



(1) Reportable Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JS349/2023

In the matter between:

GIDEON SHOKO & 27 OTHERS

Plaintiffs

and

ADCORP WORKFORCE SOLUTIONS

(PTY) LTD

Defendant

Heard: 2 to 4, and 23 March 2026

Delivered: 20 August 2026

JUDGMENT

PHEHANE, J

Introduction

[1] The plaintiffs bring an application in terms of section 191(5)(b)(iii) of the Labour Relations Act¹ (LRA) claiming that their dismissal from the employ of the defendant with effect from 5 May 2020 is both procedurally and

¹ Act 66 of 1995, as amended.

substantively unfair. They seek an order declaring their dismissal unfair and retrospective reinstatement; alternatively, twelve months' compensation; in the further alternative, just and equitable compensation.

[2] The defendant opposes the referral and seeks an order dismissing it.

[3] The plaintiffs' trial bundle is marked "A" and the defendant's is marked "B".

Background

[4] The defendant trades as an entity called Adcorp Blu and forms part of an entity called the Adcorp Group.

[5] It is common cause that the defendant (Adcorp Blu) is a temporary employment service (TES). Adcorp Blu supplies labour to a vast number of its clients in Pretoria, Polokwane and Klerksdorp and manages the human resources functions relating to their employees. In the present dispute, Adcorp Blu supplied blue collar labour to its client KAP Automotive (Pty) Ltd trading as Feltex Trim Silverton (Feltex). Feltex has sites at Silverton and Rosslyn in Pretoria.

[6] The undisputed evidence of Mr Vernon Le Roux, Adcorp Blu's Regional Manager for a period of 25 years, was that Feltex manufactures and supplies motor vehicle components, specifically carpets to the Ford Motor Company (Ford) which is also based in Silverton. The carpets are produced on a "just in time" (JIT) operating model, which means that carpets are not manufactured in high volumes – they are manufactured on a quick turnaround period for immediate supply to Ford as inadequate storage facilities exist to store excess carpets. It is for this reason that the Feltex site in Silverton is located approximately 200 to 300m from Ford. Adcorp Blu supplies employees to Feltex for the variations in Feltex's production cycles.

[7] Feltex operates on a three-shift system: the morning shift from 06H00 to 14H00; the afternoon shift from 14H00 to 22H00; and the evening shift from 22H00 to 06H00. It is common cause that this dispute relates to only the morning and afternoon shifts.

- [8] It is common cause that the plaintiffs were employed by Adcorp Blu and were placed at Feltex at the Silverton site, where they manufactured carpets together with the permanent staff of Feltex. The plaintiffs were commonly referred to as “*Blu*” employees and the Feltex employees as “*permanent employees*”. This distinction is important, as will become evident below.
- [9] The plaintiffs comprised of employees who were unionised, as well as non-unionised employees. The unions that the plaintiffs were affiliated with were the South African Clothing and Textile Workers Union (SACTWU) and the National Union of Metalworkers of South Africa (NUMSA). In these present proceedings, the plaintiffs are not represented by any trade union. However, they are legally represented.
- [10] It is also common cause that on 30 March 2023, the plaintiffs together with the Feltex permanent employees, signed a petition setting out 14 demands. In essence, the plaintiffs and the Feltex employees were disgruntled about their ill-treatment by a Feltex manager, namely Mr. Richard Gilbert (Mr Gilbert). They wanted Mr Gilbert to be dismissed from the employ of Feltex. The employees also lodged a formal grievance regarding their ill-treatment by Mr. Gilbert.
- [11] It is common cause that on 6 April 2023, Feltex summarily dismissed its employees and Adcorp Blu employees who participated in the unprotected strike action and Adcorp Blu furnished the plaintiffs with dismissal notices on 9 May 2023. The employees of both Feltex and Adcorp Blu who complied with the *ultimata* issued by Feltex were issued with final written warnings.
- [12] The Feltex employees launched a similar dispute as this present dispute, that was determined in this Court under case number JS348/23 (the Feltex Judgment). In that dispute, this Court found that the dismissal of the Feltex employees save for two, was both procedurally and substantively fair. Before this present trial became part-heard, Adcorp Blu relied on the testimony of one of the employees in the Feltex Judgment. When the trial recommenced, the representative of the plaintiffs, who had changed from the initial representative, informed this Court that the Feltex Judgment was the subject

of an application for leave to appeal, including aspects of evidence that was before this Court during those trial proceedings, with particular reference to the evidence of Christinah Thandekwayo, as shop steward of SACTWU and former employee of Feltex, who was dismissed. The reliance on the Feltex Judgment was thus jettisoned during the trial proceedings but resurfaced in Adcorp Blu's heads of argument without any explanation.

[13] In my view, this Court is not bound by the decision in the Feltex Judgment as that judgment is the subject of an application for leave to appeal on findings of law and fact. The decision of this Court in this present dispute is premised on the pleadings, evidence and the applicable law in relation to the facts before it.

[14] The plaintiffs' pleaded case is that they did not participate in the unprotected strike action – instead, they found themselves “*caught up*” in the strike that was undertaken by the Feltex employees, who prevented the plaintiffs from accessing Feltex's plant to render their services. They allege that Adcorp Blu dismissed them without issuing any *ultimata*; that the *ultimata* issued by Feltex were unclear, ambiguous and did not afford them with sufficient time to reconsider their actions. In addition, they allege that Adcorp Blu dismissed them without holding a disciplinary inquiry prior to the dismissal. Therefore, the plaintiffs allege that their dismissal was both procedurally and substantively unfair.

Legal Framework

[15] Section 213 of the LRA defines “strike” to mean:

‘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’.

[16] In *Transport and Allied Workers Union of South Africa obo Ngedle and others v Unitrans Fuel and Chemical (Pty) Ltd*² (*Unitrans*) the Constitutional Court remarked that in everyday phraseology, every collective work stoppage is called a strike action. The Constitutional Court proceeded to illustrate that the following four elements must exist to make up a strike under the LRA:

‘(a) a partial or complete concerted refusal to work or retardation or obstruction of work, (b) by persons who are or have been employed by the same employer or by different employers, (c) for the purpose of remedying a grievance or resolving a dispute, (d) in respect of a matter of mutual interest between employer and employee.’

[17] Items 6 and 7 of the former Schedule 8 Code of Good Practice: Dismissal³ which was applicable at the time of the plaintiffs’ dismissal, provided the following guidelines in respect of dismissal for participation in unprotected strike action:

‘6. Dismissals and industrial action

- (1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including-
 - (a) the seriousness of the contravention of this Act;
 - (b) attempts made to comply with this Act; and
 - (c) whether or not the strike was in response to an unjustified conduct by the employer.
- (2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the

² 2016 (11) BCLR 1140 (CC) at para 106.

³ Repealed with effect from 4 September 2025 by General Notice No. 3470 in GG 53294 dated 4 September 2025.

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.'

- [18] Adcorp Blu pleads rather clumsily, that Feltex, its client, is the deemed employer of the plaintiffs.⁴ On the evidence of Adcorp Blu's witnesses, Messrs Vernon Le Roux (Mr Le Roux), its Regional Manager and Mr. Jacob Boer (Mr Boer), its supervisor at the Feltex sites in Rosslyn and Silverton, Adcorp Blu took the time from Feltex in terms of dealing with the strike action from issuing *ultimata*, contacting the two unions and to ultimately dismiss the plaintiffs and Feltex employees, as Feltex is the deemed employer.
- [19] With the coming into effect of the 2014 Amendments to the LRA, provision was made to regulate temporary employment amid the scourge of unemployment in South Africa. Section 198(1) of the LRA defines a TES as any person who for reward, procures for or provides to a client, other persons who perform work for that client and who are remunerated by that TES. Section 198(2) of the LRA provides that the TES is the employer of the person whose services have been procured for or provided to a client by the TES.
- [20] Section 198A(1) of the LRA provides that a temporary service means work for a client by an employee '*not exceeding the duration of three months*', as a substitute for an employee who is temporality absent, or in a category of work for any period of time determined to be a temporary service by a collective agreement, a sectoral determination or notice published by the Minister of Employment and Labour in accordance with subsections (6) to (8) of section 198A.
- [21] The import of the provisions of section 198A(3)(b) of the LRA is where employees who earn below threshold as prescribed from time to time by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act⁵

⁴ Pleadings, statement of response at para 3.3 on p 26.

⁵ Act 75 of 1997.

and who *do not* perform a temporary service as defined in section 198A(1) for a client are deemed to be employees of that client for an indefinite period subject to the provisions of section 198B.

- [22] On the common cause facts of the present dispute, Adcorp Blu is the employer of the plaintiffs who provide services for its client, Feltex. There is therefore, no merit to Adcorp Blu's contention that Feltex is the deemed employer of the plaintiffs. This contention is simply not supported by the evidence. There is no evidence to trigger the application of section 198A(3)(b)(i) of the LRA relating to the duration of the plaintiffs' placement at Feltex and their earnings.⁶ To put this contention to bed: in *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa and others*,⁷ the Constitutional Court held that section 198(2) and section 198A(3)(b) cannot co-exist. I am therefore satisfied that on the common cause facts, the provisions of section 198(2) of the LRA apply. Therefore, Adcorp Blu was the employer of the plaintiffs at the time of their dismissal.

The evidence

- [23] The defendant called two witnesses: Messrs. Le Roux and Jacob Boer.
- [24] The plaintiffs called two witnesses who are plaintiffs – Messrs. Gideon Shoko and Koketso Molapo.

Evidence on behalf of the defendant

Mr Le Roux:

- [25] Mr Le Roux stated that on the morning of Monday, 3 April 2023, he was informed by Mr Leonard Du Pisanie, the Adcorp Blu Operations Manager, that the employees of Adcorp Blu and Feltex were on strike; they were not at their workstations and were outside Feltex's premises at the security gate. Mr Le Roux drove from home to the Feltex Silverton site and arrived between 10H00 and 11H00. He observed many employees, more than 60 or 70, comprising

⁶ The pay slip of plaintiff Gideon Shoko of March 2023 appears at A3 and his May 2023 at p 4. Other than these documents. Nothing further is placed before the Court that would trigger section 198A(3)(b) of the LRA.

⁷ 2018 (11) BCLR 1309 (CC) at para [83].

of both Adcorp Blu and Feltex employees standing outside the security gate at the Feltex site. He stated that he could not identify the Adcorp Blu employees as he wanted to drive safely through the striking employees who were protesting by singing and dancing. He found it difficult to drive his vehicle, which he described as a “*big bakkie*” through the entrance gate due to the conduct of striking employees who were “*toyi-toying*” in front of the security gate and making intimidating remarks.

[26] He managed to drive through with difficulty and went to the administration block and met with Messrs Jacob Boer and Gideon van Zyl, Adcorp Blu contract managers who work on four Feltex sites, including the Silverton site. Messrs Boer and van Zyl took him to meet with the Feltex human resources official, Ms Roenel Haywood (Ms Haywood) and a Feltex production manager. His evidence was that “*several*” meetings were held between Adcorp Blu and Feltex to discuss the correct steps that should be taken according to the law to address the unprotected strike action. Mr Le Roux emphasized that Feltex took the lead in addressing the striking workers and issuing the *ultimata*. Mr Le Roux confirmed that Mr. Clinton Milan, Feltex’s Operations Manager who is no longer employed by Feltex, issued a notice to the striking workers and trade unions on 3 April 2023⁸ notifying them that the workers were embarking on an unprotected strike action and had ignored the first ultimatum issued by Feltex at 9h25AM instructing them to return to work. Mr Le Roux stated that Mr. Clinton issued *ultimata* to the striking workers by communicating them to the striking workers and placing them on “*notice boards*”.

[27] Mr Le Roux’s evidence did not assist the Court as the bulk of his testimony comprised of his legal representative reading emails to him into the record, which Mr Le Roux confirmed although he was not a recipient of the emails. It is unclear how and when he gained knowledge of these emails. He did not explain this to the Court. His evidence entailed explaining to the Court, that Ms Haywood sent emails to the two unions on 3 April 2023⁹ requiring them to intervene in the unprotected strike action. This email refers to a petition. He stated that he was aware of a petition by both Adcorp Blu and Feltex

⁸ B4 to 5.

⁹ B3.

employees who wanted Mr Gilbert to be dismissed.¹⁰ The employees lodged a grievance which led to a grievance hearing being scheduled for 5 April 2023. The grievance hearing was to be facilitated at Feltex by an external chairperson named Natalie Singer¹¹ and according to Mr Le Roux, this grievance hearing did not commence as the employees saw Mr Gilbert on the shop floor and recommenced their strike action because they were unhappy that Feltex management reneged on an agreement that Mr Gilbert would not enter the plant. It later transpired during the evidence of Mr Shoko that an agreement was reached between management and the unions that Mr Gilbert would not be permitted to be present at work until the grievance had been resolved.

[28] Mr Le Roux's evidence was that he was not present at Feltex on 4 and 5 April 2023. He was present at Feltex on 6 April 2023, when he observed the plaintiffs striking outside the security gate. He stated that their enthusiasm had waned on this date due to the passage of days and they were not as actively engaged in the strike action compared to their conduct on 3 April 2023. He vaguely explained that the same process that occurred on 3 April was repeated on 6 April 2023- that is, meetings were held with Feltex management, Mr Milan communicated the *ultimata* to the striking employees and placed them on "*notice boards*". In response to a direct question by the Court if he was present when the *ultimata* were issued on 3 and 6 April 2023, he answered in the negative and directed the Court to the video footage to give the Court "*better content*".¹²

[29] With reference to a schedule compiled by the defendant,¹³ Mr Le Roux confirmed that Adcorp Blu assembled this schedule using data from Feltex's face recognition clocking system and the grievance form. This schedule shows who was on strike and when. He confirmed that most of the plaintiffs worked an 8-hour shift on 5 April 2023.

¹⁰ B6 to 8.

¹¹ B12.

¹² Transcript, Vol 2 at p 38, lines 5 to 25.

¹³ B161 to 162.

[30] Without any particularity, Mr Le Roux stated that the effect of a work stoppage in the production of carpets would be “*massive*” and he gave example of an international entity that was penalized “*close to a million rand per month*” for having stopped a production line.¹⁴ Adcorp Blu did not place any evidence before this Court in respect of the penalties incurred by it during the unprotected strike action relevant to this dispute. Mr Le Roux confirmed that he did not receive any feedback regarding any damages Feltex suffered as a result of the strike action.¹⁵

Mr Boer:

[31] During Mr. Boer’s evidence, video footage¹⁶ was shown, which he confirmed was taken by Feltex during the strike action. The video footage is not disputed by the plaintiffs.

[32] Mr Boer confirmed that he and Mr van Zyl were called to Feltex at Silverton by Mr du Pisanie on 3 April 2023. Mr du Pisanie informed them that there was unrest at Silverton. On arrival at Feltex at approximately 08H30, he observed more than 20 workers outside the Feltex security gate, engaging in strike action. Himself, together with Messrs van Zyl and Du Pisanie went to the administration block and met with Feltex management. Both himself and Mr van Zyl waited outside the boardroom for instructions from Mr du Pisanie, who emerged from the boardroom and told them to go and observe the shop floor, which they did. He observed no work on the production side. No machines were running. He observed that a handful of employees were working on the logistics side. This was reported to Mr du Pisanie.

[33] From the boardroom, Mr. Boer observed Mr. Milan at the security gate, engaging with the striking workers and handing out papers, which Mr Boer understood to be *ultimata*, as he had inquired from Mr. Milan as to what the documents were. He saw Mr. Milan placing these documents on the windows of the security guard house in full view of the striking workers. He confirmed that neither he nor Mr van Zyl went to the security gate where the strike was

¹⁴ Transcript, Vol 1 at pp 6 to 7.

¹⁵ *Ibid* at p 12, lines 29 to 32.

¹⁶ Exhibit 1.

occurring. Mr Boer made his observations from the boardroom. He confirmed that the first ultimatum dated 3 April 2023¹⁷ was placed on the security guard window at about 09H00. He stated according to his knowledge, the striking workers did not return to their workstations at 10H30 as instructed in this ultimatum. He stated that at 14H00, he did not note any attendance by employees on the shop floor and he left the Feltex premises at about 15H00.

- [34] He stated that according to Feltex's clocking system, the plaintiffs worked on 4 and 5 April 2023 and "thinks" he did not go to Feltex on 4 and 5 April 2023. He was not involved in the grievance hearing that pertained to the complaint against Mr. Gilbert. Mr Du Pisanie instructed him and Mr van Zyl to go to Feltex on 6 April 2023 and he stated that "*What happened on Monday [3 April 2023] happened again on Thursday [6 April 2023]*".
- [35] Mr. Boer confirmed that they arrived at Feltex on 6 April 2023 at around 09H00 or 10H00 and the workers were on strike action as depicted in the video footage. About 30 employees were on strike, a bigger number compared to 3 April 2023 and the striking employees were more active on 6 April than they had been on 3 April 2023.
- [36] He observed that no machines were running on the shop floor and this was communicated to Mr du Pisanie. He also observed Mr Milan at the security gate, placing the last and final ultimatum dated 6 April 2023¹⁸ on the security gate windows and the employees continued striking until after 14H00. He left the Feltex premises at around 15H00 as no further instructions were issued to him.
- [37] His evidence is that he knew the plaintiffs as he worked with them; however, he did not at any stage, with the benefit of the video footage, identify the striking workers in the video footage. He confirmed that he contributed to populating the schedule¹⁹ which indicates who was not at the workstation by viewing the face recognition time and attendance printouts received from Feltex. Although Mr. Boer did not identify the plaintiffs in the video footage, he

¹⁷ B2.

¹⁸ B19.

¹⁹ B 161 to 162.

was able to identify a Feltex female employee entering the turnstyle at the security gate on 3 April 2023, while the strike was ongoing.

[38] Mr. Boer confirmed that the plaintiffs were at work on 4 and 5 April 2023. Some had returned to work after the first ultimatum was issued and were given final written warnings for their conduct. He confirmed that employees who were able to prove that they were ill and had not participated in strike action on 6 April 2023 were “excused”. He confirmed that about 40 to 50 final written warnings were issued by him to employees who participated in the strike action from 3 to 6 April 2023 but heeded to *ultimata*.²⁰ He further confirmed that dismissal “letters” were issued by him and Mr van Zyl on instructions from Adcorp Blu management, which “letters” the employees refused to sign.²¹ These documents are not dismissal letters – they are entitled “*Disciplinary Outcome Form*”. Mr Boer explained Adcorp Blu did not have standard dismissal letters.

[39] Mr Boer confirmed that the plaintiffs were on strike action on 6 April 2023, as their shift started at 06H00 and they did not report to their workstations. When the plaintiffs were dismissed by Feltex on 6 April 2023, he received instructions from Adcorp Blu management to issue the plaintiffs with dismissal letters. He confirmed that he sent the plaintiffs a voice note²² in which he informed them that “*people who are dismissed from Feltex are dismissed from [Adcorp] Blu*” and they are to appear at his offices to receive documentation relating to the Provident Fund and Unemployment Insurance Fund forms.

[40] Mr Boer stated that all the *ultimata* were clear and afforded the plaintiffs sufficient time to consider their actions.

Evidence for the plaintiffs

²⁰ B159 is an example of such final written warning as was confirmed by Mr Boer.

²¹ B 33 to B55.

²² Exhibit 2.

- [41] The plaintiff's pleaded case is that they were not on strike action and were caught up in the strike of Feltex employees and were prevented by them from entering the plant.

Mr Shoko:

- [42] Mr. Shoko's evidence, confirmed by Mr Molapo, was that the plaintiffs had 14 issues noted in a petition and a grievance form which they planned would be handed up to human resources on 3 April 2023. He stated that after handing over the grievance, the morning shift intended to return to work by 10h30. He confirmed that their plan to handover the grievance to human resources did not materialize as planned and ultimately, the plaintiffs including himself who worked the morning shift did not render their services on 3 April 2023. He confirmed that the first ultimatum was issued to the employees at 09H25 or 09H30 and this ultimatum was not heeded to. However, his evidence was that "*no one worked*" on 3 April 2023.
- [43] He confirmed that a notice was issued to the employees at 12H00, which was pasted on the window at the security gate – this notice called upon employees to return to work by 2pm as they had ignored the first ultimatum that was issued at 09H45.²³
- [44] Mr Shoko stated that shop stewards who met with management during the course of the morning on 3 April 2023 reached an agreement concerning the grievance hearing that would be held to deal with the employees' grievances to the effect that Mr Gilbert would leave the premises, would work from home and would return to work when the grievance hearing was arranged.
- [45] Mr Shoko stated that the plaintiffs rendered their services on 4 April 2023.
- [46] Mr Shoko sought to explain that why the plaintiffs were not at their workstation on 5 April 2023. He stated that they were called by Ms Thandekwayo for her to explain to them the presence of Mr Gilbert on the shop floor. This version is not pleaded.

²³ A53.

- [47] Mr. Shoko made much about himself having a rapport with Mr Gooch, Feltex's General Manager for speaking up about the workers' dissatisfaction with seeing Mr Gilbert walking on the shop floor with Mr. Milan, creating an impression of a 'brotherhood' that was bothersome to the employees. He further made much about the workers walking to the security gate to wait to hear from management. It is not pleaded that the employees left their workstations to have a meeting with the union shop steward or to have a meeting with management at the security gate.
- [48] Mr Shoko's evidence was not coherent. He further stated that at a point, the employees asked to take a "lunch" break and were permitted to take their break between 09h50 to 10h20. His evidence was that he went to wait at the boardroom as he was a witness in the grievance hearing. At 13h25, Ms Thandekwayo informed him that Mr Milan stated that the grievance hearing is cancelled and all employees of the morning and afternoon shifts were to attend at the canteen at 13h45 in order for her to provide them with an explanation. Once more, none of this is pleaded.
- [49] Mr Shoko left the premises as his shift had ended and he does not know what happened in the afternoon.
- [50] Mr Shoko gave a long-winded explanation about how he was unable to gain entry to the Feltex premises on 6 April 2023 when he arrived for work. He stated that armed security refused to permit him entry. Again, this version is not pleaded. He also stated that Feltex management prevented the plaintiffs from gaining entry into the premises on 6 April by not placing attendance registers at the security gate for the employees to sign to gain access to the premises. Once again, this version is not pleaded. Of importance, Mr Shoko distanced himself from the plaintiffs' pleaded case that they were "*caught up*" in industrial action not of their making and could not proceed to their workstations on account of the conduct of Feltex employees.²⁴

²⁴ See: Pleadings, statement of claim at paras 32.1 to 32.2 on p 9 and transcript Vol 4 at p 7, lines 20 to 29 and p 8, lines 1 to 15.

[51] According to Mr Shoko, he worked his morning shift and left the premises on 5 April 2023 when his shift ended. He was confused about the ultimatum that was issued on 5 April 2023 calling for representations by 07H30 on 6 April 2023 explaining why they should not be dismissed for partaking in an unprotected strike action from 09H15 to 10H20 and from 14H20 on 5 April 2023,²⁵ whereas he had worked his shift until 14H00 on 5 April 2023 and now was blocked from entering the premises. He made several contradictory statements – he did not see the final ultimatum that was posted, he did not know about it or what was expected of him. His evidence is that around 08H00 on 6 April 2023, he read the final and last ultimatum that was issued to the morning shift²⁶ and he understood it to be “*lies*”²⁷ as he was unaware of any document requiring employees to make representations. His evidence was that he was not aware of any representations made by SACTWU on 5 April 2023 at 18H45 setting out reasons why the employees should not be dismissed.²⁸ He only became aware of SACTWU’s representations in this regard in 2025 during preparations for the present trial proceedings.

[52] Mr Shoko confirmed that the plaintiffs were dismissed at 09H30 on 6 April 2023 and he formed part of the employees seen on the video footage dancing and protesting in a circle outside the security gate following their dismissal. He stated that he was not aware of the appeal that was lodged by SACTWU against the dismissal of their members.²⁹

Mr Molapo:

[53] Mr Koketso Molapo testified that he worked the afternoon shift that commences at 14H00. He sent a WhatsApp message to his team leader on 6 April at 15H36 informing him that he is unable to attend work as he was attending a funeral. He explained that when he went to collect his dismissal letter on 3 May 2023, he inserted on the “*disciplinary outcome form*”³⁰ that the dismissal is unfair, as he informed his team leader “*during that day*” that he

²⁵ B15.

²⁶ B19.

²⁷ Transcript Vol 4 at p 9, lines 25 to 29 to p 10 at lines 1 to 16.

²⁸ B17.

²⁹ The appeal appears at B24 to 26.

³⁰ B37.

“*won’t be available*”. Mr Molapo stated that on 3 May 2023, he had in his possession, a death certificate proving that he attended a funeral, but he could not explain when the death certificate was handed over to Adcorp Blu. It was not put to Mr Boer that Mr Molapo was not at work on 6 April 2023 due to attending a funeral. Further, Mr Molapo, who was a member of SACTWU, did not tell his union that he was attending a funeral when the union was making representations and lodging an appeal – his reason for not informing SACTWU is because he was already dismissed and there was no one to communicate with. This explanation is unconvincing.

- [54] He confirmed that he signed the petition that was to be handed over to management on 3 April 2023. He further confirmed that he only worked six hours on 3 April 2023 as he arrived late for work due to transport problems. He claimed not to know about any strike action on his late arrival. On 4 April 2023, he worked eight hours. On 5 April 2023, he clocked in before the afternoon shift commenced and explained that he did not work as there was a hearing; as no leaders were present, he left the workstation and went and stood outside in the yard with fellow shift employees, waiting for the hearing and denied participating in strike action. This version is at odds with the plaintiff’s pleaded case.

Analysis

- [55] The strike occurred on Feltex’s premises.
- [56] A material contradiction arises in the evidence of Adcorp Blu’s witnesses. Mr Boer’s evidence is that only Mr Du Pisanie, himself and Mr van Zyl from Adcorp were present at Feltex on 3 and 6 April 2023 and only Mr du Pisanie met with Feltex management in the boardroom to discuss how to deal with the strike action. Mr Le Roux was vague in respect of what occurred on 3 and 6 April 2023 in meetings with Feltex management. He vaguely referred to numerous meetings, phone calls and messages. His evidence that *ultimata* were placed on “notice boards” is not borne out by with the video evidence and oral evidence tendered by Mr Boer that the *ultimata* were placed in glass windows at the security guard house.

[57] Further, his evidence that the strike had waned on 6 April 2023 does not accord with the video footage and the evidence of Mr Boer. Mr Le Roux's evidence in respect of what occurred on 3 and 6 April is unreliable. His evidence that he was not physically present when the *ultimata* were issued totally removes him from the Feltex premises on 3 and 6 April 2023. This is buttressed by the further contradiction in the evidence of Messrs Boer and Le Roux with regard to the atmosphere of the strike action on 3 and 6 April 2023 – Mr Boer described the atmosphere as having escalated – this is borne out by the video footage, whereas Mr Le Roux stated that the atmosphere had waned due to the burning sun. Mr le Roux had no independent knowledge of what transpired on 3 and 6 April 2023 and wanted to refer to his notes at a point during his evidence. This request was refused by his own legal representative. Further, he was cautioned by the Court to stop making notes on the witness bundle when questions were posed to him. Mr Le Roux could not assist the Court with the impact of the strike action on Adcorp Blu or Feltex that is a consideration in determining whether dismissal is the appropriate sanction. Therefore, the evidence of Mr Le Roux in respect to what occurred on 3 and 6 April 2023 is unreliable. This taints his credibility as a witness.

[58] Mr Boer conceded with reference to Adcorp's schedule,³¹ that the plaintiffs participated in a strike action over two days.³² Although he did not specify these two days, on his own version, it was 3 and 6 April 2023, when was present at Feltex's premises following Mr du Pisanie's instructions that he must attend at the premises. In the same breath, Mr Boer conceded that the plaintiffs complied with the ultimatum of 3 April 2023.³³ Having made these concessions, it is concerning Adcorp Blu dismissed the plaintiffs for participating in strike action from 3 to 6 April 2023 as recorded in the dismissal notices issued by Adcorp Blu. Mr Boer gave the impression of a supervisor who danced to the tune of the marching orders of his managers and Feltex, without establishing the facts.

³¹ B 161.

³² Transcript, Vol 2, p 81 at lines 10 to 20.

³³ *Ibid* at p 82, lines 1 to 20.

Did the plaintiffs engage in strike action on 3 April 2023? If so, what was the duration of the strike action?

[59] Contrary to the plaintiffs' pleaded case that they did not participate in strike action but were "caught up" in the conduct of Feltex employees that prevented them from accessing the Feltex premises to render their services, on the version of both Messrs Shoko and Molapo, the plaintiffs' had a grievance with demands – one of which was the removal of a manager who was ill-treating employees. The employees agreed amongst themselves that they would not render services at the start of the morning shift on 3 April 2023 at 06H00, as they intended to hand up a memorandum to Feltex, containing their demands and thereafter, render their services. On the evidence of Mr Shoko, meetings regarding a grievance hearing concerning Mr Gilbert were held during the morning of 3 April 2023 while the employees withheld their labour. Their conduct on 3 April 2023 is consistent with the definition of strike action in that they withheld their services in the furtherance of a demand.

[60] On Mr Shoko's evidence supported by the schedule³⁴ of the strike action compiled by Adcorp Blu, most of the morning shift workers did not render services on 3 April 2023 and therefore, they participated in strike action for the duration of 8 hours, save for plaintiff Papiki Dikobe, who worked his eight hour morning shift. Two of the plaintiffs were scheduled to work the afternoon shift. One of them, namely Paul Moeng worked his eight hour afternoon shift, but Koketso Molapo worked for only six hours and therefore, it is taken that he participated in strike action for two hours. His explanation about transport problems is unconvincing and is not supported by any indication that he informed his team leader that he would be late on the day.

Did the plaintiffs participate in strike action on 4 April 2023?

[61] It is not disputed that the plaintiffs worked their shifts on 4 April 2023. Thus, I do not find that they participated in strike action on this date.

³⁴ B163 to 164.

Did the plaintiffs participate in strike action on 5 April 2023? If so, what was the duration of the strike action?

- [62] Most of the plaintiffs did not participate in strike action on 5 April 2023, save for the following employees: Messrs. Paul Moeng, Koketso Molapo and Jabulani Mkansi who did not work the full afternoon shift as no clock out data is recorded. Mr Molapo's evidence is that he sat in the yard and waited for instructions. Therefore, I find that Mr Molapo participated in strike action although the duration cannot be ascertained from Adcorp Blu's schedule.³⁵ There is no explanation why Messrs. Moeng and Mkansi were not at work and the duration of their absence cannot be ascertained. In the scenario of a strike action, while the onus rests on the employer to show that the dismissal was fair, it is for an employee to explain his or her conduct.³⁶
- [63] The schedule indicates that Messrs Thulani Chauke and Ernest Mokoko did not work the afternoon shift. No clocking data is available for them. I therefore find, in the absence of any explanation, that they participated in strike action for the duration of eight hours on 5 April 2023.
- [64] It cannot be gainsaid that the Feltex employees were on strike on 5 April 2023. On Adcorp Blu's own version, most of the plaintiffs worked the morning shift on 5 April 2023 and ended their shift at 14H00. The employees that left work at 14H20 and did not work the afternoon shift were not the plaintiffs, barring Messrs. Moeng, Molapo and Mkansi. Therefore, the penultimate ultimatum of 5 April 2023 did not apply to most of the plaintiffs as they had not participated in an unprotected strike action on 5 April 2023, save for the aforementioned three plaintiffs.

Did the plaintiffs participate in strike action on 6 April 2023? If so, what was the duration?

³⁵ B163 to 164.

³⁶ See: *Septhai v Barloworld Transport (Pty) Ltd* (JS411/16) [2021] ZALCJHB 446 (14 December 2021) at para 12 and 13. For the difference between the onus of proof and evidential burden see *DB Contracting North CC v National Union of Mineworkers and Others* [2015] 10 BLLR 973 (LAC) at para 75, *Jugwanth v Mobile Telephone Networks (Pty) Ltd* [2021] 4 All SA 346 (SCA) at para 6.

- [65] The schedule indicates that all the plaintiffs on both shifts partook in strike action on 6 April 2023. According to Mr Boer, the plaintiffs on the morning shift did not report to their workstations to commence the shift at 06H00, therefore, they were on strike action. Further, as the situation remained unchanged at 14H00, the afternoon shift as well, were on strike action.
- [66] According to Mr Shoko, the plaintiffs were confused on 6 April 2023 about the ultimatum that was issued on 5 April 2023 as they had worked their shift and were “blocked” from entering the premises by Feltex management. Plaintiff Enock Khoza is recorded to have been off sick on 5 April 2023,³⁷ yet, he was dismissed.
- [67] The ultimatum is confusing, as it gives the employees a deadline of 07H30 to make representations why they should not be dismissed and failing which, they would be dismissed. Therefore, the version of Mr Shoko that there was confusion on the morning of 6 April 2023 and that the plaintiffs were prevented from entering the premises is probable.
- [68] The video footage of 6 April depicts strike action and Mr Milan pasting *ultimata* on the security windows. It also depicts some individuals standing and looking on. Once more, it cannot be gainsaid that both Feltex employees and Adcorp Blu employees were observed striking by Mr Boer. In my view, Adcorp Blu did not make any serious effort to identify from the numerous video footage, on 6 April 2023 which of its own employees who work the morning and afternoon shift were participating in the strike action at the security gate. It painted its own employees with the same brush.
- [69] Therefore, Adcorp Blu did not discharge its onus to prove on a balance of probabilities that its own employees participated in strike action on 6 April 2023.

Ultimata

- [70] As the strike action occurred on its premises, undertaken by both Feltex and Adcorp Blu employees, Feltex took the lead in issuing and communicating the

³⁷ B 164.

ultimata. It is not disputed that Adcorp Blu did not issue separate *ultimata* to its own employees. It did not have to do so, as it worked in concert with Feltex in managing the strike action. The *ultimata* were also addressed to Adcorp Blu site management.

- [71] Feltex communicated with SACTWU and NUMSA at the earliest opportunity, at 07h58 on 3 April 2023 to seek their intervention.
- [72] In terms of the pre-trial minute,³⁸ Adcorp Blu records that the first ultimatum was issued at 08h00 on 3 April 2023, giving the employees until 10H30 AM to return to work. However, according to Adcorp Blu's notice of the same date to all employees, the two unions and Adcorp Blu site management, the first ultimatum was issued at 09H25 on 3 April 2023.³⁹ The first ultimatum was directed to all the employees. The deadline of 10H30 was applicable to the morning shift. On the version of Mr Boer and considering Feltex's correspondence, the employees eventually heeded to this ultimatum.
- [73] In Feltex's penultimate ultimatum to all employees, the two unions and Adcorp Blu site management of 5 April 2023, Feltex records that the employees were issued with an ultimatum on 3 April 2023 and they *eventually returned to work*.⁴⁰ On the facts, the employees rendered their services on 4 April 2023. With Mr Shoko's ramblings about meeting in the canteen, assembling at the security gate for the reason of waiting for feedback about an aborted grievance hearing on 5 April 2023, the schedule shows that the majority of the plaintiffs worked their morning shift and only two of the plaintiffs, Messrs Moeng and Molapo were scheduled for the afternoon shift. Five of the plaintiffs are recorded to have been on strike action on 5 April 2023, being, Messrs Moeng, Molapo, Chauke, Mkansi and Mokoko.⁴¹
- [74] Mr Shoko's evidence is that the employees were confused on the morning of 6 April 2023 when they reported for duty, as to the reason for this penultimate ultimatum. The basis for the penultimate ultimatum on the afternoon of 5 April

³⁸ At para 17.4 on p 40 of the pleadings bundle.

³⁹ B 4.

⁴⁰ B15 to 16.

⁴¹ B163 to 164.

2023 directed at all the plaintiffs in unclear, as the majority worked their eight hour morning shift that ended at 14H00. The afternoon shift starts at 14H00 and ends at 22H00. The penultimate ultimatum states that the afternoon shift left work at 14H20 and it was unclear, as it did not indicate what time the employees were expected to return to work on 5 April 2023. The ultimatum called upon the employees to submit written representations by 07H30 on 6 April 2023 explaining why they should not be dismissed for refusing to work normally. They were further warned that failure to provide written representations would lead to dismissal. SACTWU was astute and provided the written representations on 5 April 2023 at 18H45.⁴² SACTWU's response was met with a last and final ultimatum, which, on Adcorp Blu's pleaded version, was issued at 08H00 on 6 April 2023, instructing the employees to return to work by 09H30.⁴³

- [75] Adcorp Blu's pleaded version is at odds with the evidence of Mr Boer, who stated that on 6 April 2023, he and Mr van Zyl arrived at the premises at 09H00 or 10H00 and repeated the same processes as had occurred on 3 April 2023 – they went to the boardroom, waited for instructions outside while Mr du Pisanie met with Feltex management, he went to make observations on the shopfloor and reported these to Mr Du Pisanie, and Mr Milan went to issue *ultimata* to the employees at the security gate. It is improbable that all this could have occurred within 30 minutes.
- [76] Feltex issued not one, but two last and final *ultimata* on 6 April 2023. The first directed the employees to return to work by 09H30;⁴⁴ the second directed all employees to return to work by 15H00.⁴⁵
- [77] Mr Boer's evidence regarding what had transpired after the last and final ultimatum was issued is unclear. He stated that after 09H30 on 6 April 2023, him and Mr van Zyl were waiting for instructions outside the boardroom and afterwards, "*emails were sent out*". He stated that decisions were taken between Feltex and Mr du Pisanie in the boardroom behind closed doors. He

⁴² B17.

⁴³ Pleadings, pre-trial minute at para 17.4 on p 40.

⁴⁴ B 19.

⁴⁵ B 22.

proceeded to state that at 14H00, there was no change as the strike action continued past 14H00. Him and Mr van Zyl waited for instructions – none came and they left the premises at 15H00 and he does not know what happened thereafter.⁴⁶

- [78] In view of the foregoing, the penultimate ultimatum issued on the sequence of events, on the afternoon of 5 April 2023 was unclear and ambiguous for the reasons mentioned above.
- [79] The last and final ultimatum that was issued in the morning of 6 April 2023 instructing the employees to return to work by 09H30 did not afford the employees sufficient time to reconsider their position and actions. On the sequence of events, at 07H37, Ms Haywood sent an email to SACTWU thanking him for written representations sent by him on the previous day. SACTWU was informed *inter alia*, that the decision by Feltex to issue a final ultimatum was not taken lightly and was warned that if their members would be dismissed if they persisted with their refusal to work.⁴⁷
- [80] Considering the tone of Feltex's email to the unions on 6 April 2023 at 07H37, in my view, a decision had already been taken then, to issue a final ultimatum with an intention to dismiss the employees. This is confirmed by the dismissal of all morning shift employees having taken effect at 09H30⁴⁸ thus not affording the employees sufficient opportunity to reconsider their actions and for the unions to engage with their members.
- [81] In view of Adcorp Blu's pleaded version that the last ultimatum was issued at 08H00 on 6 April 2023, the second last and final ultimatum dated 6 April 2023 directing the employees to return to work by 15H00 makes no logical sense, as it would have been impossible for the employees to comply with the time frame as they had already been dismissed at 09H30 on 6 April 2023. No evidence was led by Adcorp Blu on how and when the second last and final ultimatum was issued.

⁴⁶ Transcript Vol 2, pp 63 to 64.

⁴⁷ B18.

⁴⁸ B 23.

[82] Adcorp Blu's version that the plaintiffs continually refused to return to work from 3 to 6 April 2023 is not borne out by the schedule it relies on. Feltex acknowledged that after the ultimatum was issued on 3 April 2023, the employees eventually returned to work. It is not disputed that the plaintiffs rendered their services on 4 April and on 5 April, most of the plaintiffs rendered their services barring Messrs Moeng, Molapo, Chauke, Mkansi and Mokoko. On 6 April 2023, a decision to dismiss the plaintiffs *au fait accompli* – the plaintiffs who arrived for the morning shift were not on strike action, as they had rendered their services the previous day barring Messrs Moeng, Molapo, Chauke, Mkansi and Mokoko. The penultimate ultimatum was not applicable to the plaintiffs that rendered their services on the morning shift on 5 April 2023 nor to Mr Khoza as he was ill. Even if they were viewed to be on strike action on 6 April 2023 on the morning shift, they were not afforded sufficient opportunity to consider their actions – they were confused – SACTWU had complied with the penultimate ultimatum and still a decision was taken to dismiss the employees despite such representations being made. No evidence was led on the issuance of the second last and final ultimatum. I have taken cognisance of email correspondence that the second last and final ultimatum was sent by Ms Haywood on 6 April 2023 at 14H03, however, no evidence was led on this.

Was the strike action unprotected, if so, was there an attempt to comply with Chapter IV of the LRA

[83] The grievance that formed the demand of the plaintiffs is not an interests dispute thus Chapter IV if the LRA is inapplicable. In the circumstances, striking over a rights interest dispute renders the strike action unprotected.

[84] The parties had agreed to hold a grievance hearing to address the plaintiffs' demand. The hearing did not proceed – the reasons for this are unclear- the plaintiffs did not make any averments regarding this hearing and Messrs Le Roux and Boer were not present on 5 April 2023. That being said, there was an attempt to deal with the grievance by agreeing to hold a grievance hearing to resolve the employees' dispute.

Was dismissal the appropriate sanction?

- [85] That the plaintiffs participated in an unprotected strike does not automatically warrant dismissal.
- [86] The pre-trial minute records the date of the plaintiffs' dismissal as 9 May 2023.⁴⁹
- [87] No evidence was led regarding the duration of the strike action on 5 April 2023 of Messrs. Moeng, Molapo and Mkansi and the effect of their strike action on the operations Feltex. Adcorp Blu did not demonstrate the penalties it had to pay, if any for the loss of production over the hours these plaintiffs did not work. Likewise, no evidence was led on the impact of the failure by Messrs. Chauke and Moloko to render services.
- [88] The plaintiffs do not allege any provocation by Adcorp Blu.⁵⁰ In the premises, the dismissal is substantively unfair.
- [89] On Mr Boer's evidence, Adcorp Blu blindly followed the instructions of Feltex to dismiss the plaintiffs without hearing their side. It is common cause that no disciplinary hearing was held prior to the plaintiff's dismissal on 6 April 2023, effective 9 May 2023. The plaintiffs were not provided with a fair opportunity to state their case.
- [90] In view of the foregoing, the dismissal of the plaintiffs is both procedurally and substantively unfair.
- [91] Reinstatement is the primary remedy for dismissal unless the exceptions in section 193(2) of the LRA are demonstrated. Adcorp has not indicated why reinstatement is impracticable.

Costs

- [92] In this Court, the general rule that costs follow the result does not apply. The duration of this trial was unnecessarily extended by the parties devoting time to issues that were not pleaded and Adcorp Blu supplementing its trial bundle

⁴⁹ Pleadings, pre-trial minute at para 4.2 on p 35.

⁵⁰ Pleadings, pre-trial minute at para 17.5 on p 40.

midway. The requirements of the law and fairness indicate either party should pay its own costs.

[93] In the premises, the following order is made:

Order

1. The dismissal of the plaintiffs is substantively and procedurally unfair.
2. The respondent is to reinstate the plaintiffs to their date of dismissal being 9 May 2023.
3. The plaintiffs reinstated retrospectively in terms of order no. 2 above are to report for duty at the offices of the defendant by no later than 4 May 2026.
4. Messrs. Paul Moeng, Koketso Molapo, Jabulani Mkansi, Thulani Chauke and Ernest Mokoko are issued with a final written warning for their participation in unprotected strike action on 5 April 2023.
5. Each party is to pay its own costs.

M T M Phehane

Judge of the Labour Court of South Africa

Appearances:

For the plaintiffs: Mr SM Ntshaba, Mr. N. Voyi

of Ndumiso Voyi Associates Inc. Attorneys

For the defendant: Ms A. Dippenaar of Kirchmanns Incorporated.