IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J302/18

In the matter between:

NTM obo JENNIFER CHOKOE & 180 OTHERS. **Applicants**

and

PPO WORKFORCE STAFFING
(THE WORKFORCE GROUP (PTY) LTD) **Respondent**

Heard: **27 - 28 November 2023, & 25 March 2024**
(Heads of argument submitted on 15 April 2024)

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date for hand-down is deemed to be on 11 December 2024**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] In their Statement of Claim, the individual applicants as represented by NTM, seek an order that their dismissals by the respondent on account of their participation in an unprotected strike action be declared procedurally and substantively unfair. Their claim is opposed by the respondent.

[2] At the commencement of the proceedings, an issue arose regarding the number of individual applicants who were properly before the Court. This arose after only four out of the 181 individual applicants had made an appearance in Court. Their representative, Mr Gumede, had submitted that there were effectively 39 individual applicants properly before the Court. This issue shall be revisited should the Court award any relief to the individual applicants.

The dispute:

[3] The respondent is in the business of *inter alia* providing temporary employment services as contemplated in section 82 of the Basic Conditions of Employment Act[1] (BCEA). The individual applicants were all employed by the respondent as Scanner Operators, Data Capturers and Stock Controllers, and were based at one of the respondent's clients, On The Dot (Pty) Ltd (Client), in Olifantsfontein Johannesburg.

[4] On 26 March 2018, NTM delivered a Statement of Claim, challenging the dismissal of the individual applicants for allegedly participating in an unprotected strike action between 6 and 12 October 2017. According to the applicants, the incident leading to their dismissal arose on 27 August 2017 when the respondent paid some of the employees R2.80 instead of their normal weekly pay of R832.50. Some of the employees had complained to the respondent's Operations Manager on 6 October 2017. It is alleged that rather than attending to their grievances, the Operations Manager ordered the employees to leave his office and subsequently the premises. They contend that they were thereafter placed on precautionary suspension.

[5] The individual applicants further allege that flowing from their suspensions, the respondent had convened disciplinary hearings at which the chairperson had not allowed NTM officials to represent them. On 12 October 2017, the individual applicants were issued with letters of dismissal for allegedly participating in an unprotected strike action, intimidation, threatening behaviour and taking the Industrial Relations Director hostage.

[1] Act 75 of 1997

[6] The respondent's case in its response to the Statement of Claim was that prior to the strike action on 6 October 2017, the employees had on two occasions in September 2017, participated in an unprotected strike action. The respondent did not pay a fixed or basic salary, and the pay structure that was in place at the time was such that employees' weekly wage was calculated individually and according to hours worked and the number of items they had 'picked'.

[7] The respondent conceded that some employees complained about their salaries on 6 October 2017 but contended that they were informed to utilise formal grievance procedures, and for the matter to be escalated to upper management. At that stage, the employees were then told to go back to their workstations and would be given feedback on their grievances. The employees refused to go back to work and embarked on an unprotected strike. Three ultimatums were issued and followed up with bulk SMSes instructing the employees to return to work, but they had persisted with their strike.

[8] On 7 October 2017 the employees had according to the respondent continued with their strike action as they did not report for duty. Further ultimatums were issued and Bulk SMSes were sent to employees, particularly directed to those employees who failed to report for the day shift the previous day. They however still refused to report for duty. The respondent had to source replacement labour.

[9] The strike action continued into 8 and 9 October 2017, resulting in the employees being issued with notices to attend a disciplinary enquiry scheduled for 11 October 2017. The respondent's case was that the strike was accompanied by threats and intimidation of replacement labour and other employees who were not on strike. The employees also allegedly barricaded entry points at the respondent's premises, necessitating that the members of a private security and of SAPS be called to intervene.

[10] At the disciplinary hearing, which was re-scheduled for 12 October 2017, NTM officials sought to represent the employees. After being afforded an opportunity to make submissions, the Chairperson of the hearing issued a ruling and denied the officials the right to represent the employees as the union did not enjoy

organisational rights. The chairperson had then advised the employees to elect five individuals amongst themselves who could represent them at the hearing. The employees nonetheless refused to do as advised, and it is contended that officials of NTM refused to leave the hearing room and became disruptive. This had necessitated members of the SAPS being called to intervene.

[11] As a result of the conduct of officials of NTM and the employees' refusal to elect amongst them representatives, the disciplinary enquiry was moved to another room and held in the employees' absence, resulting in their dismissal. They were informed of the dismissal via bulk SMSes. Despite the decision to dismiss, the employees had continued their presence at the client's premises and had caused disruptions. They had stayed on the premises until 2 November 2017, after the respondent had obtained an urgent interdict under Case Number J2861/17.

The dispute and issues for determination:

[12] In the parties' pre-trial minutes, the main disputes identified were whether the individual applicants had participated in an unprotected strike from 6 October 2017; the rate of pay and weekly wages of the individual applicants; whether they were paid on 27 August 2017; whether or not the Operations Manager had chased them from his office and instructed them to leave the premises; whether some of the individual employees were on official leave when the incident leading to their dismissal occurred; and whether they were issued with dismissal letters.

[13] The issues the Court is required to determine are whether there was a strike embarked upon by the employees; whether the dismissals were procedurally and substantively fair; whether NTM had organisational rights; and whether the dismissals were automatically unfair.

The legal framework:

[14] Section 68(5) of the Labour Relations Act[2] (LRA) provides *inter alia* that participation in a strike that does not comply with the provisions of this Chapter

[2] Act 66 of 1995, as amended.

or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. It further provides that in determining whether the dismissal is fair, the Code of Good Practice Dismissal in Schedule 8 must be taken into account, and in particular, its items 6 and 7[3].

The evidence and evaluation:

1. *The substantive fairness of the dismissals:*

[15] Item 6 of the Code provides that;

> '(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including-
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> 1. the seriousness of the contravention of this Act;
> 2. attempts made to comply with this Act; and
> 3. whether or not the strike was in response to unjustified conduct by the employer.'

[16] There is a dispute as to whether the strike took place or not. To this end, the starting point is section 213 of the Labour Relations Act[4] (LRA), which defines a strike as follows;

> '…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

[3] Which provides;

'Any person who is determining whether a dismissal for misconduct is unfair should consider-

1. Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
2. If a rule or standard was contravened, whether or not-
1. the rule was a valid or reasonable rule or standard;
2. the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
3. the rule or standard has been consistently applied by the employer; and
4. dismissal was an appropriate sanction for the contravention of the rule or standard.'

[4] Act 66 of 1995, as amended.

employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory.'

[17] Against the above definition, the evidence of the respondent's then National Industrial Relations Director, Mr Tebogo Moalusi was as follows;

1. The respondent had placed about 200 employees, including the individual applicants at the client, which is a food retailer. The employees' role at the client was to 'pick' items off the shelves that were ordered online, and that were to be delivered to customers.

2. The individual applicants worked different shifts (day/night) and their pay structure was performance based, taking into account how many items they had 'picked'. They were not paid a basic salary.

3. This pay structure had resulted in employees being paid differently depending on their performance. As a result of grievances pertaining to their remuneration in accordance with the existing pay structure, the employees had with effect from the morning shift on 6 October 2017, commenced their unprotected strike action at the client's premises.

4. Moalusi testified that when the employees refused to attend to their workstations, he had verbally instructed them to return to work and advised them to ventilate their grievances in accordance with internal procedures. The employees had refused to go to their workstations, resulting in no less than three ultimatums being issued to them. The first was issued at 10h00; the second at 11h23; and the third at 12h00. The employees ignored all the ultimatums as they gathered in the parking lot.

5. The strike according to Moalusi had impacted on the client as its operations were brought to a standstill. On 7 October 2017, and when the strike continued, ultimatums were also issued at 14h41; 16h40 and 17h33. These were issued in respect of those employees who failed to report for the afternoon shift. In addition, bulk WhatsApp messages were sent to employees imploring them to return to work

6. On 9 October 2017, bulk SMSes were also sent to employees after they failed to report for duty over the weekend of 7 and 8 October 2017, which were also ignored. Since the employees refused to go back to work, the respondent brought in replacement labour at the client's premises to assist with its operations. This had aggravated the striking employees, who proceeded to barricade the entrance/exit of the premises and started throwing stones at vehicles. Members of the SAPS and private security had to be called to intervene, and to further escort replacement employees in and out of the client's premises, as the conduct of the employees had become violent.

[18] In disputing that there was any strike action, the submissions made on behalf of the individual applicants were that on 6 October 2017, they had commenced the morning shift and had merely sought an explanation from their immediate manager about their pay queries. They contend that their manager. 'Ruben', informed them to wait for Moalusi to address their grievances. The said Ruben and another manager then approached them whilst they were performing their duties, and had without any explanation, instructed them to leave their workstations and vacate the premises. Once they were outside of the premises, their access cards were then blocked, preventing them from gaining access.

[19] It is trite that in circumstances where there are disputes before the Court, the approach to be adopted is that as set out in *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others*[5]. The Court is therefore

[5] (427/01) [2002] ZASCA 98; 2003 (1) SA 11 (SCA) at para 5 where it was held;

> "On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c),

required to make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities of their versions.

[20] In support of their contentions, the applicants relied on the testimony of Ms. Tholeka Mdinga. She could not testify regarding the events of 6 October 2017 as she alleged that she only reported for the day shift on the following day. Her testimony was that she reported for duty and had discovered that she was not paid her salary. The employees then approached the said Ruben who had informed them to wait for Moalusi. The employees then waited for Moalusi at the parking lot.

[21] The above testimony raises questions as to why would a line manager tell employees to stop working and wait in a parking lot for another manager to address their grievances. Moalusi's testimony was to concede that the employees had approached him and complained about their salaries, and he had advised them to follow procedures in raising their grievances. Mdinga's version clearly does not make sense, particularly since the main contention of the applicants was that it was on 6 October 2017 that they had approached their immediate managers who told them to raise their grievances with Moalusi and subsequently ordered them to leave the premises.

[22] What makes Mdinga's version even more improbable is that when Moalusi came to them, he simply dropped off documents (ultimatums) and placed them on the floor with a stone on top of them and left without saying anything. As to why Moalusi would have done as alleged is unclear. The only probable inferences to be drawn is that the employees had after raising their grievances with their line managers and Moalusi on 6 October 2017, abandoned their work stations and congregated at the parking lot. Moalusi had approached them to return to work and when they refused, he had then issued them with ultimatums after reading the contents thereof to them. When they refused to accept copies

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this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

of the ultimatums, he had then placed them on the floor next to the employees with a rock on top.

[23] Ms Jennifer Chokoe's evidence on behalf of the applicants did not take their case further. Her version was simply that she did not go to work on 7 October 2017. She alleged that she was sick and had gone to a hospital on that day. She alleged that she went home after she was discharged from hospital on the same day and had received an SMS that she was suspended with effect from 7 October 2017. She added that she also received and a notice that she was 'retrenched'. She further testified that at some point thereafter, she had tried to gain access to the workplace to explain the circumstances of her absence but was denied access. She contended that she was however able to speak to Moalusi at some point, who had refused to accept her explanation for her absence and copies of her medical certificate which she attempted to hand over to him.

[24] The difficulty with Chokoe's evidence is that she sought to insist that she was notified via SMS on 7 October 2017 that she was suspended and/or retrenched, despite it being put to her that no such SMSes were ever issued by the respondent to the employees. There was no proof of any such SMSes. Despite having received this non-existent SMS, she denied having received any other SMSes informing employees to return to work. She denied knowledge of, or receipt of any ultimatums.

[25] If indeed Chokoe was in hospital and discharged on 7 October 2017, clearly it would have been unfair for the respondent to dismiss her as her circumstances for failing to report for work on that day would have been different from other striking employees. The difficulty however with her version under cross examination was that when asked about any form of proof in that regard, she sought to produce from the witness stance, a document dated 22 January 2018, which had not been previously disclosed to the respondent. Her contention was that she was not given the document at the time that she was discharged, but only received it when the respondent required proof from her. As to which other copy of her medical certificate she had sought to provide to Moalusi at the time of the strike or thereafter when she allegedly spoke to him is unknown.

[26] It is apparent that Chokoe clearly manufactured untenable versions that she was in hospital and not on strike, when the probabilities do not favour her version of events. As if that was not enough, during cross-examination, she had testified that after receiving the purported notice of suspension on 7 October 2017, she did not go back to the premises. This however changed when asked the same question, when she contended that she went back to the premises on 9 October 2017, and there were no other employees at the entrance. She alleged that she spoke to Moalusi on that day who told her that she was absent. In the same token, she further recalled that on 6 October 2017 she did go to work for her night shift. Clearly the contradictions in her version are glaring.

[27] Mr Mhlengi Camane, whose testimony was not finalised, did not make himself available after the proceedings had resumed following the matter having been part heard. The applicants' representative merely informed the Court that he was unavailable as he had obtained new employment. Camane's testimony was accordingly struck off the record.

[28] Mr Sidney Makelane's version regarding the events of 6 October 2017 materially contradicted that of Mdinga. His version was that upon raising their grievances with their managers (Ruben and 'Athol'), the latter started shouting at them and ordered them to leave the premises. He testified that when the employees came back from lunch outside the premises, they realised that they were denied access back. He testified that on 7 October 2017, he received an SMS notifying him of his dismissal, and yet on 9 October 2017 he had reported for duty with other employees and discovered that replacement labour was brought in to carry out their functions. At that point, he and others had then asked management for their letters of dismissal.

[29] Of course, Makalane's version does not make sense, to the extent that he sought to repeat the contention that their managers told them to leave the premises after they had raised their grievances. His version that employees received SMSes notifying them of their dismissal on 7 October 2017 is equally false and is clearly contradictory to that of Chokoe, who had testified that the SMSes received on 7 October 2017 informed employees of their suspension.

[30] Ms Florence Ziningi Mngadi's testimony was no different to that of Chokoe. She also denied participation in the strike and alleged that she was sick from 5 October 2017 and was at home. She contended that she was not aware of what was going on at the workplace. She further testified that because she was sick, she 'recovered after a long time and went back to work', but was prevented from gaining access into the premises. The difficulty with Mngadi's version is that it was bare and not supported by any documentary evidence to demonstrate that she was indeed sick or hospitalised at the time of the strike. Despite having received notification *via* SMS that she was dismissed, it is however not known at which stage she went back to work only to discover that she was denied access.

[31] Against the evidence of Moalusi, it is apparent that the employees upon raising their grievances in the morning of 6 October 2017 with their immediate managers, decided to abandon their workstations and embarked on an unprotected strike. This was despite Moalusi's advise to them when he arrived that they should utilise the internal procedures to raise their grievances. On the opposite end, the applicants' version of events regarding whether they had embarked on a strike action as led by Mngadi, Mdinga, Chokoe and Makelane, was not only at odds with their pleaded case, but contradicted each other. Effectively, these witnesses sought to deny the obvious, clearly manufactured their versions, and their versions lacked any credibility or probabilities.

[32] In conclusion on this issue, the individual applicants' action of abandoning their workplace constituted a concerted refusal to work for the purpose of remedying a grievance related to their remuneration. Clearly their conduct amounted to "a strike" as contemplated in the definition of that term in section 213 of the LRA.

[33] The strike embarked upon by the individual applicants from 6 October 2017 was clearly unprotected, and they made no attempts whatsoever to comply with the provisions of section 64 of the LRA.

Was the strike in response to unjustified conduct by the respondent?

[34] To succeed with this defence, the applicants were required to establish that the conduct complained of was so egregious or inexcusable, or that they were

treated unfairly or unlawfully, making the failure to comply with the applicable procedures under section 64 of the LRA excusable. In other words, the applicants were required to further demonstrate that their decision to embark on an unprotected strike was spontaneous in reaction to the respondent's provocative conduct. Equally so, the applicants were required to establish that given the conduct of the respondent, they had no alternative remedy to their concerns that bonuses would not be paid.

[35] In the parties signed pre-trial minutes in compliance with the now repealed provisions of Clause 10.4.2.2 of the Practice Manual, the applicants in response to whether there was any provocation on the part of the respondent, contended that they were provoked because they were chased away when their raised their pay queries.

[36] In their written closing arguments, it was submitted that the dispute that arose on 6 October 2017 was 'not a matter of mutual interest but that of right'. It was contended that the individual applicants were frustrated and angered by the respondent's conduct of unilaterally deducting or reducing their salaries to R0.33 or R1.43.00 in certain instances without informing or consulting with them. Further arguments raised were that the individual applicants were not consulted regarding the change in the pay structure, which prevented them from earning normal contractual salaries.

[37] It will be recalled that the applicants' case has been to consistently deny that they had embarked on a strike action. It is a contradiction to allege that they were not on strike, whilst at the same time alleging that they were provoked after allegedly being chased away by their managers, or that they were not consulted when the pay structure was changed. Be that as it may, the applicants' contention that their grievances related to a dispute of right made their conduct even more serious. Since their grievances related to payment of salaries, their remedies were to be found under the provisions of sections 69, 73A, or 80 of the BCEA, and again, no attempt was made to utilise those remedies. They cannot contend that they lacked any remedies in respect of their grievances.

[38] Furthermore, the facts of the case as already dealt with were that after they had raised their pay queries with their managers, they were informed to follow internal processes and that the matter would be escalated to management. It further did not appear to be in dispute that on 6 October 2017, it was not the first time that the applicants had complained about their pay. Even if there was no evidence led to indicate that the strike was planned, what was however apparent is that when the applicants were informed that they should follow procedures and raise their grievances, they did not heed that advice and had instead immediately embarked on a strike.

[39] I have already concluded that there was no substance in the allegation that any of the managers the applicants had referred to had instructed them to leave the premises. Equally without merit, and to the extent that the employees persisted with that contention, at no stage during Moalusi's testimony, was it ever put to him that the employees could not go back to work as they were denied access. These contentions were only raised when the applicants testified.

[40] In the end, there is no substance in any allegation that the individual applicants were provoked into an unprotected strike action. Of course, as already indicated, the individual applicants had reason to be aggrieved with the inconsistent salary payments they had received. The applicants did not state as to when the respondent had changed the pay structure without consulting them. I did not however understand the respondent's case to be that the pay disparities were not an issue for the employees. The amounts that the individual applicants had received as salaries resulting from the existing pay structure, and to the extent that they were not disputed by the respondent, were indeed shocking in circumstances where legislation related to minimum wages is in existence.

[41] Against the above observations, the fact remains that mere unhappiness with non-payment of consistent salaries in circumstances where the applicable salary structure had been in existence for some time, cannot suddenly constitute provocation[6]. This is particularly so in circumstances where as

[6] *NUMSA obo Maseko and 47 Others v AMT Africa Recruitment (PTY) Limited* [2022] ZALCJHB 267; (2022) 43 ILJ 2792 (LC) at para 39.

already indicated, the individual applicants had various legal options available to them to remedy their grievances, without resorting to unprotected strike action.

[42] Notwithstanding my reservations and comments related to the respondent's salary structure, I am of the view that the individual applicants' decision to embark on an unprotected strike, cannot be said to have been due to the respondent's provocative conduct on 6 October 2017. To the extent that they were treated unfairly and unlawfully regarding salary payments, it has already been concluded that there were avenues open to them to address their grievances.

[43] A further issue that arises regarding substantive fairness of the dismissal relates to the individual applicants' conduct during the strike action. Other than the fact that their unprotected strike constituted misconduct, evidence led by Moalusi was that the employees had blockaded the entrance and exit into the client's premises; attempted to intimidate and prevent replacement labour from working; intimidated staff and other employees who wished to render their services. These actions had necessitated that members of the SAPS and private security be called to intervene. Of course, all these allegations were denied by the applicants, who on their version were merely waiting peacefully outside of the premises.

[44] The applicants had contended that some of them ought not have been dismissed on the basis that they were not on strike but absent from duty for legitimate reasons such as official absence of leave or sick leave. I have already dealt with this issue in relation to the evidence of Chokoe and Mngadi, and it has been found that their evidence ought to be rejected as it was manufactured.

[45] To the extent that the applicants had merely relied on some form of documentation in persisting with their contentions that some of them were on legitimate leave, not much weight can be attached to those documents without any form of oral evidence presented on their behalf. In the end, there is no basis for a finding to be made that the dismissals were substantively unfair.

4. Procedural fairness:

[46] Regarding procedural fairness in instances of unprotected strike action, Item 6 (2) of the Code provides that:

> 'Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.'

[47] The procedural fairness of a dismissal in such instances requires that there should be contact with the employees' union; that ultimatums should be issued and where appropriate, a hearing should be held. In *NUMSA and Others v Pro Roof Cape (Pty) Ltd*[7]*,* this Court held that the Code was not exhaustive and ought not to be applied mechanistically. The Court added that other relevant considerations in determining the procedural fairness of the dismissal included the duration of the strike, the harm caused by the strike, the legitimacy of the strikers' demands, the conduct of the strikers and the timing of the strike.

[48] In *Mndebele and others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant) (Mndebele)*[8]*,* it was held that;

> 'The purpose of an ultimatum is not to elicit any information or explanations from the employees but to give them an opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not. The ultimatum must be issued with the sole purpose of enticing the employees to return to work and should in clear terms warn the employees of the folly of their conduct and that should they not desist from their conduct they face dismissal. Because an ultimatum is akin to a final warning, the purpose of which is to provide for a cooling-off period before a final decision

[7] [2005] ZALC 14; [2005] 11 BLLR 1126 (LC); (2005) 26 ILJ 1705 (LC) at para 30.
[8] (2016) 37 ILJ 2610 (LAC).

> to dismiss is taken, the *audi* rule must be observed both before an ultimatum is issued and after it has expired. In each instance, the hearing may be collective in nature and need not be formal.'[9]

[49] In *AMCU obo Rantho and Others v SAMANCOR Western Chrome Mines (Rantho)*[10], the Labour Appeal Court (LAC) reiterated that the object of an ultimatum is to give striking employees the opportunity to reconsider their action, and that the ultimatum must therefore be clear and unambiguous and give the employees sufficient time to reflect. The LAC added[11] that where illegally striking employees obey an ultimatum and return to work within the stipulated time, the employer will not be entitled to dismiss them as to hold otherwise would render the purpose of an ultimatum nugatory. It was further held that an ultimatum by the employer was a waiver of the right to dismiss for the period of its duration. Thus, if the employees refuse to return to work, the waiver implicit in the ultimatum will lapse, but that if they comply with the ultimatum, the employer is ordinarily precluded from dismissing them for the act of striking, but not necessarily for other misconduct committed during the strike.

[50] Moalusi testified that after the strike action commenced in the morning shift of 6 October 2017, and he had issued all three ultimatums at varying times during the day to the 200 employees who were gathered outside their workstations. He had also issued further ultimatums and bulk SMSes to the other employees who were supposed to be on the afternoon shift on 7 October 2017, as they had also failed to report to their workstations.

[51] Moalusi had confirmed that NTM was not notified of the ultimatums and contended that there was no obligation on the respondent to do so as the union did not have organisational rights. The respondent's contention that there was no obligation on it to contact NTM prior to issuing the ultimatums cannot be faulted based on the approach set out in *Roberts Brothers Construction (Pty) Ltd and Another v National Union of Mineworkers and Others*[12], where the LAC held that;

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[9] At para 27.
[10] [2020] ZALAC 46; (2020) 41 ILJ 2771 (LAC); [2021] 3 BLLR 236 (LAC).
[11] At paras 25 – 27.
[12] [2020] ZALAC 15; (2020) 41 ILJ 2107 (LAC); [2020] 10 BLLR 1030 (LAC)

> "The duty of the employer to contact a trade union in terms of Item 6(2) of the Code is restricted to contacting a trade union that has been granted organisational rights under Chapter III of the LRA or enjoys contractual rights under a recognition agreement concluded with the employer. The duty obliges the employer to contact an appropriately recognised bargaining agent."[13]

[52] In this case, the evidence did not demonstrate that NTM had any organisational or contractual rights at the respondent. Equally so, there was no evidence presented that NTM had prior collective bargaining engagements with the respondent. Accordingly, the failure to contact NTM cannot make the dismissals procedurally unfair.

[53] Moalusi had testified that he personally went to the striking employees as they gathered and attempted to hand them copies of the ultimatums. The employees had refused to accept them. It was against the employees' reaction to his attempts to hand out the copies of the ultimatum, that he had read the contents thereof and thereafter placed the copies on the ground near them with a rock on top of them. Other than attempting to hand them copies of the ultimatums, he had also sent them bulk SMS, instructing them to return to work and that they should stop their unprotected strike. He had testified that further ultimatums were issued on 7 and that on 8 October 2017, he had again approached the employees where they were gathered at the client's premises and read the ultimatums to them.

[54] In the signed pre-trial minute, the applicants had denied being issued with any ultimatums and contended that they were chased away by the Operations manager when they raised their pay grievances. I have already made conclusions regarding the improbabilities and lack of credibility of that contention.

[55] Makelane on behalf of the applicants could not dispute Moalusi's version that the employees refused to accept copies of the ultimatums on 6 and 7 October 2017, hence he placed them on the floor near them with a rock on top. This was notwithstanding his earlier contention that Moalusi did not at any stage arrive at

[13] At para 18.

the client's premises on 6 October 2017 and attempted to hand them copies of the ultimatum. He also could not dispute Moalusi's version that bulk SMSes were sent to all the employees instructing them to come back to work, and that there were no other contradictory SMSes telling employees not to report for work.

[56] Mdinga, who alleged that she had only reported for duty on 7 October 2017 confirmed that Moalusi approached the employees where they were gathered and had put copies of 'documents' on the floor near them with a rock on top, but that he left without saying anything. The employees did not however look at or take those copies after Moalusi had left. She however confirmed receipt of an SMS instructing employees to go back to work on 7 and 8 October 2017 but contended that they could not resume their duties as they were denied access back into the premises after going out for lunch. I have already made conclusions regarding the version that the applicants were locked out of the premises to the extent that it was not put to Moalusi during his cross-examination.

[57] Chokoe as already indicated, had denied knowledge of the ultimatums and SMSes sent to all the employees. As she had insisted, the only SMS she had received was regarding her suspension or 'retrenchment', and it is inexplicable that she was the only employee who had received those non-existing SMSes, but not all the pertinent SMSes that his co-employees had received.

[58] Against the individual applicants' testimony as summarised above, it is apparent that Moalusi had indeed approached them at varying times on 6 and 7 October 2017 to serve them with copies of the ultimatums. They had refused to accept them and it is improbable that Moalusi could have simply left the copies on the floor with a rock on top given their importance without having said anything to them. There can be no dispute that the contents of the ultimatum were clear and unambiguous, as the employees were required to return to work, failing which consequences including termination of their services could follow. The employees had refused to accept the copies and return to work despite Moalusi having read the ultimatums to them.

[59] The individual applicants had between 6 and 9 October 2017, time to reflect on their actions and consider the ultimatums issued to them inclusive of on 8 October 2017. Other than the written ultimatums, SMSes were sent to them to enable them to reflect on their actions and still, this did not yield any results until notices to attend a disciplinary hearing were issued on 9 October 2017. Against this background, the court is satisfied that proper ultimatums were issued to employees, and that they were granted sufficient time to reflect on them and their actions.

[60] Moalusi had testified that bulk SMSes were sent to the employees notifying them of the disciplinary enquiry to be held on 11 October 2017. The hearings were initially scheduled to be held at the client's premises but had to be moved to the respondent's premises in Midrand and to be held on 12 October 2017. He was in the hearing and was to testify as a witness when NTM made representations to represent the employees. At that stage the chairperson told the witnesses to leave the hearing venue as he considered the representations, and he went to his office.

[61] After the chairperson had refused the NTM officials the right to represent the employees at the hearing, those officials refused to accept the chairperson's ruling and demanded that the employees be dismissed. The employees had refused an opportunity afforded to them to elect five amongst them who would represent them. Makelane confirmed that the employees had refused to select five amongst themselves as they held the view that each of the 180 employees should have a right to represent themselves.

[62] Mdinga's evidence was not of assistance regarding the events of 12 October 2017. She conceded that she received notification of the disciplinary enquiry but however did not attend it because she did not have taxi fare to get to the hearing venue. Equally unhelpful was Chokoe's evidence, who had denied having received any SMS notification of the hearing. Mngadi on the other hand equally denied having received notification of the hearing by SMS, but however confirmed that she received notification of her dismissal.

[63] The chairperson of the disciplinary hearing, Nkateko Shingange had also testified regarding the events of 12 October 2017 after NTM officials were not allowed to represent the employees. Her version was that having asked the employees to select five amongst themselves to represent them, they had refused and had adopted an aggressive and threatening attitude towards her. She had warned the employees that if they failed to select five amongst themselves to represent them, she would proceed in their absence. At that stage they had demanded that they be dismissed and had refused to proceed with the hearing. She had then proceeded in their absence and recommended dismissals after hearing testimony on behalf of the respondent.

[64] Makelane further confirmed Moalusi's version of events after NTM was not allowed to represent the employees, and the latter had refused to select five amongst them to represent them. He further confirmed that all the employees that were supposed to have attended the hearing instead moved to Moalusi's office. He alleged that the employees went to Moalusi's office to find out about the hearing that did not take place.

[65] Clearly Makelane's version corroborate Moalusi's version, other than that he denied the latter's version that all the employees stormed into his office, intimidated him and demanded their letters of dismissal. Makelane's version that they all went to the office to enquire about the hearing does not make sense in circumstances where on the employees' own version, they knew that NTM officials were not allowed to represent them and they had refused to select five employees to represent them. It is further obvious that the employees did not merely go to Moalusi's office with good intentions. This is so to the extent that it was not seriously disputed that members of the SAPS and private security had to be called as the employees had forcibly occupied Moalusi's office and threatened him, and that they only dispersed after that intervention. Moalusi had described the events as a hostage situation since about 55 employees forced their way into his office and refused to leave, telling him that he should suspend or dismiss them, and further demanding that the replacement employees be instructed to leave the client's premises.

[66] Against the above, it ought to be concluded that upon the individual applicants having rejected the ultimatums, the respondent had correctly notified them of disciplinary hearings against them. They had also rejected an opportunity to state their case as to why they should not be dismissed after being afforded an opportunity to present their case through five people they would have selected amongst themselves. Once they rejected that opportunity and given their continued misconduct, the approach adopted by the chairperson in dismissing them cannot be faulted.

[67] Despite the individual applicants having been notified of their dismissal, they had continued to gather at the client's premises and continued with their violent conduct of impeding operations. This had resulted in the respondent having to approach this Court to obtain an urgent interdict on 2 November 2017. Clearly in these circumstances even if the Court were to find any form of unfairness, these are employees whose conduct made a sanction of dismissal appropriate.

Conclusions:

[68] Against all the above evidence, it is apparent that the individual applicants had embarked on an unprotected strike between 6 and 9 October 2017, with no attempts being made whatsoever to follow the procedures laid out in section 64 of the LRA. Even if the individual applicants had legitimate grievances regarding their salaries, there were avenues that they could have utilised to resolve those grievances, and there was no evidence indicating that the strike was provoked by any conduct on the part of the respondent.

[69] From the moment that the unprotected strike commenced on 6 October 2017, and notwithstanding their bare denials, the individual applicants were issued with ultimatums and bulk SMSes including into 8 October 2017, imploring them to return to work or face the consequences of their actions. They had all ignored the respondent's pleas to them to return to work. In the process of their unprotected strike, the individual applicants had further committed misconduct by impeding the operations of the client and intimidating and harassing replacement labour, which had also necessitated the intervention of the members of the SAPS and private security.

[70] The individual applicants' misconduct continued even on 12 October 2017 after NTM officials were denied permission to represent them at the disciplinary enquiry. When they refused to select five amongst themselves to represent them, they had as per Makelane's version, insisted that each of the 180 of them should represent themselves, which was clearly an unreasonable position to adopt. To the extent that they refused to participate in the hearing as per the directions of the chairperson, the latter was accordingly correct in proceeding in their absence.

[71] Against all the above, the only conclusion to be reached is that the dismissal of the individual applicants was procedurally and substantively fair. It is not necessary for the Court to determine whether the dismissal was automatically unfair in the alternative, in that no case was made in that regard by the applicants.

[72] I have further had regard to the requirements of law and fairness to the extent that the respondent sought a costs order against the applicants. Considering the facts and circumstances of this case, I am of the view that a costs order is nonetheless not warranted

[73] Accordingly, the following order is made;

Order:

1. The dismissal of the individual applicants listed in the Statement of Claim was procedurally and substantively fair.

2. The applicants' claim is dismissed

3. There is no order as to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:	Mr. M. Gumede, NTM Official
For the Respondent:	Adv. C. Gibson, instructed by Hunts (INC Borkums) Attorneys.