IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

Case No.: JS389/2005

In the case between:

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION First Applicant

MEMBERS OF FIRST APPLICANT Second Applicant

and

PLATINUM MILE INVESTMENTS (PTY) LTD t/a TRANSITON TRANSPORT Respondent

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JUDGMENT

RAMPAI, AJ

[1] The matter came by way of a statement of claim on the 6 December 2005 for adjudication. The first applicant sought, as the main relief, an order whereby the dismissals of its members by the respondent were declared to have been automatically unfair plus other ancillary forms of relief. The matter was opposed. The respondent filed its statement of response on the 14 December 2005. It denied the claim that its decisions to fire the second applicant plus others boiled down to automatically unfair dismissals. It averred that such multiple dismissals were procedurally and substantively fair. Accordingly it contended that the applicants were not entitled to the relief they sought.

[2] The trial commenced on the 15 March 2007, adjourned twice and finalized on the 11 January 2008. Throughout the duration of the trial, Mr Baloyi appeared on behalf of the applicants and Ms Charoux on behalf of the respondent. The respondent commenced to adduce evidence in keeping with paragraph 9 pre-trial minutes of the conference that was held on the 4 September 2006.

[3] The version of the respondent was narrated by three witnesses, namely: Mr Sven Viljoen, the respondent's operations director; Ms Ilze Bosch, the respondent's human resources manager and Ms Helena Roux, the respondent's industrial relations manager who chaired the workplace disciplinary inquiries.

[4] Briefly summarised the essence of the respondent's evidence was that the first applicant was introduced to the respondent on 10 February 2005. Before the notice of strike was given on 5 September 2005, Mr Nkosi arrived at the respondent's plant without any appointment tried to force his way through the gate and created quite a scene when the security guard refused him entry. Mr Viljoen was called to the main gate to restore order where the unionist had caused chaos. The unionist racially abused him. He threatened to start a strike unless Mr Viljoen signed a recognition agreement the members of the first applicant, in

other words, the second applicant and others, embarked upon a strike on Thursday the 8 September 2005. Such strike was, so they testified, unprocedural and unprotected. They testified that the grievance of the strikers was about a demand that their employer must sign a recognition agreement with their trade union. But the trade union had not presented any draft recognition agreement to the respondent for consideration.

[5] The director and the manager testified that meetings were scheduled with the workers trade union to iron out the provisions of the proposed recognition agreement. However, such meetings never took place. They were frequently postponed because Mr Nkosi, the union official concerned, was often too late or too busy or never showed up.

[6] Notwithstanding this fact, the second applicant and his fellow strikers refused to call off the work stoppage, refused to resume work and refused to vacate the plant in the absence of their union representative. The union representative could not be reached by phone on the day of the strike. The police were called. With the aid of the police, the strikers were evicted from the plant.

[7] On the same day, 8 September 2005, the respondent charged the strikers. The misconduct was that they

participated in an illegal industrial strike action at its plant in Boksburg on Thursday the 8 September 2005. The strikers refused to receive and to sign the notices of their disciplinary hearings. The disciplinary inquiries were all set down for hearing on Friday the 16 September 2005. The first applicant wrote a letter to the respondent on 9 September 2005 and challenged the respondent to obtain a declaratory order or prohibitory interdict from the labour court if it reckoned the strike was unprotected.

[8] On Friday the 16 September 2005 the disciplinary inquiries could not take off the ground. The striking employees refused to have anything to do with the contemplated inquiries. As the result of their stance, the chair postponed the disciplinary inquiries to Monday the 19 September 2005 for hearing. The respondent informed the first applicant accordingly. On 17 September 2005, a day after the postponement, the union informed the employer that since its members were on a protected strike they would not attend the disciplinary inquiries on 19 September 2005 but that they would only attend the hearings after the strike.

[9] On Monday the 19 September 2005 the striking employees did not attend the disciplinary inquiries as was expected. They continued picketing outside their workplace as before. The chair proceeded. The respondent presented its evidence. The chair heard that the strike was unprocedural

and unprotected. No evidence was presented by or on behalf of any striking employee. The chair returned the verdict that the strikers were guilty as charged. She then imposed the sanction of dismissal in respect of any and all the strikers. This concludes the evidence of the respondent.

[10] The version of the applicants was narrated by two witnesses, namely: Mr Ashmond Vilakazi, the shop stuart of the striking employees and Mr Thulani Christopher Nkosi, the union organiser of the first applicant. They denied the respondent's version.

[11] The concise version of the applicants was that there were two pending disputes between the applicants and the respondents on Thursday the 8 September 2005. The first dispute, they averred, arose on the 29 June 2005. The applicants referred the first dispute to the CCMA on the same day, the 29 June 2005. The first dispute concerned organisational rights. The first applicant's efforts to conclude a recognition agreement on behalf of its members were frustrated by the respondent.

[12] The first dispute was conciliated on the 17 August 2005. On the 3 September 2005 commissioner Ms B Mbovane issued an advisory award. She advised the parties to conclude a recognition agreement within 30 days, in other

words, before the 4 October 2005. She also advised the applicants to go on strike if the parties failed to conclude a recognition agreement within the said period.

[13] The second dispute, they averred, arose on the 18 July 2005. The applicants referred the second dispute to the National Bargaining Council for the Road Freight Industry on the 27 July 2005. The second dispute concerned the respondent's usage of a labour broker. The first applicant's efforts to engage the respondent in bargaining negotiations about the second matter were also frustrated by the respondent.

[14] The aforesaid National Bargaining Council did not endeavour to conciliate the second dispute within 30 days, in other words, before the 28 August 2005. On the 2 September 2005, the applicants gave the respondent notice of strike. The strike was supposed to commence on Sunday the 4 September 2005. The next day, on Saturday the 3 September 2005 the applicant's unionist received the advisory award from the CCMA in respect of the first dispute. On account of the advisory award pertaining to the dispute of rights, the first applicant decided to call off the strike pertaining to the dispute of interest that was due to start on Sunday the 4 September 2005. On the same day the 3 September 2005 the first applicant withdrew the notice of strike relating to the second dispute. The

applicants withdrew the notice of strike in order to give the negotiations a chance to settle the dispute.

[15] By Monday the 5 September 2005 the applicants realised that the respondents was still not serious to resolve even the dispute of rights through negotiations. The respondent's attitude prompted the first applicant to give the respondent another notice on the 5 September 2005 for the strike scheduled to commence on Thursday 8 September 2005. Mr Nkosi was never at the respondents plant on 5 September 2005, created a scene or abused anyone there as alleged. On that day the first applicant's members at the respondent's plant embarked on a lawful strike in connection with the dispute of mutual interest referred to the National Bargaining Council for the Road Freight Industry (NBCRFI). The striking employees were unlawfully locked out and the respondent immediately started with disciplinary actions against them all.

[16] The second applicant and his fellow workers declined to attend the disciplinary hearings on Friday the 16 September 2005 and Monday the 19 September 2005. They wanted to take no part in the disciplinary inquiry because their strike action was lawful and because the respondent's lock-out action was unlawful. On the 19 September 2005 they were unfairly dismissed in their absence. This completes the version of the applicants.

[17] This then are the two conflicting versions of the parties. Besides the oral testimonies of the five witnesses as well as the court record, six documents were used as evidence, among others, the respondent's bundle and the applicants' bundle. For the sake of convenience I shall refer to the respondent's bundle A as exhibit A and the applicants' bundle B as exhibit B, the transcript of the video footage, exhibit C, disciplinary hearing notice, exhibit D, settlement agreement as exhibit E and arbitration award as exhibit F. I have to mention that exhibit E, the settlement agreement, does not refer to the same parties as in these proceedings. It was only used for a different purpose which will become clearer later.

[18] Ms Charoux, counsel for the respondents argued, on the basis of the evidence before me, that the strike was about recognition agreement and not labour broker or casual workers. She submitted that the strike was unprocedural and unprotected. In the first place she contended that the notice of strike was invalid and premature as was the strike. In the second place she contented that the dispute concerning the recognition agreement first had to be arbitrated before the aggrieved workers could have embarked on a strike.

[19] Mr Baloyi, counsel for the applicants, disagreed. He

argued that the strike had nothing to do with the recognition agreement and that it was all about the labour broker and causal workers. He submitted that, as such, the strike was procedural and protected. The notice of strike was valid, he contented. He argued therefore, that the strike was procedural and protected.

[20] The critical question in the case is the nature of the dispute. If, on the one hand, the grievance related to the issue of a recognition agreement, then the strike concerned a dispute of rights. In that event, Ms Charoux's submission and not Mr. Baloyi's must be upheld. If, on the other hand, the underlying grievance concerned the issue of a labour broker, and not a recognition agreement, then the strike concerned a dispute of interests. In that event, Mr Baloyi's submission and not Ms Charoux's must be upheld.

[21] A distinction between a dispute of right and a dispute of interest was illustrated in **HOSPERSA & ANOTHER v NORTHERN CAPE PROVINCIAL ADMINISTRATION** (2000) 21 ILJ 1066 (LAC) by Mogoeng AJA. At paragraph 9 he clarified the character of a dispute of right and at paragraph 10 a dispute of interest.

[22] Prior to the strike of 8 September 2005, there were two defined disputes pending between the parties. The first of these was declared on 29 June 2005. It was pending in the

CCMA. In paragraph 3 of the referral form (LRA Form 7.11) the first applicant described the nature of the first dispute as follows:

> ¡°The company is refusing to meet the union and conclude collective agreement on organisational rights."

Vide p. 70, exhibit A, also known as bundle A. The first applicant stated in paragraph 4 of the referral form that the dispute arose at Boksburg on the 29 June 2005. This was a dispute of rights.

[23] Before the strike the parties exchanged a great deal of correspondence in connection with the dispute of right. The words "recognition agreement" appears in the following letters: Letter from Satawu to Transiton dated 2005.06.07, *vide* p. 9, exhibit A. Letter from Transiton to Satawu dated 2005.06.09, *vide* p. 50, exhibit A. Letter from Transiton to Satawu dated 2005.06.20, *vide* p. 21, exhibit A. Letter from Satawu to Transiton dated 2005.06.20, *vide* p. 52, exhibit A. Letter from Satawu to Transiton dated 2005.06.29, *vide* p. 54, exhibit A. Letter from Satawu to Transiton dated 2005.09.02, *vide* p. 57, exhibit A. Letter from Transiton to Satawu dated 2005.09.06, *vide* p. 60, exhibit A.

[24] Ms Charoux argued, on the strength of the aforegoing letters, that the correspondence served as overwhelming

evidence that the strike of the 8 September 2005 was about recognition agreement. The argument is flawed. Firstly, before the 27 July 2005, there was only one dispute, dispute of rights. It follows therefore, as a matter of logic, that until the 29 June 2005 the theme of the correspondence between the parties could not have been about anything else but recognition agreement. Obviously all the letters exchanged before the 30 June 2005 and probably even before the 27 July 2005, I dare say, cannot be relied upon as evidence that the strike originated from the grievance pertaining to the recognition agreement.

[25] It seems clear, therefore, that the first five of the seven letters specified in the preceding paragraph do not advance the respondent's case at all. The golden thread which runs through all of them is the fact that they were all written before the second dispute about mutual interest arose. That is their common denominator. It cannot be contended, as the respondent did, that those five letters militated against the case of the applicants that the strike was not about recognition agreement but rather about the labour broker.

[26] Secondly, Ms Charoux also heavily relied on the six letter specified in paragraph 23 above. That letter from Satawu to Transiton was written on the 2 September 2005. The letter reads:

"DD : 02 SEPTEMBER 2005

TO : TRANSITON TRANSPORT
ATT : L BOSCH
FAX : (011) 915-2202

Sirs/Madam

RE : 48 HRS NOTICE

This letter serves as 48-hours notice in terms of Section 64 of the LRA, Act No 66 of 1995 as amended from time to time.

The proposed action would commence on Sunday the 04 September 2005 at 14H00.

Be as it may, the union will be available to meet with yourselves before, during and after the industrial action to try and resolve the dispute (Recognition Agreement.

Trusting you will find the above in order.

Regards,

(signed)
T.C. NKOSI
UNION OFFICIAL"

By then there were already two pending disputes. This is the first important feature which distinguishes this letter from the other five letters preceding it. The second dispute was a dispute of interest. The underlying grievance was the issue of the labour broker. According to the first applicant's referral form, the second dispute arose on 18 July 2005 and it was referred to the NBCRFI on the 27 July 2005, *vide* p. 12 exhibit A.

[27] The second feature of the letter which distinguishes it from the five letters written before it, as specified in paragraph 23, is the location of the words “recognition agreement”. In all of those five letters the formal headings were the same, namely recognition agreement. These words, or words to that effect, were written in bold letters immediately below the salutation. They, at once and in a conspicuous manner, catch the reader’s attention and clearly indicate to the reader what the common subject-matter of those letters was.

Unlike those letters, the letter of 2 September 2005 was differently structured. The formal heading was not recognition agreement. It was different. This is important. Take a look at the letter again. The words “Recognition Agreement” appeared as the tail of the third paragraph. Besides the letters R (for recognition) and A (for agreement) which were written in capitals, the two words were written in small letters. It is also important to note that the two words were put in brackets. All these five or so features are further distinguishing properties of the letter.

[28] As I see it, all these peculiar features, give this letter another meaning, a different and a whole new meaning. The substantive scheme of things, as borne out by the structure of the letter itself, suggests that the issue of the recognition agreement was not what the letter was

concerned about – contrary to what paragraph 3 may, at a glance, seem to imply. Taking it on its face value and considering it in isolation, it may create the impression that the strike was about recognition agreement. The fact of the matter is that the letter does not specify the actual grievance which gave rise to the contemplated strike. To that extent it was unclear. But so was the reply thereto. The respondent did not say why it considered the strike unlawful. The letter was intended, first and foremost, to be notice of strike in terms of section 64, Labour Relations Act No. 66/1995. I am convinced that was the topic of the letter and not the grievance of the strike. Therefore, it will be readily appreciated that the theme of this letter was completely different. This particular letter was in a class of its own. The proposed industrial strike action was supposed to commence on Sunday the 4 September 2005.

[29] There is a distinct transition between paragraph 2 and paragraph 3 of the letter. The author stated that, **before, during and after** the industrial strike action, the union would still be available to meet the employer to try and resolve the dispute relating to the recognition agreement. He did not say the industrial strike action flowed from the recognition agreement. If it did, it would have been an unlawful industrial strike action since the dispute of right (recognition agreement) had already been timeously conciliated on the 17 August 2005 and the parties were still

waiting for the conciliator's award. Such award was still outstanding as on 2 September 2005.

[30] Mr T C Nkosi struck me as a knowledgeable unionist. He testified that he knew all these legal intricacies. In particular he knew that on 2 September 2005 he could not sent a notice to embark on an industrial strike action on 4 September 2005 in connection with the first dispute, namely the dispute of rights, concerning the recognition agreement. Given his knowledge, the composed and confident manner in which he testified, it seems to me improbable that he would, on behalf of the union, prematurely have given the employer notice of strike, which strike he considered lawful in terms of section 64 and persisted throughout his testimony that it was protected.

[31] The prepositions before, during and after as used in paragraph 3 of the letter seem to convey a message that the union was willing to engage the employer in further negotiations pertaining to the recognition agreement which was not hit by the contemplated industrial strike action. The opening phrase "Be (sic) as it may" fortifies the conclusion that in paragraph 3 of the letter, the writer was venturing into something else. The something else, of course, was the recognition agreement, which was not affected by the strike. As I see it, the bracketed words, recognition agreement, were used to qualify the word

"dispute" immediately preceding them and, not the words "the industrial action" used earlier in the sentence far away from them.

[32] On the same day, Friday the 2 September 2005 the respondent reacted to the notice of strike. The response was:

"Dear Mr Nkosi

RE: 48 HRS NOTICE

Your letter of 2 September 2005 refers.

The proposed industrial action is unprocedural and unprotected.

Should your members embark on such industrial action, they will be liable for dismissal.

Yours sincerely

(signed)

H ROUX

HUMAN RESOURCES OFFICER"

[33] This concise response was an outright rejection to negotiate about any dispute – particularly the first dispute about the recognition agreement which the union was prepared to discuss with the employer – strike or no strike. Over and above such cold rejection, I get the distinct impression that the respondent was too quick to jump to the conclusion that the industrial strike action was directly linked to the first dispute. The connective tissue was, so

reckoned the respondent, the two magic words, “recognition agreement” used in the notice of strike. So convinced was the respondent about the grievance that the strike was intended to address or highlight that it overlooked to give the matter a serious second thought.

[34] It seems to me that the critical assertion in the first paragraph of the letter to the effect that the notice of strike was given in terms of section 64 was given little or no attention. The respondent wasted no time to label the industrial strike action as unlawful. I am in agreement with counsel for the respondent that the first notice of 2 September 2005 was somewhat unclear and not adequately informative and specific. But so was the respondents’ response of 2 September 2005. It too asserted that the industrial strike action was unprocedural and unprotected without specifying the reasons. It would appear that the respondent never asked the question as to what else could make the proposed strike lawful. Had this question ever crossed the mind of the respondent’s functionaries they would probably have realised that the notice of strike could have related to the issue of the labour broker, in other words, the second dispute referred to the NBCRFI more than 30 days earlier on the 27 July 2005 in respect of which no conciliation proceedings had been held. If, on the one hand, the union had specified that the notice was given in terms of section 64(2) then the

industrial strike action would indeed have been illegal as the respondent contented. If, on the other hand, the union had specified that the notice was given in terms of section 64(1) then the industrial strike action would not necessarily have been illegal.

[35] At any rate the first notice of strike was withdrawn the next day, on Saturday, the 3 September 2005. The testimony of Mr Nkosi was that the decision of the union to withdraw such notice was influenced by the arbitration award, exhibit F, which was delivered to him per *traditio manu* earlier on the very same day. But he did not thereby mean that there was a connection between the strike planned for the 4 September 2005 and the first dispute referred to the CCMA whose advisory award was dated 3 September 2005. He was firm that the union was not influenced to do so by the employer's claim that the planned industrial strike action was unprocedural and unprotected. His testimony that he received the advisory award at the CCMA on Saturday the 3 September 2005 was to a certain extent indirectly corroborated by Mr Vilakazi, the shop steward. Moreover, exhibit E tended to give credence to his testimony to the effect that the CCMA office operates even on Saturdays. I accept his evidence in this regard and also that he informally received the arbitration award on Saturday, 3 September 2005 by hand when he happened to be at the CCMA in connection with a different matter. The said

exhibit served as an element of true corroboration.

[36] I have to stress that his evidence that the union withdrew the first notice of strike in the hope that the employer would be prepared to negotiate seriously in accordance with the advisory award makes perfect sense. The fact that the union, at the same time as it was informing the employer about the withdrawal of the first notice of strike, also alerted the employer that it would notify the employer of the new date on which the contemplated industrial strike action would commence fits quite well into the contention of the applicants that such industrial strike action was unrelated to the first dispute. The respondent did not see things that way and did not want to entertain the thought that the union could be correct and the respondent incorrect as regards the lawfulness of the industrial strike action.

[37] The respondent snubbed the first applicant's request for a bilateral meeting to resolve the first dispute notwithstanding the looming industrial strike action. The first applicant's decision to call off such an industrial strike action did virtually nothing to persuade the respondent to meet the first applicant so as to resolve the first dispute. Attitudes hardened on both sides. When it became evident to the union that the respondent was not prepared to resolve even the first dispute through negotiations, the first applicant re-activated its notice of strike on the 5

September 2005.

[38] The notice of strike reads:

¡°DD : 05 SEPTEMBER 2005

TO : TRANSITON TRANSPORT

ATT : H R MANAGER
FAX : (011) 915-2202

Sirs

RE : 48 HRS NOTICE IN TERMS OF SECTION 64(1) (B)

The above-said subject refers.

This letter serves as an official notice to embark on a protected industrial action, in terms of section 64(1)(b) of the LRA, Act No 66 of 1995, as amended from time to time.

The proposed industrial action will commence on Thursday the 08th September 2005.

The union doors are open for negotiations in an attempt to resolve the dispute.

We trust that the above is in order.

Regards

(signed)
T C NKOSI
UNION OFFICIAL"

[39] The second notice was clear. This time the union stated that the notice of strike was given in terms of section 64(1)

(b). The section implicitly covers disputes of interests. It does not require an advisory award. The special strike procedure as regards disputes of rights is set out in section 64(2). It reads:

> ¡°If the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135 (3)(c) before notice is given in terms of subsection (1)(b) or (c)."

The section goes on to say that a refusal to bargain includes: a refusal to recognise a trade union as a collective bargaining agent.

[40] Again the respondent ignored the first applicant's invitation to "attempt to resolve dispute" through negotiations. On this occasion as on the previous occasion, the notice of strike did not specify the grievance or the dispute to which it related. But on this occasion, the notice made it quite clear that the industrial strike action was not about a refusal to bargain as regards the issue of a recognition agreement. Although the notice did not say what the grievance was, it did say what it was not. The respondent's inflexible stance continued to be that "The proposed industrial action is unprotected" and that "should your members embark on such action, they will be dismissed." *Vide* p. 18, exhibit B.

[41] What emerged from the two notices of strike issued by the union on the 2 September 2005 and on the 5 September 2005 – and the employer's two responses on the same

dates was: the union's serious intention to seek a negotiated resolution of the disputes and the employer's serious determination not to negotiate but rather to dismiss.

[42] The second notice of strike dated Monday the 5 September 2005 stated that the industrial strike action would commence on Thursday the 8 September 2005.

It was given in terms of section 64(1)(b). It allowed the respondent the requisite 48 hours before the strike commenced. By 5 September 2005 the dispute of mutual interest referred to the NBCRFI had still not been conciliated. The 30 day conciliation period had already lapsed. The evidence led by both parties was that the industrial strike action commenced on Thursday 8 September 2005. Mr Baloyi submitted that all these facettes of undisputed evidence completely satisfied the legislative conditions necessary for an industrial strike action to be protected. I am persuaded that the submission is correct. Apart from its response of 5 September 2005 – *vide* p. 18, exhibit B, on Tuesday the 6 September 2005 the respondent also sent an urgent letter to the national secretary of the first applicant and bypassed the first applicant's trade union organiser, Mr T C Nkosi. Through the pen of Ms Bosch, the respondent gave its own account of events as from 1 August 2005 tot 6 September 2005. In the longest letter exhibited in these proceedings the

respondent levelled a few accusations against Mr T C Nkosi. It is clear that the respondents regarded him as the troublemaker who instigated work stoppages and illegal strikes which disrupted its operations.

[43] It is important to quote the respondent's reasons for its assertion that the industrial strike action planned for Thursday the 8 September 2005 would be an illegal one. At paragraph 9 of the letter the respondent wrote:

> "9. To summarise: The proposed industrial action will be unprotected briefly for the following reasons:
>
> 9.1 On 17 August 2005, Mr Nkosi and ourselves met at the CCMA for a conciliation meeting, the primary issue being "Collective Agreement on Organisational Rights" (case ref.: GAJB 17374-05). The Company raised a point *in limine* at the conciliation to the effect **that no dispute existed**. The parties were instructed by Commissioner B Mbovane to submit written representations by 19 August 2005. This was done and we still await the Coma's ruling in this regard.
>
> 9.2 Thus, the proposed industrial action will not only be premature, but also unprocedural from the point of view that **disputes concerning organisational rights**, collective agreements, etc. must, once conciliation has been concluded, be referred to arbitration. Strikes are not lawfully permitted in respect of this type of dispute – a fact of which your Mr Nkosi is apparently unaware or chooses deliberately to ignore."

[44] During the conciliation hearing at the CCMA on 17 Augustus 2005 – Ms Bosch argued on behalf of the respondent that there was no dispute as regards the issue of the recognition agreement. Similarly, during the trial in the Labour Court on 15 March 2007 she testified on behalf of the respondent that there was no dispute as regards the issue of the labour brokers. Her wishful denials could not be reconciled with the undisputed facts. The fact remains that the workers, rightly or wrongly, believed that their employer was refusing to recognise their bargaining agent and that their employer was using a labour broker. As a result of these alleged unfair labour practices, they declared two labour disputes. Eventually they went on strike in connection with the dispute of interest.

[45] But in its fax to the national secretary, the respondent still persisted that the proposed industrial strike action was about organisational rights – section 64(2). The same witness Ms Bosch did not disclose to the national secretary that according to the union's second notice of strike (5 September 2005) the grievance which gave rise to the impending industrial strike action was not specified but that the notice was given in terms of section 64(1) and not section 64(2). The gravity of the respondents' letter in particular and the adverse impact of the ultimate

deadlocked industrial situation demanded a response, an urgent one, to resolve the conflict. No reason, not even a speculative reason for that matter, was ventured out, on behalf of the respondent, as why the first applicant would have decided not to answer the letter bearing in mind the parties kept each other constantly posted. The probabilities favour the contention that the union replied and the employer received the reply.

[46] At paragraph 10 the respondent continued as follows:

> "10. In view of the above, we now advise as follows:
>
> 10.1 Should your members indeed embark on the intended unprotected industrial action on 8 September 2005, or on any other date for that matter, then the Company will have no option but to terminate their employment with immediate effect. We have tried our utmost to prevent this type of conduct from recurring, but to no avail. Moreover, the members received final written warnings for their participation in previous unprotected strike action."

The trade mark threat of the respondent was repeated to the national secretary.

[47] At paragraph 11 the respondent concluded as follows:

> "11. We trust that you will intervene in this matter as we do not wish to see our staff joining the ranks of the

unemployed."

This was not a sincere statement given the fact that the respondent had deliberately ignored the trade union organiser's request for meetings, not once but twice, in less than a week immediately preceding the respondent's letter to the national secretary purporting to seek the latter's intervention.

[48] One of the primary objectives of the current labour legislation is to promote orderly collective bargaining. Section 64(1)(b) gives expression to this objective by requiring written notice of the commencement of the proposed strike. Such notice will be declared fatally defective if, for instance, it gives the employer concerned less than 48 hours to consider and to decide about its line of action. Where the strike is commenced with less than the prescribed 48 hours, it will render a notice defective. In **CERAMIC INDUSTIRES LTD t/a BETTA SANITARY WARE v NATIONAL CONSTRUCTION BUILDING & ALLIED WORKERS UNION** 1997 (2) 18 ILJ 671 (LAC) the court held that if the notice of the proposed strike did not comply with the provisions of section 64(1)(b) it would be defective and the strike pursuant to such defective notice would be unprotected. I know of no provision or authority and none was cited by counsel for the respondent for the proposition that a notice of strike would be defective and

the subsequent strike unlawful on the ground that such notice did not specify the grievance of the strike.

[49] Counsel for the respondent vigorously suggested to Mr Nkosi and also argued that neither the first applicant's national secretary nor any union official answered the respondent's letter of the 6 September 2005. Indeed the suggestion and argument stemmed directly from the testimonies of the respondent's witnesses, Mr Viljoen and Ms Bosch. However, Mr Nkosi was steadfast during his chief examination and cross examination that on the 7 September 2005 he did answer the respondent's letter of 6 September 2005. He denied the insinuation that the letter contained in the applicant's bundle of documents which was handed to the respondent's counsel, Ms Charoux, on the 15 March 2007, was a fake, recently fabricated.

[50] The controversial letter reads:

"DATE 07 SEPTEMBER 2005

TO : TRANSITON TRANSPORT
ATT : Ms I BOSCH
FAX : (011) 915-2202

Madam

RE : 48 HRS/PROTECTED INDUSTRIAL ACTION

Your letter dated the 06/Sep/2005 refers.

The above said letter is misleading as it mispresents, facts

misinterpret the LRA.

The notice served on the 05 September has to do with mutual interest disputes in terms of section 64(1) a (sic) 134 of the LRA, Act No 66 of 1995 as amended from time to time.

Be (sic) as it, (sic) the union will avail itself for negotiations.
Regards,

T C NKOSI
UNION OFFCIALS"

[51] Ms Charoux urged me to disregard the aforesaid letter on the grounds that it really never came into existence on the day it purports to have come. But Mr Baloyi urged me to take the letter into account on the grounds that it was an authentic letter and not a fake (recently and deceptively created in order to bolster the applicant's case).

[52] At paragraph 3 of its letter of the 6 September 2005 the respondent wrote about the industrial strike action scheduled for Sunday the 4 September 2005:

> "3. On 2 September 2005, a facsimile was received from your Mr Nkosi in terms of which he gave 48 hours notice of commencement of industrial action on 4 September 2005. This dispute concerned the Recognition Agreement. (Please refer to Annexure A attached hereto)."

[53] At paragraph 9.2 of its same letter the respondent wrote as follows about the industrial strike action which was scheduled to commence on Thursday the 8 September 2005:

> "9.2 Thus, the proposed industrial action will not only be premature, but also unprocedural from the point of view that disputes concerning organisational rights, collective agreements, etc. must, once conciliation has been concluded, be referred to arbitration. Strikes are not lawfully permitted in respect of this type of dispute – a fact of which your Mr Nkosi is apparently unaware or chooses deliberately to ignore."

[54] It is clear from those two extracts from the letter that the respondent still believed that the industrial strike action was about the dispute of rights. Moreover, the respondent, in the same letter levelled certain personal accusations against the union organiser. Above all this the respondent expressly exhorted the national secretary to intervene. Mr Nkosi's testimony was that the first applicant received the respondent's letter, that the letter came to his attention and that, on behalf of the first applicant, he answered the letter. He explained that his letter of the 7 September 2005 was elicited by the respondent's letter of the 6 September 2005. He did not personally write the letter. He dictated it to his secretary who wrote it by hand on his instructions which he

apparently conveyed to her over the telephone. The letter cleared up whatever misgiving or incorrect impressions that could previously have been created. It stated in crystally clear language that the looming industrial strike action had to do with mutual interest. It was not about disputes of right but rather dispute of interest.

[55] The respondent's detailed letter to the first applicant is a very important letter on account of its contents. The fact that its intended target was the national secretary, someone very high up the echelon of power underscores its vital importance. Now the respondent wants me to belief that the applicants did not at all respond to such an important letter, the longest of them all on record, with a great variety of allegations including wrong perceptions or assertions concerning the connection between the impending strike and its underlying cause.

[56] The record shows that for every letter written by the one party to the other in the instant case there was almost invariably an immediate corresponding reply. I am not persuaded, as the respondent would have it, that of all the faxes which were transmitted to and fro, the first applicant, for absolutely no apparent reason, received but chose not to answer such an important letter from the respondent, written and received at a critical moment in parties labour relations. It must be borne in mind that since the 2

September 2005 this was the first letter in which the respondent, anyway signalled its intention to talk to the first applicant about the fast deteriorating labour relations on its plant.

I pause to observe. Nowhere in this detailed and long history does the respondent say a word about the second dispute.

[57] Ms Charoux pointed and Mr Nkosi admitted that in the founding affidavit he made in support of the union's urgent application under case number J1820/05 of this court, shortly after the dismissals of the strikers on 19 September 2005, no mention was made of the letter of 7 September 2005 from Satawu to Transition – vide p. 7 – 8 exhibit A. The relevant portions of Mr Nkosi's affidavit reads:

> "4.5 On the 6 September the Respondent, through its industrial Relations manager, Ms. Ilse Bosch wrote to the deponent herein and advised that should "your members embark on such action, they will be dismissed." A copy of the aforesaid letter is annexured hereto marked "TNC 3".
>
> 4.6 A similar letter was sent to the General Secretary of the First Applicant dated 8 September 2005, copy of which is annexured hereto marked "TNC 4".
>
> 4.7 On the 9th September 2005 the union wrote a letter to the Respondent in response to the abovementioned correspondent indicating that if the respondent is of the view that the strike is unprotected, a declaratory order

> and/or interdict should accordingly be obtained by the Respondent from the Labour Court to that effect. A copy of the said letter is attached hereto marked "TNC 55"."

[58] On the strength of the aforegoing Ms Charoux submitted that the witness' affidavit was a true reflection of all the correspondence between the parties between 6 and 9 September 2005, and that no letter was faxed from the first applicant to the respondent on 7 September 2005. The submission is not really persuasive. In the first place there is no indication anywhere in the affidavit where the deponent averred that the three specified letters constituted an exhaustive list of the correspondence exchanged between the parties. For instance he did not mention the equally important letter of 5 September 2005 (notice of strike) which precipitated the dismissals. Both letters of 5 September 2005 and 7 September 2005 from Satawu to Transiton stated that the notice of strike was in terms of section 64(1)(b). The letter of 7 September 2005 went a step further and also specified the grievance as mutual interest. As I have already found, even if the letter of 7 September 2005 was never written, there is enough material to support the contention that the reason for the strike was not the alleged refusal to bargain in connection with the recognition agreement which dispute was pending in the CCMA but rather the issue of the labour broker, which dispute was still pending in the aforesaid National

Bargaining Council.

[59] The fax transmission report shows that on 7 September 2007 at 17h30 one document number 0316 was transmitted to fax recipient number 011-915 2202 from SATAWU at Springs whose fax number is 011-815 2852. The fax message reads:

> "Document has been sent."

Vide p. 20 exhibit B.

When the respondent's witness was confronted with this technological piece of evidence, they were not able to give any sensible answer. All Ms Bosch could really say was that she was not an expert to explain the apparent fax transmission report of a document which did not really exist at the time it was purportedly sent through.

[60] Her evidence that she did not receive the letter in question and that it only came to her attention for the first time on 15 March 2007 may be possible but it is highly improbable. However, the crucial issue is whether the letter in truth and in reality existed at the time and whether it was sent to the respondent. On the facts the answer to both must be affirmative. The fax transmission report materially enhances the probabilities of the applicants' version and strongly militates against the respondent's contention that the letter

was fabricated *ex post facto*. I hold the firm view that, on the facts, the first applicant has discharged the onus that the respondent probably received the letter of 7 September 2005. Mr Nkosi's testimony that the original had gone missing and that it could not be found was a reasonable explanation bearing in mind the circumstances in which it was written. In the respondent's heads of argument virtually nothing was said about the important fax transmission report. The failure of the respondent's counsel to address me on this aspect is not without significance.

[61] The aforesaid finding disposes of the crux of the case. The industrial strike action the applicants declared on 5 September 2005, which commenced on Thursday 8 September 2005, was all about the second dispute referred to NBCRFI on 27 July 2005. That second dispute remained unresolved for more than 30 days. On 5 September 2005 when the first applicant gave the respondent notice in terms of section 64 LRA No. 66 of 1995 such notice was valid. The industrial strike action of 8 September 2005 commenced after the expiry of the requisite forty eight hour notice. Therefore the industrial strike action was procedural and protected. Neither the notice of strike nor the industrial strike action was premature, unprocedural and unprotected as the respondent contended. Since the notice was valid, the strike procedural and protected, it cannot be said the strike was unjustified. The strike was justified. **RAM & OTHERS v**

BTR SARMCOL-DIVISION OF BTR DUNLOP LTD (1996) 17 ILJ 72 (LAC).

[62] The argument and the suggestion, that the union and its members were obliged to go to arbitration before they could embark on an industrial strike action in connection with the second dispute, is fallacious. The certificate of outcome in respect of the dispute of interest was issued by Mr. Ackermann under the aegis of the aforesaid National Bargaining Council. He did so on 23 September 2005, fifteen days after the industrial strike action had commenced. By then the whole thing was water under the bridge even if directing the parties to arbitration was permissible. The participation of the workers in an industrial strike action was an accomplished fact. So was their dismissals. As regards these proceedings the belated certificate of Mr Ackermann was of no moment. The second dispute was, after all, a dispute of interests and accordingly not arbitrable.

[63] An attempt was made by counsel for the respondent to rely on certain inadmissible document for the suggestion that even if the grievance of the strike was a dispute of interest, the strike action would, in any case still have been unprotected. It was suggested to Mr Nkosi that such strike action did not comply with the grievance procedure as contained in a collective agreement I disallowed that line of cross-examination because it was not part of the

respondent's pleaded case and there was no evidence by the respondent as regards the alleged agreed disciplinary procedure. But besides that obstacle, failure to comply with pre-strike domestic procedures embodied in a collective agreement does not render an industrial strike action unprotected provided the strikers have followed the statutory pre-strike procedures instead. **KGASAGO & OTHERS v MEAT PLUS CC** (1999) BLLR 424 LAC. **HOSPERSA & ANOTHER v NORTHERN CAPE PROVINCIAL ADMINISTRATION**, *supra*, at par. 10.

[64] A video footage of the first day of the industrial strike action on Thursday 8 September 2005 was, by mutual consent, played out in court. I watched the video footage and read its transcript – exhibit C. The respondent tendered the evidence in a bit to show that the industrial strike action was about a dispute of rights and not a dispute of interests. The proceedings, if I may use the word in a loose sense, were filmed in the absence of the unionist of the striking employees, Mr. Nkosi. They obviously did not understand English very well. Someone was used as an interpreter, between management represented by Mr. Viljoen and Ms Bosch and the strikers. What took place there was an abortive and a belated attempt by the respondent to diffuse the situation by directly engaging the first applicant's members in a haphazard dialogue belatedly arranged without a proper consultative invitation to their union.

[65] Before any striker could say a word about the industrial strike action, Ms Bosch, in a rather commandative tone and presumptive manner, said things like:

> "Now listen to me"
>
> "Run to the CCMA, run to Bargaining Council"
>
> "As I stand here still today he has not shown me his agreement. So he has not given me the opportunity to talk or negotiate an agreement."
>
> "Now you say sign the agreement and I haven't even seen it."
> "Tolani is taking you down the wrong road."

Vide p. 1 exhibit C.

[66] Those commands, accusations and assumptions were clearly not designed to determine from the strikers themselves what the strike actually entailed but rather to tell them what the management reckoned the strike was all about. The respondent's management knew quite well what the industrial strike action was about. The claim of the respondent that the dispute of interest did not exist like its claim that the letter of 7 September 2005 did not exist was a lamentable flight from reality. I am not impressed. The strikers' union had told them what it was all about. That pill was too bitter for them to swallow. When they met the strikers they sang a different tune.

[67] For Ms Bosch to say to the strikers

> "I am prepared to talk to your rep ..." was not sincere.

Their representative had, on no less than three occasions, asked for such talks but simply ignored by the respondent. The statement was undoubtedly false. To say their rep was taking them down the wrong road did not only amount to backstabbing the unionist but also made in bad taste in an attempt to drive a wedge between the strikers and their union. The statement was actuated by malice to ruin the relationship between the union and its members. This strengthens the unionists' evidence that the respondent was opposed to the idea of unionisation of its employees and that the respondent did not want to negotiate in good faith.

[68] During the cause of the standoff Mr. Vilakazi said the following, among others:

> "I've got a letter from the CCMA"

Later on he said

> "I am saying that you must call Mr Nkosi. He must come here. He must come here to sign agreement..."

Vide p.1 exhibit C.

[69] On behalf of the respondent it was argued that reference to

the advisory award from the CCMA was an indication that the industrial strike action was about the dispute pertaining to the recognition agreement and not a dispute pertaining to the labour broker. It was further argued that reference to the word "agreement" was reference to the recognition agreement. At first Mr. Vilakazi admitted this suggestion. But when counsel for the respondent revisited the point the witness somersaulted. He answered that when he said Mr. Nkosi must be called to sign the agreement he actually meant an agreement about the issue of the labour broker and not recognition agreement. On a few occasions during his cross-examination Mr. Vilakazi repeatedly said he was unable to answer certain intricate legal questions and frankly asked that such questions be deferred to Mr. Nkosi, his advisor. Mr. Vilakazi was not an impressive witness.

[70] On the other side of the coin, Mr. Viljoen had no comment on Mr. Baloyi's suggestion that he and Ms Bosch were driving the entire communication process, according to the video footage, and that none of them ever pertinently enquired from the strikers why they were striking. He also conceded that the placard showed what the grievance of the strikers was. The placard read:

"Transiton down with casual and driver hire."

It was a demand by the strikers that their employer should

stop using casual workers and labour brokers. But nothing was said in any placard about recognition agreement, Mr. Viljoen also conceded this point. Certainly he would have had it captured on video, if there was.

[71] By and large the whole encounter between the management and the strikers was not a structured and formalised meeting. It had no semblance of the sort of negotiations the union had in mind and had been requesting all along. It was a peaceful but hostile encounter. The submission, that the video footage shows what the industrial strike action was all about, is neither here nor there. If anything the video footage tendered to give credence to the version of the strikers.

[72] The respondent contended that the applicants raised the grievance relating to the labour broker for the first time on 15 March 2007. The issue, so went the respondent's contention, was something which took the respondent by surprise and demonstrated just what a fake the union's letter of 7 September 2005 was. The contention was completely misplaced. The issue of the labour broker, identified by Mr. Nkosi as DHL Labour Brokers was raised and brought to the respondent's attention on three different occasions before the trial commenced on 15 March 2003. *Vide* p. 13 exhibit B at par. 3 – referral form in respect of the second dispute to the NBCRFI dated 27 July 2007. *Vide* the strike grievance

placard – video footage filmed on 9 September 2005, the second day of the industrial strike action. *Vide* p. 5 exhibit B par. 4.2 statement of claim dated 1 December 2005. This paragraph is worth quoting:

> ¡°On the 27th July 2005, the union made a referral to the Bargaining Council for the Road Freight Industry, (The Bargaining Council) which dispute relate to the usage of Labour broker by the Respondent, A copy of the referral form is attached hereto and marked "**TCN2**".

[73] The mere fact that there was no correspondence about the issue of the labour broker does not necessarily justify the conclusion that the industrial strike action was therefore about the recognition agreement. Such a contention is an argument as thin as the casing of a sausage. The evidence clearly reveals that the strategy of the union in its dealings with the employer of the strikers was to tackle one thing at a time. The issue of the labour broker was the second item on the priority list of the union. The issue of the recognition agreement topped the list. The applicants concentrated on the first thing first. Naturally they expected that resolution of the first dispute would facilitate resolution of the second. But when it became apparent that resolving the first was going to be a hard, hostile, drawn out and ugly battle, they changed their strategy and intensified the battle on both fronts of the conflict. They took the respondent by the scuffle of the neck. They declared war on the second frontier. When the heat

was turned on, their opponent cried out that it was foul play. Certainly it was no guerrilla warfare. The rules of war allowed it. The industrial strike action was a fair play.

[74] The ultimate superior in the respondent's empire was quick to meet fire with fire. He decreed that the industrial strike action was unlawful. He, Mr. Sven Viljoen, without giving the strikers any valid ultimatum and without obtaining any court order declaring the industrial strike to be unprotected, not that he was obliged to, immediately resorted to an industrial lockout action and summarily charged the strikers. The misconduct levelled against them was described as:

> ¡°Participation in unprocedural and unprotected industrial action from Thursday 8 September 2005 at 07h00."

Vide exhibit D.

[75] The striking workers did not attend the disciplinary hearings on Friday 16 September 2005. The hearings were postponed. Three days later, they were resumed. Again the strikers declined to take any part. On that day, Monday 19 September 2005, they were dismissed *in absentia* for participating in an unprotected industrial strike action. The disciplinary hearings were chaired by Ms Helena Roux. She testified as the respondent's witness number 3. When it was put to her that the industrial strike action was legally

protected, she answered that no striking worker came forward to tell her why it was. Browsing over the respondent's bundle of documents - exhibit A - I discovered that the same Ms Roux was the writer of the respondent's letter to the applicant dated 2 September 2005, who first made the claim that the proposed industrial strike action was unprotected – *vide* p. 58 exhibit A. In my view, her objectivity as required of an impartial referee, was already compromised. Before she could hear the dispute she had already expressly sided with the respondent by expressing a view adverse to the striking workers.

[76] Because the industrial strike action was lawful the respondent was wrong in demanding that the striking employees must resume work, in resorting to the industrial lockout action, in accusing them, in finding them guilty and in dismissing them in their absence. Since the employees did not participate in an unlawful strike, they did not commit any misconduct which warranted the taking of any disciplinary actions against them. The verdict was premised on an assumed state of affairs, which did not really exist. There was no fair reason for the dismissals. As it were, they were automatically unfair.

[77] The respondent's witnesses, Mr Viljoen and Ms Bosch were unimpressive as witnesses. The lady's testimony was untrustworthy. I rejected their evidence whenever it

conflicted with that of the applicants. I accepted the evidence of the witnesses for the applicants, Mr Vilakazi and Mr Nkosi, and particularly of Mr Nkosi, wherever his evidence deflected from that of Mr Vilakazi.

[78] In the light of all these, I have come to the conclusion that the dismissals of the employees were procedurally and substantively unfair. Therefore, I am inclined to grant the relief as prayed for in the statement of claim.

[79] The applicants have been successful. They are entitled to the costs order. No reason exists as to why they should be deprived of the fruits of their success.

[80] Accordingly I make the following order:

80.1 The dismissals of the individual applicants were automatically unfair.

80.2 The respondent is directed to re-instate all the individual applicants with effect from the date of their dismissal on 19 September 2005 without loss of earnings or benefits on the same terms and conditions which governed their contracts of employment immediately prior to their dismissals.

80.3 The costs of all the applicants relating to this matter shall be borne and paid by the respondent.

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M. H. RAMPAI, AJ

On behalf of the applicants:	Attorney M.M. Baloyi Instructed by: SATAWU SPRINGS
On behalf of the respondent:	Adv. L. Charoux Instructed by: Yusuf Nagdee Attorneys BRAAMFONTEIN

Heard on: 11 January 2008

Delivered on: 7 February 2008

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