about this not being included in the notice, he answered that he did not see a need to do so, and if the respondent wanted to know why the secondary strike was being pursued, it could ask. In short, I believe that what the two notices actually contain is inconsistent with the existence of any conduct on the part of the respondent in the form of milling, bagging and transporting maize meal for LFC.

[52] In the letter by the respondent to NEAWUSA of 2 November 2021, the respondent called upon NEAWUSA to attend a meeting that very same day, and in this meeting, NEAWUSA would be required to provide particulars as to the effect the secondary strike may have on the business of LFC, as would be required by section 66(2)(c). NEAWUSA did not even answer this letter,

despite the fact that the respondents impressed upon NEAWUSA that it considered the strike to be unprotected and that its members could face dismissal. When Lenepa was asked under cross examination why he did not even answer this letter, he explained that he was busy with the strike and other things, and only read the letter on 4 November 2021. Considering the implications of everything that was involved in this matter, this kind of explanation is unacceptable. In any event, and even in the correspondence that followed from NEAWUSA on 4 and 5 November 2021, no mention was made that the secondary strike was necessary because the respondent milled, bagged and transported maize meal for LFC, despite the respondent making it clear that it took issue with any effect the secondary strike would have on the business of LFC.

[53] Another important probability is that I have difficulty in accepting that the respondent would support its direct competitor in the form of LFC by in effect running its production for it during the course of its strike, for months on end. This simply makes no commercial sense for the respondent. There was not even evidence to indicate what the respondent would possibly gain by doing this. Surely it is highly unlikely that the respondent, as some sort of gesture of goodwill or solidarity with LFC, or to otherwise support it, would devote its production facilities, employee costs and other production costs to conducting milling operations for LFC that LFC is unable to conduct because of the strike there. Simply put, the suggestion involves the respondent sacrificing revenue for months just to support LFC, one of its primary competitors. This proposition, in my view, is nothing short of nonsensical.

[54] The applicants' pleaded case in this regard also differs from the case advanced in evidence. The pleaded case was '*... the primary employer was getting some of its maize production to be produced (milled) at the premises of the Respondent ...*'. This pleaded version clearly contemplated that LFC took some of its stock of maize to the respondent who actually milled it on behalf of LFC. But when giving evidence, all the applicants' witnesses testified that the respondent was taking its own maize stock it had milled and then placing it in bags belonging to LFC. This is a material contradiction, which I believe substantially detracts from the credulity of the applicants' case in this regard.

- [55] So, what was the evidence for the applicants in this respect? First, Lenepa did testify that in the course of the strike at LFC, the respondent was packaging maize meal for LFC by placing it in LFC bags brought to the respondent and then filled at the respondent, which bags would then be collected and placed on LFC trucks to transport back to LFC. However, he personally did not witness any of this and had no personal knowledge of the same. He conceded that he only knew what was reported to him by the shop stewards at the respondent. His evidence in this regard thus has little value.
- [56] Sithabela testified that as from August 2021, they (the employees) received bags reflecting the product label of LFC, and they then filled these bags with maize meal from the respondent's maize meal stock. Those bags were then placed on a pile and collected and placed on trucks that came from LFC. Sithabela stated that he, as shop steward, reported this to NEAWUSA. Under cross examination, Sithabela was not able to provide any documentary or corroborating proof of this alleged conduct by the respondent. Considering it took place, on his own version, for some two months, he was asked why he never took photographs of this, which he could not adequately answer. He was also unable to explain why NEAWUSA failed to take any action about this for some two months, considering he had reported this alleged conduct of the respondent at the outset. He conceded that any work he was required to do takes place in terms of a production schedule, however he did not provide any of these records.
- [57] Lithabeng testified that he worked on the machine that packaged 1, 2 and 5 kilogram maize meal bags. He stated that he was instructed by his supervisor to put maize meal into Ubuntu maize meal bags, with Ubuntu being the product name of LFC. He also testified that he would receive an invoice from his supervisor which reflected what Ubuntu bags he had to fill. Once the bags were filled, they would be collected by trucks from LFC. When cross-examined, Lithabeng stated that the maize meal put in the bags belonged to the respondent. He was unable to explain why the respondent would place its own maize meal into bags of LFC. He was also asked what evidence he had to support his version, and he conceded he had nothing. In particular, and despite conceding that he acted based on an invoice given to him, he was unable to provide any such documentary proof.

- [58] Khohlokoane, who was employed at LFC, testified that he was told by the employees at the respondent when LFC trucks left the respondent's premises and assumed that these were the same trucks which entered LFC's premises later, because they arrived at LFC approximately one hour later, with the distance between the two mills being approximately 80 kilometers. He stated that this happened for three to four months. Under cross examination, Khohlokoane could not explain why he or the other picketers at the entrance to LFC had not taken photographs of these trucks entering LFC, nor kept any kind of record of the same. He also had no evidence where these trucks actually came from, and simply assumed they were from the respondent.
- [59] I next turn to the testimony presented by the witnesses for the respondent. Steyn, as CEO, testified that the respondent will not pack bags with maize meal for anyone else, especially not a competitor such as LFC. He stated that no such conduct ever took place that he was aware of. Under cross examination, Steyn was asked if he personally attended to pack bags with maize meal, and he conceded that he did not. He however explained that he was directly responsible to work out all quotations for all maize meal dispatched from the respondent, and he would have been aware if there was any transaction in terms of which maize meal was dispatched to LFC. Steyn also explained the entire transactional process, which involved quotations, invoices, loading, dispatch and a weigh bridge, in respect of which proper records are kept. There was no record of any transactions with LFC. It was put to Steyn that packers were packing Ubuntu bags, which he disputed, stating that the respondent's system would not allow it. And lastly, under re-examination, Steyn explained the fallacy of the respondent packing bags for a competitor for three months, and then not servicing its own customers.
- [60] Griessel, who is in charge of operations, testified that there was no such thing as the respondent packing bags from LFC with maize meal. He stated that he gave no such instructions, and he would be the one who would give such instructions. He also explained that his office is 25 meters from packaging, and he would have seen this happening, especially if it happened over months as alleged by the applicants. He also did daily inspections of packaging and never noticed such activity. His evidence in this regard could not be

contradicted under cross examination. The evidence of Griessel was corroborated by Els, the dispatch manager. Els in particular testified about the gate access and weigh bridge records for August and September 2021, which would record all customers and products leaving the respondent's premises. These records were discovered by the respondent way of a supplementary bundle. Els testified that these records showed that there were never any vehicles from LFC entering or leaving the respondent's premises and no products dispatched to LFC. And finally, Els stated that everything loaded and packed on vehicles passes his desk, and he would have known if there was anything for LFC. The cross examination of Els did not compromise his evidence and actually further supported what he said in giving evidence in chief. He explained he checks all weigh bridge records against invoices and delivery notes on a daily basis, and also compares this against the original order as source documents. He made it clear that if there was any order for LFC, he would have been fully aware of it.

[61] Because of the late introduction of the supplementary bundle by the respondent, I afforded the applicants the opportunity to call a rebutting witness to deal with this. In this context, the applicants called Dlamini, who worked at the respondent as a dispatch clerk from 2005 to 2024, when he was dismissed. He testified he was aware of the respondent packing bags for LFC with maize meal. Dlamini then discovered documents about how the process of ordering, loading and dispatching products at the respondent works. These documents related to other customers, and Dlamini discovered no documents relating to LFC *per se*. Overall considered, and as will be discussed next, Dlamini's evidence was not supportive of the applicants' case at all, and properly considered, was quite prejudicial to it.

[62] According to Dlamini, whenever any customer places an order, that order is received by the person responsible for orders, who then processes the order and an invoice is generated. The order and invoice must reflect the same of the customer and the quantity and description of all products ordered. The products are visually inspected before loading, and Dlamini would sign a check list confirming this. Dlamini would also receive the order documents when attending to the dispatch of the order, to verify the order dispatched is

correct. He however could not comment on the weigh bridge records discovered and testified to by Els, as he stated he does not work with it.

[63] Under cross examination, Dlamini was compelled to concede, after considerable effort, that if the respondent backed bags of maize meal for LFC from the maize stock of the respondent, there needed to be an order and invoice which reflected LFC as a customer and the price of the order. He had to also concede that he never saw any such documents for LFC. He was also unable to explain on what basis the respondent would be able to invoice for LFC's Ubuntu bags simply filled at the respondent, as there was no such product at the respondent. He finally conceded that nothing could leave the premises of the respondent without the prescribed documentary process and passing the weigh bridge. All these concessions, under cross examination, are fully in line with the testimony of Griessel and Els.

[64] In my view, what the evidence shows is that any contention that the respondent was packing bags of maize meal for LFC for months on end during the course of the strike there, is simply devoid of any truth or substance. I am convinced this was contrived to try and make out a case that the secondary strike would have an effect on the business of LFC, when in reality none existed and the secondary strike was nothing else but a worker solidarity issue to bolster the picket line at LFC. In this context, it must also be considered that for the entire three day strike period, the employees actually left the premises of the respondent to picket at LFC. If the purpose was to stop support of LFC by the respondent in the form of the conduct of the respondent complained of, I would have expected a picket line at the respondent itself.

[65] In summary, the respondent and LFC are competitors in the same sector. There exists no commercial relationship between them. A strike at the respondent would have absolutely no effect on the business of LFC. Where it comes to the evidence the applicants sought to present to indicate otherwise, this evidence can be comfortably rejected on the basis that it is contrived and entirely unsupported by the probabilities. None of the applicants' witnesses could identify a single transaction, invoice, delivery note, weighbridge record, dispatch document or other contemporaneous business record evidencing the alleged processing of maize meal for LFC. I have little hesitation in accepting

the testimony by Steyn, Griesel and Els, which is largely unassailed, that there existed no commercial transaction between the respondent and LFC in terms of which the respondent packed bags of LFC with maize meal and that this was then transported from the premises of the respondent to LFC. I am comfortable in saying that realistically, it makes no sense at all for a business like the respondent to in essence take over the production for a direct competitor out of its own maize stock without any invoicing, pricing or records, to the detriment of its own customer base, for months on end. And then to top it all off, the applicants' own witness, Dlamini, ultimately supported the respondent's version that without the proper documentary process and LFC in fact having to be a customer of the respondent, it would not be possible to provide product to LFC.

[66] In argument, the applicants' counsel sought to make much of the fact that the respondent failed to place CCTV footage of the period between August and September 2021 before the Court to corroborate its version. It was undisputed that the respondent's premises are monitored by CCTV cameras, including the packaging and dispatch areas. However, both Griesel and Steyn explained that the CCTV footage rotates (reboots) on a six month basis, and past recordings are not kept. This evidence was uncontested. In this case, and by the time this matter was referred to Court in 2022 by the applicants, the footage had long since been deleted in the ordinary course of operations. The applicants' criticism in this regard is entirely unwarranted, and I decline to draw any adverse inference against the respondent for such footage not being produced. I may add that it was never even called for by the applicants at any time.

[67] Once it is true that the secondary strike at the respondent can have no effect on the business of LFC, that must be the end of the matter for the applicants, and section 66(2)(c) has not been complied with. The failure to satisfy this base requirement means that no further requirements of the section need to be considered. I will however simply mention, in passing, that the respondent lost production revenue of some R4 million, over the three days of the strike, whilst there is no evidence of any effect this strike had on LFC. On a proportionality basis the secondary strike would in any event be unreasonable,

and thus also not in compliance with section 66(2)(c). In the end, the secondary strike by NEAWUSA and the employees would equally be unprotected by virtue of them failing to satisfy the requirements of section 66(2)(c). The following dictum in *AngloGold Ashanti supra* is in my view equally apposite *in casu*:³³

‘The findings that s 66(2)(c) encompasses proportionality as a standard to assess the reasonableness of secondary strikes, and that, on the facts, all secondary strikes in this instance had no effect on the business of the primary employer but would have had disproportionately devastating effects on the secondary employers, disposes of the primary issue for determination.’

[68] One final issue must be dealt with. In his written argument, the applicants’ counsel contended ‘*It is clear that the Respondent in dismissing the Applicants for the alleged unprotected strike dismissed them without a sanction stating that they should be dismissed for the alleged guilty finding ...*’. This contention is inappropriately made and is in any event without substance. Firstly, no evidence was presented by the applicants’ witnesses in this regard. But secondly, and even more importantly, this consideration relates to whether the dismissal of the employees for unprotected strike action is fair or unfair. The parties had agreed, as set out in the introduction to this judgment, that the fairness of the dismissal of the employees for participation in unprotected strike action was not in dispute in this case, and the applicants are bound by this election.³⁴ As said in *SA Breweries (Pty) Ltd v Louw*³⁵: ‘... the premises upon which the issues were to be advanced had been refined and limited by the terms of the minute, which is the very purpose of the minute and, more particularly, the very purpose of the directives in the Practice Manual. It was therefore inappropriate to fall back on the generalities of averments about procedural and substantive unfairness ...’. And lastly, this issue has nothing to do with whether an automatic unfair dismissal as contemplated by section 187(1)(a) exists. Even if the employees were dismissed in the manner as

³³ Id at para 101.

³⁴ See *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) at 614B-D; *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another* (2000) 21 ILJ 142 (LAC) at paras 16 and 83; *GE Security (Africa) v Airey and Others* (2011) 32 ILJ 2078 (LAC) at para 20 – 21.

³⁵ (2018) 39 ILJ 189 (LAC) at para 14

complained of by the applicants' counsel, it cannot magically change an unprotected strike into a protected strike to bring it within the ambit of section 187(1)(a), which is the only case I am called on to decide. This last-ditch attempt to save the applicants' case must fail.

Conclusion

[69] In conclusion, it is my view that the applicants have failed to prove that the dismissal of the employees was automatically unfair as contemplated by section 187(1)(a) of the LRA. Whilst it is true that they were dismissed for participation in strike action, it is my conclusion that the secondary strike action embarked upon by the employees on 2, 3 and 4 November 2021, for which they were dismissed, constituted unprotected strike action, because the applicants failed to comply with both sections 66(2)(b) and 66(2)(c) of the LRA. The applicants failed to prove that the respondent received a strike notice of the applicants' intention to commence secondary strike action on 2 November 2021 (when the strike actually started). It has also not been shown by the applicants that the secondary strike will have any effect on the business of LFC as the primary employer, especially considering the respondent and LFC have no commercial relationship and are direct competitors. Since this matter is only about the application of section 187(1)(a) of the LRA, a finding that an unprotected strikes existed *in casu* must spell the end of the applicants' claim, which falls to be dismissed.

Costs

[70] As to costs, it is clear that in terms of section 162(1) of the LRA I have a wide discretion. In this instance, the employees were always advised by NEAWUSA as their union. Unfortunately, they were wrongly advised, but had no reason to doubt their union. I do not believe the employees themselves were malicious or *mala fide* in pursuing this matter or acting as they did. NEAWUSA is open to some criticism for its conduct preceding and during the strike, and in particular, its failure to prove that proper strike notice was received by the respondent is lamentable. But I do not believe the conduct of NEAWUSA is such that it warrants a departure from the ordinary principle that in employment disputes, costs do not follow the result. It is my view that a costs order against the

applicants, all considered, would not be appropriate. I consider it fair and justified that no order as to costs be made.

[71] For all of the reasons as set out above, I make the following order:

Order

1. The individual applicants' dismissal by the respondent was not automatically unfair as contemplated by section 187(1)(a) of the LRA.
2. The applicants' claim is consequently dismissed.
3. There is no order as to costs.

S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Advocate M S Sebola

Instructed by: Sebola Nchupetsang Sebola Inc Attorneys

For the Respondent: Advocate M J Van As

Instructed by: Steyn De Kock Inc Attorneys