IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

JS 877/05

In the matter between:

MADIMETJA CLAYTON LESHILO
AND OTHERS **APPLICANTS**

and

MESSINA PLATINUM MINES LIMITED **RESPONDENT**

JUDGMENT

Cele AJ

Introduction

[1] Three applicants have filed a claim of unfair dismissal based on an unprotected strike which took place during the period 25 May 2004 to 1 June 2004 at Voorspoed Shaft Mine. Their dismissal was preceded by disciplinary hearings conducted by the respondent against them.

The respondent, acting in its capacity as the erstwhile employer of the applicants, opposed this claim.

[2] At the commencement of this trial, the respondent made a "with prejudice" offer of settlement. An amount of R62 000 was offered by the respondent to each of the three applicants as an equivalent of 24 months' remuneration calculated at the employment rate or remuneration on the date of the dismissal. The compensation was to be the full and final settlement of the dispute between the parties which emanated from an unprotected strike of 25 May 2004 at the respondent's premises. Initially all 3 applicants turned the offer down and insisted on a relief of retrospective re-instatement. However, after the first witness, called by the respondent, had given his evidence in chief Mr Maepula being the second applicant accepted the settlement offer. The dismissal dispute between him and the respondent was consequently settled. There remained a dispute between two applicants and the respondent.

Background Facts

[3] The two applicants were employees of the respondent, in its mining operations underground and were based at Voorspoed Shaft Mine. As a means of recording arrival and departure times of its employees, the respondent kept an electronic clocking system which was operated at its gate and at its mine entrances. Three shifts per day were in operation. The respondent considered the three shift arrangement and found it to be unproductive. It then entered into negotiations with two

registered unions operating in its mine being, the National Union of Mineworkers (NUM) and the United Association of South Africa (UASA). In the pleadings, the applicant put it in dispute whether or not an agreement was reached between the two unions and the respondent on a change of working hours. The respondent sought to introduce a change of working hours on 26 May 2004. However, on 24 May 2004 the respondent received a letter, purporting to have been written on behalf of its workers, by Mr Innocent Hlwale who was its mine employee. The body of the letter read:

> Subject: Suspension of CONOPS IMPLEMENTATION
>
> "We the workers of Messina Platinum Mines (mpm) have realized that the management has taken unilateral decision of implementing CONOPS without consulting us. We see this as undemocratic and forced decision. We therefore resolve and demand that:
>
> 1. The management should suspend the implementation of CONOPS and start clarifying us on CONOPS until we reach consensus.
> 2. CONOPS should also be suspended at shaft and Engineering sections until a settlement is reached.
> 3. Management should negotiate with our leaders in good spirit.

> We give MPM management 48 hours to suspend CONOPS and start the negotiations with our leaders until we the workers take a final decision.
> We hope that this matter will be treated as urgently as possible."

[4] The reference to "conops" is a reference to continuous operations system" which the respondent said had been agreed upon between it, the NUM and the UASA. The two applicants were not the members of either of the two unions but were members of the Building Motor Engineering and Allied Workers Union (BMEAWU). The respondent granted partial recognition to BMEAWU, consisting of stop order facilities, access for purposes of recruiting and organising. The respondent regarded the conduct of Mr Hlwale as disruptive and as an attempt by him to sow discord. It issued a letter of suspension dated 25 May 2004, suspending him with immediate effect pending an investigation into his conduct. The letter was addressed to BMEAWU. At 15h00 of that day Mr Hlwale was placed on suspension and at 15h10 -17h00, a group of about 100 employees gathered at the parking area near the main gate of the respondent. It was then the end of the day shift.

[5] The first applicant, Mr Leshilo chaired the meeting of the employees who were gathered at the parking area. The matter for discussion was a unilateral change of working conditions by the respondent in introducing "conops". The employees decided to commence with a strike by the night shift not going to work. The strike indeed

commenced in that afternoon. In the morning of the next day the employees similarly gathered at the parking area in furtherance of a strike. Mr Leshilo continued to take a lead in the deliberations that took place.

[6] In the morning of 26 May 2004 the Regional Chairperson of NUM arrived at about 05h00 together with the Branch Committee and they urged employees to report for duty. A large group of the employees responded to the call and entered through the gates into the premises to report for duty. A small group gathered next to the change room but moved off-site to gather next to the main gate. Employees who had reported on duty for the night shift knocked-off at about 8h30. A memorandum was then written by the group of employees at the main gate, for the attention of Mr De Vos of the respondent. It was presented to him at the gate at about 12h30 by Messrs Hlwale Leshilo and one known as Lucky.

[7] In the meantime, the respondent had approached this court and had obtained an interdict against BMEAWU and some of its memebers. The order interdicted and prohibited them *inter alia* from participating in an unprotected strike, from picketing within 500m from the premises of the respondent and from intimidating any employee of the applicant from returning to work or intimidating clients or suppliers of the respondent. The Sheriff served the order to the employees. They read it and moved 500m away from the gate, however, a number of employees still withheld their labour on 27-28 May 2004. The respondent issued a second ultimatum on 28 May 2004. A final

ultimatum was issued on 31 Mat 2004 as the strike continued until 1 June 2004. On 1-3 June 2004 the respondent identified those of its employees that it considered had taken part in the strike and it suspended them. During the period 7-14 June 2004 internal disciplinary hearings were conducted by the respondent against the employees who were charged with:

> "(1) Participating in unprotected industrial action from on or about 25 May 2004 to 01 June 2004, and/or alternatively absence without leave or authorization from 25 May 2004 to 01 June 2004,
>
> (2) Inciting, instigating or encouraging one or more employees to take part in or continue with unprotected strike."

[8] Both applicants were found guilty and were dismissed. They referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for conciliation. On 27 July 2005 the CCMA issued a certificate of outcome to the effect that the unfair dismissal dispute between the parties in relating to an illegal strike remained unresolved. In terms of section 191 (5) (b) (iii) of the Labour Relations Act 66 of 1995 ("the Act") the applicants referred the dispute to this court by means of a statement of claim.

The Issue

[9] The applicants challenged the substantive and procedural fairness of their dismissal. Mr Leshilo admitted firstly that the strike in question

was unprotected and secondly that he took part in it. His version was that on 26 May 2004 he, like others, wanted to respond to the call to report for duty after an ultimatum was issued by the respondent. He said that he was prevented by Messrs Letsabe and Maki from resuming his duties. In respect of the procedural fairness, he said that a proper procedure was not followed, *inter alia*, in that the chairperson acted as complainant and that the respondent had prejudged the outcome by treating him, as a BMEAWU member, differently from other employees, thus producing an outcome that was unfair. The second applicant, Mr Maesela, averred that he never took part in a strike but reported for duty, saying it was shown by his clock card record. He said that the respondent treated him differently because he was a BMEAWU member, against which union a negative attitude had been taken by the respondent. As the dismissal of the two applicants was not in issue, the respondent bore the onus of proving that such dismissal was based on a fair reason and was fairly carried out.

The Trial Issues

The respondents version

[10] The respondent entered into recognition agreements with two registered trade unions at its Voorspoed Shaft, namely the NUM on 26 November 2002 and UASA, on 26 January 2004. BMEAWU approached the respondent in November 2003 to obtain organisational rights. Partial rights, consisting of stop order facilities, access for

purposes of recruiting and organising were granted to the BMEAWU in January 2004.

[11] The Voorspoed Shaft, where the applicants were based traditionally operated 3 shifts per day. The system soon proved to the respondent to be unproductive. The respondent entered into negotiations with NUM and UASA so as to change the shift configuration. On 26 March 2004 the respondent entered into a written agreement with the two unions to change the shift configuration at the shaft. One of the major changes brought about by the substantive agreement was a change to continuous operations. The change made it possible for the shift to operate for 365 days of each year. The Department of Minerals and Energy was involved in the negotiations and it granted permission to the respondent in April 2004 for work on continuous operational basis. Discussions between the local representatives of NUM and UASA and the respondent to implement the continuous operations system began where upon it was agreed that the continuous operations system would be implemented in stages, the first of which was on 10 May 2004 for the Shafts and Engineering division. 26 May 2004 was the effective date for the production division of the Shaft, which was the majority of the employees at the mine. However, on 24 May 2004 the respondent received a letter, purporting to have been written on behalf of workers by Mr Innocent Hlwale, also a mine employee of the respondent. That led to the suspension of Mr Hlwale.

[12] The respondent regarded the conduct of Mr Hlwale as disruptive and as an attempt by him to sow discord. It issued a letter to the

BMEAWU on 25 May 2004 with the intention to suspend him on full pay and with immediate effect pending an investigation into his conduct. At 15h00 on the same date, Mr Hlwale was placed on suspension.

[13] At about 15h10 – 17h00 a group of about 100 people gathered at the parking area, near the main gate of the respondent. It was then the end of the day shift. The group was still gathered when time for the reporting of the night shift workers came. The strike by the employees effectively commenced and 276 employees did not report on duty for the night shift on 25 May 2004. The strike continued in the early hours of the following day. At about 05h00 the Regional Chairperson of NUM arrived and together with the Branch Committee they urged NUM members to report for duty. A large group of employees heeded the call and entered the premises to report for duty. In the meantime, a smaller group continued with the strike next to the change room but moved off-site and gathered next to the main gate. Employees from the night shift knocked-off at about 08h30.

[14] At about 12h30 a delegation from the striking employees requested a member of management of the respondent to receive a memorandum from them. Mr W De Vos represented the respondent in receipt of the memorandum. In the meantime the respondent had been to this Court and had on that day, 26 May 2006, obtained an interim interdict. At 15h10 the respondent issued an ultimatum to all striking employees to resume work in terms of the continuous operations system.

[15] On 27 May 2004 at about 06h30 an employee who was to start work at 07h00 was found lying dead about 100 metres from the salvage yard of the respondent and an unused bullet was lying some metres away from the murder scene. One Mr James Noneli who had earlier addressed the striking crowd to return to work in the morning, was on 28 May 2004 found dead. He had been shot on the head. At about 15h00 of that day, the respondent issued an ultimatum to the striking employees. On 31 May 2004 at about 11h20 a final ultimatum was issued by the respondent.

The role of the applicants

[16] The Chief Industrial Relations Officer of the respondent at the time of the strike had been a Mr Anthony Make. When he came to testify in the case, he was no longer working for the respondent. The two applicants were well known to him as employees of the respondent and as interim committee members of BMEAWU. He saw both of them at the gathering of 25 May 2004 at 15h10-17h00. They were in front of the group but Leshilo was the one who was speaking. They prevented employees who were coming to report for duty. Police arrived and went to address the crowd so that those who wanted to come in to work could do so but the applicants, together with the others, continued to intimidate and prevent them from reporting. They would physically stop other employees and verbally discourage them from reporting for work and encouraged them to join the unlawful and unprotected strike after motor vehicles had dropped them off to commence their shifts.

[17] Mr Maki contradicted the version of the second applicant which was to the effect that he never took part in the strike but was part of the group that reported on duty. Mr Maki personally saw and identified the second applicant not only taking part in the strike but also intimidating other employees with the first applicant. He could not be mistaken about the second applicant who, wore yellow shoes during the strike, and because he had dealings with him as a committee member of BMEAWU.

[18] Mr Maki did not have a video camera to capture the events during the strike. He was challenged into producing records pertaining to the strike and for a disciplinary hearing in respect of the strike. He testified that the respondent had employed the services of an outside consultant to assist it with the disciplinary process. The consultant had taken the files and all other information away with him as they had been in his possession. A attempts to retrieve them were all in vain. During the strike he had kept running notes of the events from 25 May 2004 to 1 June 2004, in the form of a "strike register" which helped to refresh his memory.

[19] The applicants' case that the respondent was inconsistent in how it dealt with members of BMEAWU as a result of their participation in the strike, was put to Mr Maki. He referred to a document which he said he had himself produced as a record of all employees against whom the respondent had taken disciplinary action for their participation in the strike. The record had details of the employees and

a summary of their misconduct enquiries. According to that record, entitled "completed cases of illegal industrial action as at 21 June 2004", forty eight employees were subjected to disciplinary action. Nineteen of them were NUM members, twenty three BMEAWU members and six were non-union members. In all, nineteen employees were dismissed comprising of nine BMEAWU members, eight NUM members and two non-union members. Eleven employees were found not guilty, comprising of five BMEAWU members, four NUM members and two non-union members. Two enquiries were postponed as on 21 June 2004. Other employees were given final written warnings and written warnings, totalling sixteen employees of which nine were BMEAWU members, six NUM members and one was a non-union member.

[20] Disciplinary proceedings of the employees were all conducted in terms of proper procedures where their rights were respected. He denied that he was targeting any particular employees of the respondent with a view to facilitating their dismissal because of their ethnic grouping or because they were "Leshilos." Mr Marius van Niekerk was the initiator for the second applicant while he himself was the Industrial Relations Officer present in attendance at the hearing. The first applicant represented BMEAWU members. He could not remember if the first applicant was himself represented but recalled that rights to his legal representation were explained to him. During the hearing security officers were called as witnesses and clock in records were handed in as evidence which showed that the second applicant did not report for duty.

[21] It was untrue that the applicants were treated differently from those employees against whom the respondent obtained an interdict from this court. The employees cited in the interdict proceedings were referred to merely because of their capacity as office bearers of BMEAWU and not because of their conduct. As regards the intimidatory conduct of the applicants during the strike, a number of employees charged raised it as their defence, during the disciplinary hearings, that they took part in the strike because they were intimidated into so participating.

[22] There had been another unprotected strike in October 2003 as a result of which some employees, including the two applicants were found guilty and given written warnings valid for one year from that date. According to the record of completed cases of illegal industrial action as at 21 June 2004, seven employees received final written warnings for that unprotected action of October 2003 and it would still be valid as at 21 June 2004.

[23] A private security company provided security services to the respondent during the unprotected strike of 2004. Mr Jacob Letsabo was the Security Supervisor deployed with the respondent. He worked with other security officers. He had progressed to being a Security Manager when he testified in court for the respondent. He knew both applicants and that they were involved with BMEAWU, which was a rival union of NUM. Both applicants were involved in a meeting of employees on 25 May 2004 where they organised and incited workers

into an industrial action. After the meeting they wanted to enter the company premises but were addressed by the members of the South African Police Services (SAPS) who had arrived at the company premises. BMEAWU members wanted to stop the "conops." Later that evening employees who came to work on the night shift were stopped by the first applicant who was telling them not to go into the mine. Mr Letsabo was at the turnstiles at the gate and within a hearing range of what the first applicant was saying. Some employees who did not support the idea of a strike went in and reported for duty as first applicant screamed at them. The second applicant was also present with the first on the evening of 25 May 2004 and on two other days thereafter. He saw the second applicant well in the strike and noticed that he had yellow takkies on. He recalled seeing him on the next day during the gate pushing incident.

[24] In respect of events of 26 May 2004 at the gate when an ultimatum to report for duty was given, striking employees were not allowed into the gate. However, they got in to clock in. They were intimidated by the first applicant who went in to get them back. The group left behind became smaller and weaker. The first applicant and his crew pushed the gate open where pedestrians were not allowed. He pushed the first applicant back to the turnstiles. He never told the first applicant that management had said he was not to be allowed in. Nor did he prohibit the first applicant at the gate from reporting for duty.

[25] Mr Letsabo testified for the respondent in a number of disciplinary hearings held against employers. However, he could not remember if

he testified in the hearings of the two applicants. Nor could he remember who the initiator or presenter of the respondent's case was. He denied that any chairperson of the enquiry ever used an abusive language to any of the employees. He was asked by court on who had called him in as a witness, that is, who the initiator was, he said that he wrote his statement and went into the enquiry to read it on the basis of what he had seen. He included a complainant having been present at hearing, when he was re examined on that aspect. In a further re-examination allowed by court, he said that in other disciplinary hearings consequent upon the unprotected strike of 2004, there would be a complainant present. He gave for the first time then, the names of Messrs Rowland Dresells, Piet van Rensburg, Albert van Wyk Muller and Martin Blekkers as complainants.

[26] The next security officer called to testify was a Mr Phuthi Marcus Manamela. He confirmed witnessing a strike taking place on 25 May 2004 and seeing SAPS members arriving at respondent's premises at about 17h30. he worked at the gate and saw the first applicant addressing other employees. He did not see the first applicant doing anything else besides addressing the employees. He, the first applicant, would tell employees to join the strike if they wanted to, but those who did not want to would simply go inside to report for duty. He would not agree to having seen the first applicant intimidating any of the employees. He knew the second applicant well and saw him with yellow takkies taking part in the strike in most of the days. He took no part in the disciplinary hearings. In respect of the gate incident of 26 May 2004, he saw the first applicant speaking to Mr

Letsabo, proceeding to the crush site and thereafter coming back to the gate. He could not hear what they were saying to each other.

[27] The fourth and the lat witness for the respondent was Mr Martin Jakobus Beukers who worked as a Shift Supervisor and a Mine Overseer for the company. In about half of the disciplinary cases emanating from the strike of May 2004, he was the complainant and in others, he was the chairperson. Other chairpersons were Messrs Roy Lube, Johan Nel and Gert Pretorius. Mr Lube had retired while Mr Nel had died. Mr Pretorius was still working for the respondent. He knew the first applicant and his brother well. The first applicant was a committee member of BMEAWU. The first applicant had returned to the company about six months prior to the date of testifying in this court. He would come with the current BMEAWU committee members to attend meetings with respondent's Human Resources Manager, Mr Jacob Mahao. He would not tell in what capacity the first applicant was acting.

[28] His role in the matter was that of a chairperson in the disciplinary enquiry of the first applicant. He could not tell who the complainant was at the enquiry. Mr Maki was the Industrial Relations Officer but there was a complaint by the first applicant against him whereupon he was replaced by one Industrial Relations Officer known as Godfrey. Mr Mighty Leshilo represented the first applicant. He could not remember the details of evidence led against the first applicant but remembered that it related to the unprotected strike of May 2004. He was referred to the record of completed cases from which he was able

to say that the first applicant had a previous warning which he took into consideration when considering a sanction. He described the procedure normally followed in an enquiry thus suggesting that he would have followed it in respect of the disciplinary hearing for the first applicant. He pointed out that he took part in about three hearings per day emanating from the unprotected strike in question. In all, he dealt with about forty cases and it was all confusing. In each case there was a complainant as no case could be done without one. He never acted as both a chairperson and a complainant. He could not remember the identity of any witnesses called by the respondent to testify against the first applicant. He recalled that some employees testified in their hearings saying that they were intimidated into taking part in a strike. Some would give names of those they said intimidated them including the first applicant and would be discharged. He believed that he was consistent in the matters he dealt with. He could not explain why Mr Lube, who was said to have been the chairperson in the second applicant's enquiry, was not called as a witness.

[29] During the trial, the respondent applied for the handing in of a founding affidavit deposed by the second applicant in an application to rescind a conciliation ruling of the CCMA. At that stage the second applicant showed some reluctance but did not strenuously oppose the application. A provisional order was issued admitting the document. Later its admission was finally confirmed. Paragraph 5.1 of the affidavit reads:

> "On the 22nd June 2004, I received a notice to attend a disciplinary hearing from Respondent. Attached hereto

> find the said notice outlining the charges which were levelled against me. I vehemently denied (I still do) all of those charges because I was on duty from the 25th May 2004 until 3am the following morning of the 26th May 2004. After I knocked off, I went home, and I was off duty until 30th May 2004, I never attended not committed either of the charges levelled against me. It was legitimate and control for me to be off duty from 25th may 2004 to 30th May 2004, and the respondent knew that I was off duty. Therefore, I never participate in an inprotected strike, absent without leave or invited, instigated or encouraged any employee to take part in an unprotected strike. Above all there was no proof that I committed either of those charges." *(sic)*

The applicants' version

The continuous operations

[30] The first applicant conceded that the strike in question was unprotected and concerned a demand by the employees for the respondent to discontinue the "conops." While the applicants disputed in the pleadings that a collective agreement was in existence between the respondent and the two other unions operating in the company, no evidence was led by either to contradict the evidence of the respondent in that regard.

The role of the applicants

[31] The first applicant conceded that he did not report for duty during the strike period. Further, he conceded that he took part in the strike. It is the extent of his participation in the strike which is in dispute. He took a lead in persuading other employees not to report for duty and to join the strike in demand for the end of continuous operations. He never invited and intimidated any of the employees into joining the strike. He further denied that BMEAWU never organised the strike as it was called by concerned employees of the respondent.

[32] The first applicant confirmed the writing and presentation of the memorandum to Mr De Vos on 26 May 2004. He confirmed the receipt of the ultimatum from management of the respondent. He then read it to the employees and warned them of the danger of engaging in an illegal strike. He encouraged them to go to their sections and to report for duty. The boom gate was then opened for them. Employees went in but as he also did so, he was surprised by Mr Letsabo who stopped him from going to report for duty. At the time, Mr Letsabo stood with Mr Maki. Mr Letsabo informed him that management had instructed him to prohibit the first applicant from getting inside the premises. He requested a formal notice for that action but none was produced by either Mr Letsabo or Mr Maki. Some of the employees with him witnessed the incident. He obeyed the order and remained at the gate as other employees proceeded to the crush office inside the company premises.

[33] In about twenty to thirty minutes the employees who had gone inside returned to the gate and told him that they would not leave him behind as if he was the one who had caused the illegal strike. Once again, he instructed them to go back inside so that they could see what the company would do with him. Employees told him that if he was not allowed in, they would continue with the strike. The strike continued until the arrival of a sheriff with a court order. The strike still continued but in compliance with some of the limitations imposed by the court. Mr Vusi Juta, the National Secretary of BMEAWU arrived and employees told him that it was not a BMEAWU strike but one of concerned employees. Soon thereafter Messrs Baldwin and Dressels of respondent's management arrived and requested a meeting with Mr Juta. Employees wanted the first applicant and one Lucky to join Mr Juta in that meeting but management members would not agree to have the first applicant in attendance. Finally, Lucky joined Mr Juta and the two left for the meeting with management members. When representatives of employees returned, it was reported that employees had to report for duty. Employees took a stand that if not all of them were allowed in, they would not go back. The strike continued. Mr Dressels indicated that the first applicant and Mr Hlwale were suspended and therefore were not to report for duty. Employees refused to resume work. The strike continued until 31 May 2004.

[34] On 31 May 2004 management issued a final ultimatum saying all employees were to return to work. Employees held a meeting in which it was agreed that they would all return to work on 1 June 2004 as instructed by management. On 1 June 2004, in the morning, all

employees reported at the security office of the respondent, Mr Dressels called the first applicant, Mr Hlwale and Mr Segoa to a meeting and there told them that they wanted to start with disciplinary actions against those who were involved in the unlawful strike. It was agreed that first applicant and Mr Hlwale would represent those employees who were charged and that first applicant would be represented by Mr Juta. It was agreed that the first applicant would be the last to be brought to the disciplinary hearing.

[35] The hearings commenced with the first applicant and Mr Hlwale representing the charged employees. The problem encountered by the representatives was that there was no complainant. There was therefore no one for representatives of employers to cross examine. The chairpersons acted as complainants as well. Some employees were dismissed while others were given a warning. On 10 June 2004 the first applicant represented Mr Hlwale in his hearing. Mr Hlwale was dismissed. The first applicant requested him to avail himself on the next day to represent him. On 11th June 2004 the first applicant's case was heard. Mr Maki had earlier refused to have Mr Juta to represent him, saying the company would not allow an outsider to take part in the hearing. Mr Beaukes was the chairperson and Mr Maki represented the Industrial Relations Department. The first applicant registered two points of concern. The first was that Mr Maki had earlier said that he would deal with "Leshilos". Beaukes agreed to have Mr Maki excused and Mr Guthrey Seete taking his place. The second was a complaint that there was no complainant. Instead of the issue being addressed, Mr Jacob Letsabo was called in as a witness.

Mr Beaukes said that he had limited time to complete the hearings and proceeded. The hearing adjourned for a break. It was at that time that he overheard Mr Maki telling Mr Beaukes to dismiss him. Mr Beaukes told him of it when proceedings resumed and subsequently complied without remorse. The first applicant was consequently dismissed at the end of the hearing. He lodged an appeal on the same day and handed it to Mr Maki. Instead of being called to an appeal hearing, a sheriff came to his residence to serve him with a court interdict, preventing him from being at the respondent's premises. He obeyed the order and never went back to the mine with the result that his appeal hearing was never held. He referred an unfair dismissal dispute to the CCMA for conciliation.

[36] The first applicant denied that, in his opening statement, at the commencement of the trial, he had said that the second applicant was with him in the meeting and in the unprotected industrial action. He insisted that he had contradicted Mr Maki's evidence that he and the second applicant had prevented employees of the night shift from reporting for duty on 25 May 2004. He conceded that NUM was the majority union in respondent's workplace but he denied knowing about a collective agreement between NUM and the respondent regulating continuous operations. He said that the meeting of striking employees failed to agree on a referral of the dispute between them and the respondent to the CCMA to make the strike lawful that is why he warned employees of the implications in taking part in an unprotected strike. After he was prevented from reporting for duty he felt that he could not just go home as a collective decision to strike

had been taken. He explained a phrase in the statement of claim: "for being forced to have participated in an illegal industrial action" as a reference to Mr Letsabo forcing him not to report for duty. He concede that Mr Hlwale took part in the unprotected strike but could not explain what was meant in the statement of claim that Mr Hlwale was on suspension and could not have taken part in a strike. He conceded that the two "Leshilo" employees were his relatives and that both were not dismissed as one was found not guilty and the other was given a warning. He believed that he had been dismissed because he was prevented from reporting for duty, the respondent was inconsistent in its approach in disciplining its employees and because the chairperson was biased against him.

[37] The second applicant said that he report for duty on 25 May 2004 and knocked off at 03h00 on 26 May 2004. He remained at work to receive his pay slip. The office opened at 07h00 and once he was given the payslip he left for town. He was off-duty on 26 May 2004. He returned to work on 27 May 2004 and continued with work until he was stopped from working on 1 June 2004. It was the clocking card system which rejected him as it would not allow him in. He went to report to the security officers who referred him to the Human resources Department. It was then at night and he went back home and returned in the morning. He was surprised when the Human Resources Manager told him that he had been taking part in a strike. He was subsequently given a notice of the hearing.

[38] On the date of his hearing, he attended at the venue. The chairperson, Mr Lube came and as he went passed him he said that he wanted the second applicant to come to the 'slaughter house'. When he came into the room for the hearing Mr Maki said he welcomed him into the 'slaughter house'. Mr Leshilo the first applicant represented him. Mr George Mashiyane was present as his witness. The second respondent indicated that Messrs Lube and Maki were not to proceed with that hearing as they were his enemies. He then left the room with Mr Leshilo, having asked for a different chairperson. His second date of hearing was on 14 June 2004, Mr Mighty Leshilo was to represent him. He received a report that Mr M Leshilo had been prevented from representing him. The hearing proceeded without him being represented. Mr Lube was again the chairperson. A clocking card history was produced by Mr Lube to see if indeed the second applicant did not report for duty. Mr Letsabo came to testify on behalf of the company and said that he had seen the second applicant taking part in the strike and was wearing red takkies. The second applicant disputed that evidence, saying he had been working. Mr Letsabo said that he and Mr Maki had a video camera in which events of the strike were recorded but said that rules of the company did not permit him to show him the pictures. Mr Lube asked which union he was a member of but Mr Latsabo answered instead, saying the second applicant was a member of BMEAWU. Mr Lube uttered some abusive words where after he was told to go and wait outside. When he returned to the room, he was dismissed. He lodged an internal appeal. His attempts to be represented and to call a witness were in vain. Mr Van Wyk was the chairperson of the appeal hearing and Mr Seete represented the

Human Resources Department. On reading papers, Mr Van Wyk said that he saw nothing wrong with his papers. He argued with Mr Seete. Mr Van Wyk finally agreed with Mr Seete and the result was his dismissal.

[39] He indicated that he had arrived in the morning at work on 25 May 2004 due to the fact that he was still to be placed in another shift as there was to be a change. He was only told at about 14h00 that he would start working at night. He had no problems with 'conops'. He said that he had not seen any strike taking place at work from 25 May 2004 till 1 June 2004 when he was prevented from reporting for duty. When he was cross-examined on paragraph 511 of his affidavit for the rescission application, he refused to answer questions, indicating that the document ought not to be admitted as he should have been given all documents for trial 21 days before the trial date. However, he conceded that it was his affidavit which he said he had made just after he had lost his job. When it was pointed out to him that the affidavit was made more than one year after his dismissal, he conceded but said he was struggling with a state of hunger at the time and was confused. He described Mr Maki as his enemy who lied against him in saying that he had taken part in a strike.

[40] Mr Maredi Jackson Mphahlele testified on behalf of the first applicant and in the main corroborated his evidence. He said that he proceeded to the crush office after employees were told to report for duty and to comply with the ultimatum of 26 May 2004. He collected his payslip. An NUM official attempted to address them but they returned to the

gate to be with the first applicant who had been prevented from coming in. He regarded Mr Maki as an enemy because Mr Maki referred to him as a "Pedi". He admitted having taken part in the unprotected strike but said that he was never charged and nobody said anything to him concerning the strike. He denied having seen the second applicant taking part in the strike. He confirmed knowing about a strike of October 2003 but said that it was not of the General Labour which the first applicant belonged to but was of what he referred to as RDOs.

[41] Mr Madimeja Enos Maja testified in corroboration of the version of the applicants. The first applicant was, according to him, elected to maintain order during the strike. He conceded that in their memorandum of 24 May 2004 they had given the management 48 hours within which to address their concerns but they embarked on a strike before the lapse of that 48 hours. No clear explanation was given for not honouring the time period given to management. A collective decision had been taken to strike against "conops". They hoped that the employer would respond quickly so that they could go back to work. According to him the gathering dispersed at about 17h00 on 25 May 2004. Whatever happened thereafter he would not know and could not therefore dispute that Mr Maki observed the first applicant stopping people from reporting for duty between 17h00 and 20h17. It came as a surprise to him when the first applicant was stopped and prevented from reporting for duty on 26 May 2004. The first applicant told them to proceed to report for duty, saying he would consult with those stopping him. They went inside, leaving him at the

gate with Messrs Letsabo and Maki. They proceeded to the crush office where payslips were given to them. Three NUM officials persuaded them to return to work. Employees felt it would be unfair to report back for work when one of them was left behind. They decided to return to the gate to be with the first applicant and the strike continued. He maintained that he never saw the first applicant threatening any employees but he heard him motivating them not to cause any havoc. As such, no one was stopped from reporting for duty besides the first applicant. He said that he did not see the second applicant taking part in the strike. He himself took part in strike until he returned to work on 1 June 2004. He was charged. At his hearing Mr Hlwale represented him and Mr Maki appeared for the Human Resources Department. He requested that his witness be allowed to testify but was not allowed to call them. Mr Maki and Mr Beaukes testified against him. He admitted though that he pleaded guilty to the charged misconduct. At the end of the hearing, he was given a warning and thereafter continued working for the respondent until he decided to leave to take a post of and Educator. He confirmed that a strike took place in October 2003 but said it involved Rock Drill Operations (RDO) and not the General Labour team. He denied that he had discussed this matter with other witnesses before he testified.

[42] Mr Pheneus Magasana Mabula also testified on having taken part in the unprotected strike and confirmed the version of the applicants. He said that he worked on 25 May 2004 but attended a meeting which ended at about 16h00 on 26 May 2004. They met again to consider the response by the management. As there was no response he decided to

join the strike. He did not see any employee who wanted to go to work being prevented from doing so. He said that there was no violence in the strike. All striking employees decided to report for duty in response to an ultimatum of 26 May 2004. As all were going back to work, Messrs Letsabo and Maki, who at the time were at the gate, prevented the first applicant from going in. The employees who had gone inside had a meeting chaired by Messrs Mdaka, Emmanuel Mogale and Lesley. It was decided, on information received that the first applicant had been denied entry, to go back to him and join him. The strike continued. He reported for duty on 1 June 2004. His supervisor, Mr Velly Kombrinck asked where he had been but he was not charged for his participation in the unprotected strike. He was warned that if he took part again, he would be dismissed.

[43] He said that employees at respondent's workplace tended to socialise on their ethnic grouping. As such he did not have good relations with Mr Letsabo and Mr Maki, who used to complain that there were too many Pedi employees in the company and they had to be got rid of. He had heard of the October 2003 strike but took no part in it as it concerned 'RDOs" and not the general workers. He said that he did not see the second applicant in the strike but said that there were many people who were singing and dancing during the strike. He would not be able to tell what took place after 16h00 on 25 May 2004 but recalled that he left the company premises together with the first applicant as the second applicant went on night shift. He said that between the dates 25 May - 1 June 2004 he did not see the second applicant.

Submissions by parties:

[44] A number of submissions were made by Mr Snider who appeared for the respondent, including:-

- A central aspect of the applicants' claim is that there was inconsistency in the application of discipline subsequent to the unlawful industrial action.
- It must in the first place be borne in mind that the industrial action was unprotected and illegal. This was well-known to the applicants as they had received the court order declaring the strike to be an unprotected strike and ordering then to return to work. Therefore it is common cause, at least insofar as the first applicant is concerned, that he was involved in unlawful activities.
- The evidence in relation to the manner in which different cases were dealt with is also extensive and extremely clear. Mr Maki gave evidence as to how the investigative process was conducted by means of the process of identification of those involved in the strike including an identification of the nature of their conduct by various witnesses.
- An exercise was thereafter done by determining whether people were absence by means of clocking records and also determining whether they were absent for a legitimate reason or not during any part of the period over which the strike took place. Ultimately, this process led to disciplinary enquiries in respect of 48 employees

and they were duly charged and underwent disciplinary enquiries.

- The outcomes of the disciplinary enquiries, according to both Messrs Beukes and Maki, were the result of a consideration by the chairmen of the disciplinary enquiries of the particular facts and circumstances which pertained to each individual dismissal. As set out above, the outcomes of the disciplinary enquiries are entirely random as the union affiliation or any other particular factor.
- The applicants advanced no evidence whatsoever of inconsistency other than calling witnesses who said that they took part in the strike but were not disciplined. In respect of the last of those witnesses, Mr Mabula gave evidence that he had been warned by his shift supervisor that if he engaged in such conduct again that he might face a dismissal. Clearly, in the light of this, there was a disciplinary process which, if it did not involve all of the individuals on strike, it certainly involved those who were identified by personnel of the respondent and by way of investigative process.
- The evidence of the first applicant's three witnesses was not put to any of the respondent's witnesses and, in addition thereto, there was no suggestion in such evidence that their conduct and the facts and circumstances surrounding their case were identical to those of the two applicants who, on the respondent's

version, which it is respectfully submitted should be accepted, were involved in intimidation and attempts to prevent non-striking employees from rendering their services to the respondent and efforts to persuade such employees to join the strike.

- Inconsistency is, in itself not a factor which necessarily renders a dismissal unfair. In *SACAWU and Others v Irvin & Johnson (Pty) Ltd* (1999) 20 ILJ 2302 (LAC) the majority in a divided Labour Appeal Court, stressed that the "parity" principle is simply a general principle of fairness and should not be applied rigidly.
- It is respectfully submitted that there is no reason why this court should not accept the evidence of Messrs Letsabo and Maki in this regard. Maki may be regarded as an independent witness in the sense that he is no longer employed by the respondent and gave evidence voluntarily. Since he was intimately involved in the strike as an IR officer from the respondent and in addition documented both the strike and the disciplinary proceedings which followed it, there is simply no reason to suggest that he was dishonest or less than frank in the evidence which he gave.
- The evidence which emerged *ex post facto* is evidence that he was racist and had poor relationship with staff. It is respectfully submitted that this evidence simply cannot be taken into account by the court as he was not given an opportunity to deal with this version notwithstanding that

the first applicant was, as set above, on several occasions advised to put his version to the witness.

- There is in any event authority to the effect that documents, even if they are not available at the trial of a matter, may be proved by oral evidence. Similarly, in this regard, there is ample authority that the trial of a hearing is a fresh hearing, a hearing *de novo* and as such the judge in the matter is not bound to hear the same evidence as the disciplinary enquiry chairman. It is clear that there is no difficulty in the court hearing evidence which is different to that which was heard and presented at the disciplinary enquiries.
- It is submitted that the applicants have made a disingenuous and opportunistic attempt to achieve their reinstatement by giving less than honest evidence in respect of their participation and conduct in the strike at the respondent which took place between 25 May 2005 and 1 June 2004 and that their testimony is not to be believed. It is further submitted that by way of the evidence of Messrs Maki, Letsabo, Beukes and Manamela, together with the documents that were presented the respondent has show that it applied discipline consistently and fairly and went far beyond the requirements set out in *Modise & Others v Steve's Spar Blackheath* (2000) 21 ILJ 519 (LAC) insofar as the dismissal of strikers is concerned.

[45] Various submissions were similarly made by the applicants. They may be summarised as including:

- First applicant's dismissal arose out of his participation in unprotected action, not as a result of his conduct during the course of the strike on the 26 May 2004 until 31 May 2004. it is common cause between him and the employer that there was a strike which was unprotected.
- Dismissal of the second applicant arose out of the strike the respondent claimed he participated in, which Mr Maesela denied any involvement as he was working night shift. The clock history of Mr Maesela was shown in his appeal disciplinary hearing and it was found that indeed he was working night shift and he never absent himself from work.
- First applicant never intimidated any employee from reporting for duty. Both Mr Anthony Maki and Jacob Letsabo failed to produce proof that indeed one or more employees reported him to the respondent. It has to be on record that security officer Mr Manamela who was at the gate was observing everything. He indicated that he never saw the first respondent intimidating or preventing any person from reporting for duty.
- There was no complainant or initiator in the disciplinary hearings of both applicants. As such, the chairpersons acted as the initiators as well.

- There was inconsistency in the application of disciplinary processes of the applicants.
- As suggested by Mr Snider, the first applicant never stated in his opening address that the second applicant took part in the strike. Rather, he indicated that if the second applicant was present, he might have been among the multitudes of employees participating in that unprotected strike.
- The respondent placed much reliance on the evidence of Mr Maki who however failed to disclose to the court that he was soon replaced by Mr Seete in the disciplinary enquiry of the first applicant as an IR representative. Mr Maki was not a reliable witness. He lied when saying that Mr Mighty Leshilo represented the first applicant when in fact Mr Hlwale was the representative. He further lied in saying that the first applicant took part in the October 2003 strike. Mr Beukes contradicted him by saying the strike was of the Rock Drill Operations and not of the General Labour Section. There were about five hundred and twenty nine employees taking part in the strike. Yet Messrs Maki, Letsabo and Manamela said that they recognised the second applicant with his yellow shoes. It is apparent that these witnesses discussed and agreed that they were going to implicate the second applicant. It is not possible that two applicants could intimidate five hundred and twenty nine

employees. Mr Manamela was working at the gate but he did not see the first applicant intimidating anyone. He said those who reported for duty were not stopped. If there were police at the gate, the applicants could not intimidate any employees. Mr Maki led evidence to say that there was no appeal hearing for the second applicant. There was, and Mr Millard Van Wyk chaired the hearing.

- In his evidence, Mr Mphalele testified that he took part in the strike without being forced. He was not charged when he returned to work. That indicated that the company was inconsistent in dealing with its employees who committed a similar misconduct.
- Mr Maja's evidence showed that there were different ethnic groupings and dislikes such as against Pedi people in the company.
- Applicants' witnesses corroborated their evidence that the first applicant did not intimidate any employees and that the second applicant was not in the strike. They confirmed that the first applicant was stopped at the gate and prevented from getting in to report for duty on 26 May 2004.
- The respondent failed to produce trial documents in time with the result that the applicants were prejudiced. Files used by the respondent in the disciplinary hearings were never produced. Those files would have shown that a proper procedure was

never followed by the respondent. The affidavit of the second applicant used in his rescission application was brought late and should not be admitted.

- A number of employees were cited in the interdict papers as having been identified participating in the unprotected strike. Some of those were not charged by the respondent. It was conceded that the respondent may have lied in obtaining the interdict.
- Applicants are entitled to retrospective reinstatement.

Analysis

[46] The dismissal of both applicants by the respondent, preceded by disciplinary hearings, remained beyond dispute in this trial. The respondent had then to prove that a fair reason existed for the dismissal and that it was fairly carried out. Two misconduct charges were preffered against the applicants being that they:

> (1) participated in an unprotected industrial action on 25 May 2004 to 1 June 2004, and/or absented themselves without leave or authorisation during the said period.
>
> (2) incited, instigated or encouraged one or more employees to take part in or continue with the unprotected strike (my paraphrase)

[47] The first applicant responded to the allegations with an unequivocal admission that he took part in an unprotected strike until the issue of the first ultimatum on 26 May 2004 when thereafter he was prevented

from resuming his duties. He admitted his leadership role in the strike. So for the period of 25-26 May 2004, his conduct fits the description of the misconduct on the first count. His defence then, is that the respondent was inconsistent in choosing who to discipline and thereafter on how to discipline. He totally denied the allegations on the second charge. The second applicant's response was a total denial of all the allegations against him and as with the first, contended that the respondent was inconsistent in how it went about disciplining those it said had taken part in the strike.

[48] At the outset, it needs to be said that NUM and UASA were the two registered and fully recognised unions operating in that industry. NUM was the majority union. The respondent produced undisputed facts that it had a collective agreement with the two unions regulating the change on working hours at its place. What the striking employees were reacting to was an implementation of such an agreement of the two unions and the respondent. All the applicants could say about this agreement, was that they bore no knowledge of it. They knew that their union, BMEAWU, had not acquired full recognition in the workplace. The most responsible and reasonable approach by the employees was to have first ascertained the basis on which the respondent introduced what it termed continuous operations. Had they done so, they would have found that there was an agreement in the workplace which the respondent was entitled, in the circumstances, to implement. In that event, they might have been dissuaded from engaging in an unprotected strike.

[49] In resolving the issues in dispute, the provisions of section 68 (5) of the Act are essential and provide that:

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

[50] Before embarking on the strike, the employees did not engage in any process as a means of complying with the provisions of chapter IV of the Act and hence their admission that the strike was unprotected. It must however be established that the dismissal of the first applicant, who admittedly took part in an unprotected strike was fair. The guide provided by the Code stipulates that 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 the Act;
> (b) attempts made to comply with the Act; and
> (c) whether or not the strike was in response to unjustified conduct by the employer.

[51] It is common cause that officials of NUM and Mr Juta of BMEAWU arrived at the workplace of the respondent on 26 May 2004. The reasonable conclusion to draw from that fact is that the respondent called union officials at the earliest opportunity to discuss the course

of action it intended to adopt. This was notwithstanding the fact that, according to evidence of the first applicant, the strike was not called by any union but by a group of concerned employees. Before the employees embarked on the strike no attempt was made to comply with the provisions of the Act. According to the first applicant, it was only after they embarked on the strike that there was a discussion about an attempt to comply but such a discussion came to naught. There was consequently a serious contravention of the provision of the Act. No evidence was led to suggest that the strike was in response to unjustified conduct on the part of the respondent. On the contrary, evidence led showed that the introduction of changed working hours was in compliance with a collective agreement between the respondent and the majority unions in the workplace.

[52] When examining substantive fairness of the dismissal of employees, the Full Court, in the case of *Mzeku & Others v Volkswagon SA (Pty) Ltd & Others [2001] 8 BLLR 857 (LAC)* had, *inter alia,* the following to say on page 863:

> "[15] In cases such as this one, where employees are dismissed because they refuse to work, the substantive fairness of the dismissal means that the conduct for which the employees are dismissed is unacceptable (or is conduct which constitutes a material breach of the employment contract) and for which the dismissal is a fair sanction. Where the conduct for which the employees are dismissed is unacceptable but the sanction of

dismissal is, in all the circumstances, not a fair sanction, the dismissal can not be said to be substantively fair…"

[53] The substantive fairness of the dismissal of each applicant must now be investigated. The first applicant was an official of BMEAWU. He took a leading role in the strike, together with other employees. During the trial, he conceded that he had known that the strike was unprotected and he knew that there were provisions of the Act which had to be complied with before embarking on the strike. The respondent committed no unjustified conduct to which the strike was a response. The first applicant's conduct on 25-26 May 2004 was therefore unacceptable. It must still be determined if dismissal was a fair sanction in the circumstances. Before doing so, I have to determine whether his participation in the strike on 26 May 2004 to 14 June 2004 was similarly unacceptable. His version was that he was prevented from resuming his duties. The respondent disputed that evidence.

[54] The strike register compiled by Mr Maki for 26 May 2004 has, *inter alia*, the following entries:

- NUM Regional Chairperson and Branch Committee urge NUM members to report for duty.
- Employees enter the site in large numbers to report for duty.
- A small crowd starts to toyi,toyi next to the crush and change house (+- 50 people).

[55] The evidence of the first applicant was that a first memorandum was received by him. He read and explain its contents to the striking employees. He urged them to report for duty. His evidence stood undisputed. The first applicant and his witness said that the group approached the gate to get in and report for duty but the first applicant's entry was blocked. In the words of Mr Letsabo, for the respondent, the first applicant and his crew pushed open the gate where pedestrians were not allowed. He then pushed the first applicant back to the turnstiles. The first applicant's version that there are employees who went in, proceeded to the crush offices, later returned to the gate and continued with a strike, was not strongly contested by witnesses of the respondent. Mr Manamela's evidence corroborated that of the first applicant that the first applicant, on 26 May 2006, when the boom gate was opened together with other employees, went inside the premises but that he then met up with Mr Letsabo and the two spoke to each other.

[56] The probabilities of this case do point towards Mr Letsabo having blocked the first applicant from gaining entry into the company's premises on 26 May 2004. He viewed their conduct as wrong for using an entry point which, according to him, the pedestrians were not allowed to use. He then pushed them back to the turnstiles. On the contrary Mr Manamela was more than willing to allow them in. Mr Letsabo appears to have misconceived the purpose for which the employees entered the premises. He had seen the first applicant addressing them and probably thought that the entry was in furtherance of the strike. It was to be noted that while he saw the first

applicant speaking and addressing striking employees, he could not hear what he was saying to them. If he did hear any utterances, he did not testify to it. He chose to use the words "he intimidated and prevented". The actual intimidatory words were never testified to by him. Mr Letsabo effectively prevented the first applicant from going into the premises in response to the first ultimatum. The striking employees decided to continue with an unprotected strike. Even when a second ultimatum was issued by the respondent on 28 May 2004, the strike continued. On 31 May 2004 the respondent issued a final ultimatum. It produced a positive response in that the striking employees decided to abandon the strike and to resume work on 1 June 2004.

[57] As already indicated, the evidence on intimidation and prevention of employees from reporting on duty was far from being clear. It lacked in its details. Mr Manamela directly contradicted the evidence of Mr Letsabo in this regard. The records of the disciplinary hearings could not be produced by the respondent to show the evidence relied upon. Mr Beukes' memory let him down on the details of the evidence led by witnesses to him against the first applicant. Mr Beukes conceded that Mr Maki and the first applicant did not have a healthy relationship. At the commencement of his hearing, the first applicant successfully asked for Mr Maki to be replaced with the consequence that he would not be privy to the evidence led at the disciplinary enquiry against the first applicant. As the first applicant was addressing the striking employees, that could very easily have been construed by Mr Letsabo as intimidating and preventing them from

reporting for duty. In my view, the evidence of the respondent pertaining to the second charge of misconduct was not sufficient to justify a finding of guilty. In paragraph 182 of his heads of argument, Mr Snider submitted that the respondent did not dismiss all of the illegal strikers but it only disciplined those strikers whom it had identified as committing acts of intimidation or otherwise having been directly identified as participating in some manner in the strike which called for a disciplinary hearing. In the light of my finings, the applicant should not have been treated differently from those employees who were merely disciplined for taking part in the strike as per count one, without committing acts of intimidation as per count two of the charges. The similarity of treatment is not to exclude some inconsistency resulting from flexibility required in the exercise of a discretion in each individual case.

[58] That brings me to the applicants' record of final written warnings considered by the chairpersons of the disciplinary hearings against the applicants. Mr Beukes corroborated the evidence of the applicants that the strike of October 2003 was a strike by the Rock Drill Operations. The two applicants were general labourers. Mr Maki could not shed more light on the dispute raised by the applicants that they did not take part in it and that the record he kept in respect of them was incorrect. Therefore, when a sanction was considered against each applicant, the final written warning ought not to have been a factor.

[59] The unacceptable participation of the first applicant to the strike with no unjustified conduct by the respondent, was limited to one day,

25-26 May 2004. Thereafter his participation was sparked by an unjustified conduct of the security supervisor, Mr Latsabo. That unjustified conduct was however mitigated by the issue of the second and third *ultimata* by the respondent. Evidence on the second charge was lacking and the first applicant ought to have been treated as a first offender. When a totality of all the evidence is considered, it can not be reasonably said that the respondent produced enough evidence that it had a fair reason to dismiss the first applicant.

[60] The evidence of both applicants was always that no initiator was used in their disciplinary enquiries. Unfortunately for the respondent, it was unable to produce records of the hearings to back up its version that there were initiators. It was put to the respondent's witnesses that the chairperson, Mr Beukes acted as well as an initiator, which he denied. Mr Letsabo who testified against the first applicant had great difficulty, even when asked by court to indicate who it was that had called him as a witness. His evidence was that he was called, he came in and he read his statement, thus suggesting, in fact that no one led his evidence. If anyone did, one who expect him to have said so. Mr Beukes said that the situation was confusing as he had to go through three enquiries per day. They had a group of employees to go through. In the circumstances, the probabilities favour the acceptance of the version of the applicants that no initiators were used in their enquiries. The result is that the chairpersons were probably biased in favour of the respondent's case, by also presenting it to the applicants. By his own admission, Mr beukes acted as a complainant in enquires of other employees based on the same facts as of the applicants. The fairness

of the procedure in the hearings of the applicants was accordingly very much compromised.

[61] The allegations of the applicants that they were disallowed from calling their witnesses is not easy to resolve in their favour. These are aspects in respect of which the applicants were not satisfactory witnesses. The first applicant clearly lied when denying that, in his opening address, he did not say that the second applicant took part in the strike. The second applicant made sure that he corrected the first in that regard.

[62] The second applicant denied having taked part in the strike and said that he reported for duty for most of the days in which the strike was ongoing. The respondent sought to impune the credibility of the second applicant in this regard by a production of a founding affidavit he had made in a rescission application. The respondent was entitled to rely on a previous inconsistent statement made by the second respondent, see in this regard *Salzmann v Holmes 1914 AD 471 at 477.* The authenticity of the statement was put beyond dispute as the second applicant owned up to it. While it was produced during the trial, he was given some time to reflect on it, when the statement was initially provisionally admitted, after court had offered him an explanation on the procedure. Later it was finally admitted as evidence against him. When its contents are considered against his *viva voce* evidence, together with the evidence of the respondent's witnesses who said that they saw him taking part in the strike, his credibility is very much tarnished. In this regard, the evidence of the

respondent stands out as being highly probable. The finding I make is that he probably took part in the strike as did others. I do not see him very much in any different position from that of the first applicant except that he did not take as much a leading role according to evidence, as did the first applicant.

[63] A proper conspectus of all the evidence suggests to me that the dismissal of each applicant was both substantively and procedurally unfair. In my findings both applicants took part in the initiation of an unprotected strike in the circumstances where no unjustifiable conduct of the employer was involved. They very well knew that they were members of a minority union. They had a duty to investigate whether or not there was an agreement between the majority union and the respondent governing the change of working hours before disturbing a healthy industrial atmosphere. They made no attempts to firstly comply with the Act before the commencement of the strike. In my view, it would be inappropriate to order the respondent to reinstate or even re-employ them. They are entitled only to compensation within the limits given by section 194 (1) of the Act.

[64] The following order will accordingly be issued:

1. The respondent is ordered to compensate each applicant in an amount equivalent to 12 months' remuneration calculated at the applicant's rate of remuneration on the date of his dismissal.

2. Such payment is to be made within 14 days from the date hereof.
3. No costs order is made.

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Cele AJ

Date of Hearing: 18 FEBRUARY 2008
Date of Judgment: 31 JULY 2008

Appearances

For the Applicant: CLAYTON LESHILO & GODFREY MAESELA

For the Respondent: Adv A N SNIDER
Instructed by: LEPPAN BEECH INC