



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other Judges

Cases no: J2316/10, J1604/10

In the matter between

BUSCOR (PROPRIETARY) LIMITED

Applicant

and

TRANSPORT AND ALLIED WORKERS

UNION OF SOUTH AFRICA

Third Respondent

MANKGE, ZACK

Second Respondent

MNDEBELE, JABU

Third Respondent

THABETHE, BHEKI

Fourth Respondent

GININDA, ALFRED

Fifth Respondent

And

In the matter between:

TRANSPORT AND ALLIED WORKERS UNION OF

SOUTH AFRICA

First Applicant

K NGWENYA AND 310 OTHERS

Second and Further Applicants

and

BUSCOR (PROPRIETARY) LIMITED

Respondent

Heard: 14-18 and 21-25 Jan, 2-5 and 15-18 April 2013 and 27 July 2013

Date of Judgment: 24 October 2013

Summary: The majority parties to a Bargaining Council orally agreed to settle the industry related dispute followed by the signing of a collective agreement that bound all parties; strike related dismissal – unprotected strike – when protected industry strike become unprotected by agreement, custom or because the *substratum* of the strike fell away - fairness of *ultimata*; conduct of the union influencing relief granted - claim for compensation S 68 (1) (b) of the LRA

JUDGMENT

COETZEE, AJ:

- [1] In this matter, the crisp questions are (a) whether one union may continue with a protected strike after the majority of union parties to a Bargaining Council has orally accepted the employers' offer pending signature of a binding collective agreement (does acceptance of the offer by two of the three resolve the underlying dispute?); (b) whether a prior arrangement amongst the union parties to suspend the strike once an informal agreement has been reached is binding on the union parties and if so, whether the employer may rely upon such an arrangement to deem the strike as unprotected; and (c) whether a prior practice or custom to suspend a pending strike once the offer had been accepted orally pending signing of a binding agreement is binding on the union that did not accept the offer

and whether the employer may rely on such a practice or custom to regard a strike as unprotected.

- [2] The Court, on 13 April 2012, ordered that the matters under case numbers J2316/10 and J1604/10 be enrolled for trial as consolidated.
- [3] In Case No J1604/10 Transport and Allied Workers Union of South Africa ("TAWUSA") and 311 individual Applicants claim relief after having been dismissed for having participated in an alleged unprotected strike. This matter will be referred to as the "dismissal dispute".
- [4] In Case No J2316/10 Buscor (Proprietary) Limited claims compensation from TAWUSA, its General Secretary, one of its trade union officials and two others for their alleged role in the alleged unprotected strike for damages that Buscor allegedly suffered during an unprotected strike or the unprotected part of a strike. This matter will be referred to as the "compensation dispute".

The parties

- [5] The Applicant in the compensation dispute is Buscor which carries on business as a bus operator in the Lowveld Region of Mpumalanga and has depot and terminus facilities at Nelspruit, Malelane, White River, Barberton and Komatipoort. It is by far the largest bus operator in the area. Buscor is the Respondent in the dismissal dispute. In the compensation dispute Buscor claims compensation from Tawusa (First Respondent, Zack Mankge (Tawusa's General Secretary cited as the Second Respondent), Jabu Mndebele at the time a local organiser of Tawusa, Bheki Thabethe (The Fourth Respondent and at the time an official of Tawusa) and Alfred Gininda (the Fifth Respondent at the time also an official of Tawusa).
- [6] TAWUSA is the First Applicant in the dismissal dispute and the First Respondent in the compensation dispute and one of the founding trade union members of the South African Road Passenger Bargaining Council ("SARPBAC") and is a signatory to the SARPBAC Constitution. Tawusa also represents A Ngwenya and 310 others who are the Second and Further Applicants in the compensation dispute.

The role players

- [7] SATAWU is another founding member of SARPBAC and at the time, it was the union with the largest membership in the sector.
- [8] TOWU is the third union which is also a party to SARPBAC. At the time, it was represented in the negotiations by its General Secretary, Gary Wilson.
- [9] The parties agreed that the individual applicants and their relevant particulars are as set out on Annexure A1.
- [10] Buscor is a member of the South African Bus Employers Association ("SABEA"). SABEA is an employers' association party to SARPBAC.
- [11] Buscor as a member of SABEA is bound by the Constitution of and the Main Collective Agreement of SARPBAC.
- [12] TAWUSA, SATAWU and TOWU and their members are also bound by the Constitution and the Main Collective Agreement of SARPBAC.

Summary of the events and the submissions of the parties

- [13] The three union parties to a bargaining council complied with the statutory formalities to embark upon a protected strike. The day before the commencement of the strike, two of the three unions orally accepted the employers' revised offer and suspended the strike pending the signing ceremony arranged for the afternoon of the day when the strike was to have commenced.
- [14] TAWUSA, the third union, did not accept the offer and in accordance with the strike notice, embarked upon the planned strike suspended by the two other unions.
- [15] The strike continued until a collective agreement binding all three unions was signed by two unions and the employer party during the afternoon of the first day of the planned strike. After the conclusion of the collective agreement, TAWUSA informed the employers that its members would return to work the following day.

- [16] The employer essentially contends that the strike became unprotected from the time of acceptance of the offer by two of the three unions pending the conclusion of the collective agreement in terms of the Constitution because acceptance of the offer by two out of the three unions terminated the functionality of the strike.
- [17] The employer also argued that there was an agreement amongst the three unions to suspend the strike once the employers have made an offer in line with the agreed fall-back position of the unions. The employer also relied upon a custom or past practice in terms of which the unions suspended strike action from the date of acceptance of an offer until the formal signing of a collective agreement.
- [18] In respect of the ultimatums the employer argued that it justifiably feared violence and that the time afforded the applicants to adhere to the ultimatums was fair.
- [19] The Union maintained that the strike remained protected until the collective agreement (contemplated by the constitution of the bargaining council) was signed by the majority unions as the agreement only from that point in time became binding on all the parties.
- [20] The Union in argument disputed the ultimatums. It contended that at Nelspruit no final ultimatum was issued as its members had been dispersed by the Police around 12:00 before the agreement had been signed that afternoon while the final ultimatum allegedly was read out around 15:00 and also that the ultimatums were unfair, if they had been issued at all, because they granted too little time to the employees to reflect upon the demand(s) to return to work.
- [21] The union placed in dispute any custom or prior agreement amongst the union parties to suspend the strike once an offer from the employers was accepted by the two unions who formed the majority for purposes of the constitution (prior to signature of the agreement) or that such a prior practice ever existed.

- [22] It further contended that if there were such an agreement to suspend the strike, it was unknown to the employers and not knowing thereof the employers could not rely thereon.

The bargaining council, its constitution and the collective agreement

- [23] A number of provisions of the SARPBAC Constitution and Main Collective Agreement play a central role in this matter.

- [24] The first is "Appendix A" to the SARPBAC Constitution which deals with "Collective Agreements" and, *inter alia*, provides in clause 10 that:

‘Collective Agreements concluded by the majority of the Trade Union Parties to the Council and a majority of Employer's Associations to the Council bind all Parties to the Council and their members as well as all employers and employees bound in law by such Collective Agreements.
(emphasis added)

- [25] It was common cause at the trial that this clause means that any two union parties concluding a collective agreement with the Employer's Organisation form the majority of unions for purposes of Clause 10.

- [26] For purposes of the Constitution a collective agreement means:

‘A written agreement concerning Substantive Conditions of Employment or other matters of mutual interest to the Parties.’ (emphasis added)

- [27] The Constitution does not in specific terms require the written collective agreement to be signed by any of the parties before it becomes a binding collective agreement.

- [28] The Labour Relations Act similarly does not require a collective agreement to have to be signed:¹

“Collective agreement” means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand—

¹ LRA Section 213.

- (a) one or more employers;
- (b) one or more registered employers' organisations; or
- (c) one or more employers and one or more registered employers' organisations.'

[29] SABEA is the only and thus the "majority" Employer's Organisation to SARBPAC and a collective agreement between SABEA, on the one hand, and SATAWU and TOWA acting together on the other hand, would therefore bind TAWUSA by virtue of the provisions of clause 10 of Appendix "A" to the SARBPAC Constitution.

Rulings during the trial

[30] During the hearing, the Court made a number of rulings. The notable ones are set out below.

[31] The Court noted an objection against hearsay evidence and undertook at the conclusion of the trial to admit or exclude hearsay evidence as the case may be. This has been done.

[32] The Court ruled that it was not the pleaded case of the applicants that some of the applicants did not participate in the strike and for that reason their dismissal was unfair.

[33] The Court also ruled that it was not pleaded that separate disciplinary hearings for the members of separate unions or for non-members was unfair.

[34] The Court made a provisional ruling that the applicants may present evidence that allegedly members of SATAWU participated in the strike but was not disciplined and that this may be a ground for unfair dismissal of TAWUSA members, if proven, but that the issue of selective dismissal was not pleaded and no evidence might be adduced in this regard.

[35] The Court allowed an application by the applicants to amend their pleadings and ruled that the amendment would become effective when the replacement pages were filed and allowed an application by Buscor to

amend its claim and that the amendment would become effective when the amended pages were filed.

- [36] Buscor gave notice of a further amendment to reduce the compensation claim in respect of repairs by excluding some invoices. It was unopposed.
- [37] The union during the presentation of its case applied for an order that Buscor witnesses were to be recalled for the union to put to them that the public address system at Nelspruit was not working properly at the time of the strike or that the volume settings have been adjusted subsequently so that at the time of the inspection *in loco* one could hear the announcements while at the time of the strike that was not the case. The Court ruled that instead Buscor could at its discretion call a witness or witnesses to deal with this issue instead of a number of witnesses having to be recalled, one of which had by then passed away. Buscor recalled Dawie Wilson to testify on this aspect.

Background

- [38] It is common cause between the parties that during 2010, wage negotiations under the auspices of SARPBAC occurred.
- [39] The demands were presented by the three unions to the employer parties as "a collective" and as a joint set of demands.
- [40] When deadlock was reached, the dispute was referred to mediation. Deadlock was followed by an agreed 30 day cooling off period. A Commissioner of SARPBAC issued a certificate of non-resolution on 24 February 2010.
- [41] The dispute was then referred for a second round of mediation. The Commissioner continued to play a part in the further proceedings.
- [42] During the negotiations, the parties agreed on some of the issues while other issues remained in dispute.
- [43] An agreement between the employers and the unions, however, was subject to the parties reaching agreement on all the issues in dispute.

- [44] After expiry of the 30-day cooling off period provided for in the SARPBAC Constitution, the three trade union parties to SARPBAC, namely TAWUSA, SATAWU and TOWU, on Friday, 26 March 2010, jointly issued a 48 hour written notice of an industry wide strike effective from a minute past midnight on Sunday night/Monday morning 29 March 2010.
- [45] The strike was '... in respect of the industry level wage dispute.'²
- [46] The notice was addressed to the President of SABEA and the General Secretary of SARPBAC on behalf of the three unions.
- [47] Mr Gary Wilson (of TOWU) as scribe for the strike committee prepared the notice for and on behalf of the three unions.
- [48] There can be no doubt that the unions complied with the formalities of the LRA and the strike was to be a protected strike.
- [49] During the course of the weekend of Saturday 27 to Sunday 28 March 2010, a better proposal of a 10% across the board increase was submitted to the trade union parties on behalf of SABEA through the mediator³ on condition that all other demands not yet agreed to were taken off the table ("the revised offer").
- [50] TOWU had a mandate to settle on that basis and during Sunday, it informed the Commissioner accordingly.
- [51] SATAWU also during Sunday informed the Commissioner of its acceptance of the offer and that written confirmation would follow.
- [52] Both unions agreed to suspend the strike pending signing of the agreement on Monday afternoon.
- [53] On Sunday, Buscor was informed telephonically that the offer had been accepted by two of the three unions who also had agreed to suspend the strike.
- [54] On Sunday, to the knowledge of Mr Kobus Burger ("Burger"), representing Buscor, TAWUSA had not committed to or rejected the offer.

² Pre-trial minute Annexure "B" par 5.2.

³ Pre-trial minute Annexure "B" par 5.3.

- [55] The Commissioner on Sunday sent an email to various recipients. The email informed the parties of the developments and was sent *inter alia* to Grant Fleetwood, the representative of the employers, to Gary Wilson from TOWU, it is also addressed to A Mataboge of SATAWU, Zack Mankge at TAWUSA and various others.
- [56] The email⁴ is important and reads as follows:

‘Dear Lady and Gentlemen

Settlement

This serves to confirm that I have received a settlement offer from the employer which has been accepted by TOWU in writing and SATAWU verbally. SATAWU has indicated that they will furnish me with written confirmation of their acceptance of the employers offer in the next few minutes.

Please note that TAWUSA informed me that they may only furnish me with an official response sometime tomorrow. TAWUSA has therefore not accepted or rejected the employer offer until such time that they express their official response tomorrow.

I am advised that TOWU and SATAWU together constitute the majority of unions, and as such, the conditions of appendix A of the Constitution, clause 10, shall apply once the agreement is signed by the employer and the majority unions and that such agreement shall therefore constitute a collective agreement entered into and agreed by the parties to the Bargaining Council. SATAWU and TOWU have accordingly confirmed with me their respective members’ mandate to suspend the protected industrial action which was schedule to commence on Monday, 29 March.

Please further note that confirmation of the signing of the settlement agreement ceremony is being coordinated from the office of the General Secretary of the Council. All enquiries may be directed to her. It is my understanding and confirmation thereof that TOWU and SATAWU’s members shall not embark on any form of industrial action having accepted SABEA’s offer as outlined in Grant Fleetwood’s email of today.

⁴ Bundle page 46 – 47.

I trust the above is in order. Should anyone wish to clarify [he gives a phone number].

May I thank all the parties for their efforts to ensure we reach this stage. I also wish that TAWUSA's feedback session yields positive results.'

- [57] TAWUSA eventually did not agree to the suspension of the strike and its members in terms of the strike notice embarked on the strike on Monday 29 March 2010.⁵ It was in dispute as to whether the striking employees included SATAWU members.
- [58] TAWUSA formally adopted the view that the strike could go ahead as a protected strike until such time as a binding written collective agreement, as contemplated in the constitution, had been concluded.
- [59] It is common cause that on the morning of Monday, 29 March 2010, the majority of the early morning shifts operated from their departure points to Malelane and Nelspruit.
- [60] The early morning shifts which operated brought commuters from outlying areas into centres such as Nelspruit, White River and Malelane where most of the commuters would work.
- [61] From approximately 08h00 onwards, most of the off-peak shifts did not operate as drivers in Nelspruit gathered in the parking area.
- [62] Also according to the minute, at Malelane no shifts operated from approximately 08h00.
- [63] According to the pre-trial minute,⁶ the strike commenced on the morning of 29 March 2010 after the early morning shifts. It is further recorded that the strike was in respect of the industry level wage dispute.
- [64] Buscor contended that during the day, it issued three ultimatums to striking members of TAWUSA at Nelspruit and two at Malelane instructing them to return to work or face possible disciplinary action which could lead to dismissal.

⁵ Pre-trial minute Annexure "B" par 5.4.

⁶ Paragraph 5.1 of the compliance with the direction.

- [65] The ultimatums were in dispute. Firstly, because according to TAWUSA the ultimatums were never issued. On the assumption that they had been issued the ultimatums (or at least two at Nelspruit) were issued prior to the signing of the 2010 collective agreement and secondly, because the time granted to the strikers to return to work was unfair as it was too short.
- [66] TAWUSA (later during the trial) also disputed that if the ultimatums had been issued at Nelspruit, its members could hear the announcement of the ultimatums as the public address system allegedly was inadequate.
- [67] The contents of the ultimatums that Buscor claims to have issued read as set out below.
- [68] On the first one, the handwritten note 12:10 appears. It reads as follows and is referred to as the first ultimatum at Nelspruit:

‘MEMORANDUM TO ALL EMPLOYEES

12:10 Illegal and unprotected strike action

It has come to the attention of management that you have embarked on an illegal and unprotected strike since 10:00. Please note that this strike is unlawful and is not in line with section 64 of the Labour Relations Act of 1995 and the Bargaining Council Constitution, which means that the employees participating in the unlawful strike are guilty of misconduct. Management urges you to refrain from this action and to call off the strike within 30 minutes of receipt of this memorandum. Please understand that for the time being you are not working, you will not get paid.’

- [69] The second ultimatum issued at Nelspruit reads as follows:

‘MEMORANDUM TO ALL EMPLOYEES

Time: 14:55 Date: 29 March 2010

ULTIMATUM

You have not returned to work despite Management's previous request.

Please note that the strike action is unlawful and is not in line with Section 64 of the Labour Relations Act of 1995 and the SARPBAC Constitution,

which means that the employee participating in the unlawful strike is guilty of misconduct.

Management no longer accept your continued refusal to return to work and should you not adhere to this ultimatum by 14:30 this afternoon it will be considered as being in material breach of your employment agreement and you will be dismissed.

Management reserves the right to take disciplinary action as a result of your misconduct. Please understand that for the time you are not working, you will not get paid.

LJ Erasmus

Legal Advisor'

[70] The last ultimatum ("the final ultimatum") reads as follows:

'MEMORANDUM TO ALL EMPLOYEES.

15:35 (Handwritten note)

Final ultimatum Final ultimatum Final ultimatum

Final ultimatum to return to work.

You have been participating in an illegal and unprotected strike from 10:00. You have defied all requests to return to normal working, and furthermore, defied the ultimatum given to you earlier to return to normal duties at 14:30 today. We hereby inform you that you are issued with a final ultimatum, and we require that you return to normal working at 15:30 today.

NO OTHER WARNINGS WILL BE GIVEN. SHOULD YOU DECIDE NOT TO RETURN TO YOUR NORMAL WORKING DUTIES, YOU ARE INVITED THROUGH THE UNION TO MAKE REPRESENTATIONS AS TO WHY THE COMPANY SHOULD NOT EFFECT DISMISSALS. SUCH REPRESENTATIONS MUST REACH MANAGEMENT ON OR BEFORE THE ABOVEMENTIONED EXPIRY DATE AND TIME.

STAFF WHO DO NOT RESUME WORK, WILL NOT BE PERMITTED ON THE PREMISES AFTER THE APPOINTED TIME. THOSE EMPLOYEES WHO DO RETURN TO WORK WILL BE ACCEPTED BY MANAGEMENT AND PROTECTED AGAINST VICTIMISATION AS REASONABLY

POSSIBLE. SHOULD YOUR RETURN TO NORMAL WORKING DUTIES, THIS WILL PREVENT MANAGEMENT FROM BEING FORCED TO DISMISS YOU.

PLEASE BE INFORMED, HOWEVER, YOU WILL FACE DISCIPLINARY CHARGES DUE TO YOUR REFUSAL TO RETURN TO WORK. PLEASE NOTE THAT SHOULD YOU NOT ADHERE HERETO, BUSCOR WILL APPROACH THE LABOUR COURT OR THE HIGH COURT AS THE CASE MAY BE IN ORDER TO PROTECT THEIR RIGHTS, ASSETS AND INTERESTS.'

[71] The evidence was overwhelming that a written collective agreement was concluded during the afternoon of Monday 29 March 2010. The time when the agreement was concluded remained in dispute.

[72] A copy of the signed agreement was telefaxed to Burger of Buscor while he was at Malelane. It read as follows:

'We acknowledge with regret that in terms of the constitution of council, that it would bound by majority decision with the insistence of SATAWU.

In the circumstance we concede that our members are unable to continue with the protected strike action after the signing of the agreement by two unions.

However, due to logistical problem cause, arising from the fact that the agreement was signed late this afternoon we envisage that, we will only be able to get our message through on 30 March 2010.

In the meantime we have sent out a notice to all our branches, copy attached.

Yours faithfully

Zack Mankge, General Secretary.'

[73] The last paragraph of the annexure reads as follows:

'In the circumstances, our members are requested to return to work tomorrow morning as a result of this agreement (emphasis added).'

- [74] Buscor, on 30 March 2010, gave notice to TAWUSA that a collective disciplinary hearing would be held on 31 March 2010 at 13h00.
- [75] Buscor set a similar disciplinary hearing for the SATAWU members and non-union members together who allegedly participated in the strike also for 13:00 on 31 March 2010.
- [76] The two disciplinary hearings took place. The chairperson of the TAWUSA disciplinary hearing found the individual Applicants guilty of participating in an unprotected strike on 29 March 2010 and on 1 April 2010 dismissed them.
- [77] The individual Applicants collectively appealed against the outcome of the disciplinary hearing. An appeal hearing was held on 6 April 2010. The appeal chairman dismissed the appeal.
- [78] In the (separate) SATAWU hearing two employees were found guilty and were dismissed. The rest for various reasons were found not guilty. Everyone that was found guilty was dismissed.
- [79] It was in dispute whether the dismissals were procedurally and substantively fair.
- [80] The Applicants in the pre-trial minute alleged that their dismissal was unfair because:
- 80.1 The sanction was excessive and unfair.⁷
- 80.2 There was non-compliance with the *audi alterem partem rule* regard being had to the fact that TAWUSA was given notice at approximately 13h20 on 30 March 2010 that a collective (disciplinary) hearing would be held on 31 March 2010 at 13h00.⁸
- 80.3 The individuals were not given a fair opportunity to consider the case against them to prepare their defence in respect of the merits and in litigation.⁹

⁷ Pre-trial minute Annexure "B" par 8.1.1.

⁸ Pre-trial minute Annexure "B" par 8.1.2.

⁹ Pre-trial minute Annexure "B" par 8.1.3.

80.4 The ultimatums were given prior to the signing of the 2010 collective agreement and the period given for the strikers to return to work was very short.¹⁰

[81] TAWUSA introduced, by way of an amendment, a further ground by alleging that Buscor locked out its members and then dismissed them while being locked out.

Summary of the evidence:

[82] For convenience, the relevant evidence of some 20 witnesses over 18 days have been summarised below.

Evidence for BUSCOR

Assaria Mataboge

[83] He was the national sector co-ordinator and chief negotiator for SATAWU in 2010 and represented SATAWU during the negotiations and in what followed.

[84] According to him, SATAWU had more than 50% representivity in the industry at the time with between 7000 and 8000 members.

[85] During the negotiations, the three unions acted as "a collective". The unions had to "cascade back" to their members for a mandate depending upon what responses they received from the employers.

[86] Assaria Mataboge ("Mataboge"), Gary Wilson of TOWU and Mr Jabu Mndebele ("Mndebele") from TAWUSA in a national strike committee meeting jointly agreed to issue a strike notice on Friday 26 March 2010.

[87] The joint notice followed after the deadlock in February and once the formal processes had been followed.

[88] According to him, there was no dispute that all the unions were to be bound by the collective agreement as from the moment of signature of the Agreement.

¹⁰ Pre-trial minute Annexure "B" para 9.2.

- [89] Usually, a deal is reached followed by the signing of a formal agreement. It usually is impossible to immediately reduce the agreement to writing. Signing of the agreement is a formal occasion to see if everything is included in the agreement and to settle the wording of the clauses. No further negotiations took place once a deal had been struck.
- [90] The three unions initially each had their own demands. They, however, formulated a consolidated approach and a consolidated set of demands was put to the employers. During the "consolidation process", the three unions agreed on a fall-back position that was to accept 10% across the board if that were to be offered. This agreement dated back to the mediation period in February 2010.
- [91] In cross-examination, it was put to him that TAWUSA never agreed to the fall-back position of a 10% increase across the board. He agreed that no mention was made of a fall-back position in the email from the mediator to the unions informing them of the acceptance of the offer.
- [92] His explanation that the mediator would have known of the fall-back position but could not disclose it as it was disclosed to the mediator during the negotiations and thus was confidential, makes sense. He also (correctly) points out that the email deals with the suspension of the strike and the acceptance of the revised offer.
- [93] In cross examination, he pointed out that the email from Fleetwood on behalf of the employers confirmed the revised offer. Fleetwood would not have known about the agreed fall-back position of the unions and could not have referred to it.
- [94] He further testified that:

‘Question: Or are you saying that you were prepared to settle on 10% and then the other issues could fall off the table?’

Our position was that in respect of those outstanding issues as they were enjoyed by the majority of our members, should the employers agree to settle at 10% we may review those outstanding issues.’

- [95] Fleetwood representing SABEA called him on Saturday 27 March informing him that SABEA was considering making an offer of an across the board increase of 10% with all the remaining issues taken off the table. Mataboge requested him to put the offer through the mediator as that was the procedure agreed between the parties.
- [96] Mataboge then phoned Wilson and Mndebele informing them of the communication with Fleetwood and that an offer could be expected.
- [97] Mataboge on Saturday received a text message from the mediator conveying the revised offer. Mataboge conveyed the offer to the two other parties. According to him, the text message would have been sent to the representatives of all three unions and the other two in fact confirmed to him having received the same message.
- [98] Already on Saturday Mndebele informed him that he was cascading the offer down to the members for a mandate.
- [99] The process the unions have agreed to was that all of them should start communicating with their members to be able to come back on Sunday with a conclusive position that would suggest to them whether they continued with the strike or they called the strike off.
- [100] During Sunday, he was in contact with Wilson and Mndebele of TAWUSA while obtaining the final go-ahead from the structures of SATAWU for SATAWU to accept the revised offer.
- [101] The revised offer was in accordance with the fall back position of the unions, also that of SATAWU but he still had to comply with the internal processes of SATAWU to authorise acceptance of the offer.
- [102] By 12:00 on Sunday, he telephonically conveyed to the mediator SATAWU's acceptance and promised a written confirmation which eventually was in the form of an email *albeit* after Sunday.
- [103] On Sunday, he was in constant telephonic contact with Mndebele and Wilson. Wilson informed him on Sunday that TOWU was accepting the offer and Mndebele conveyed to him that in respect of the offer "things look

positive". Mndebele never on Sunday indicated to him that TAWUSA accepted or rejected the offer. The last communication with Mndebele was before 13:00.

[104] The email from Fleetwood to the mediator confirming the employers' revised offer was sent at 13:13.

[105] Mataboge received the mediator's email on Sunday. The mediator's email was sent 14:35. Mataboge testified that he had conveyed the acceptance of the offer to the mediator prior to 14:35.

[106] After acceptance of the offer by the two unions, Mataboge was inundated by the media and he granted a number of interviews and appeared on radio and ETV to announce the settlement and that the strike was suspended.

[107] The first announcement that he made on radio was that the strike was suspended at 14:00 on Sunday 29 March 2010. He could make the announcement as SATAWU and TOWU had accepted the offer by that time and they were the majority unions.

[108] He referred to a press release on Sunday where Mndebele was quoted as saying that the strike would continue on Monday.

[109] According to him, the suspension of the strike was binding on TAWUSA and any strike thereafter would be unprotected.

[110] He said:

'... that after the two unions which may constitute a majority in the bargaining forum can confirm that they accept the offer from the employers association, therefore the strike that may take place beyond that day would not be a legal strike.'

[111] He motivated this view based on the negotiations and discussions between the unions that when the offer was accepted there would be a settlement:

'If you check my email I was shocked because among ourselves as unions during our discussions in the presence of Jabu Mndebele representing TAWU, it was a clear understanding that should there be a positive

response from the employers in terms of what we want, obviously the strike would not take place.'

[112] He said that in each of the three years prior to 2010, the unions agreed not to proceed with a strike once an offer from the employers had been accepted.

[113] He alluded to previous occasions where deadlock was reached and where no strike followed:

'I want to confirm in this court that that was not the first instance. We had similar situations in the previous years, I think two or three years, where in which we would negotiate, end up being a deadlock situation, go through the mediation process, be issued with a certificate to strike and lockout, and just towards the end of the 30-day cooling period, the employers would come back and say, "We are accepting or confirming the acceptance of what you are demanding".

And was TAWU involved in those negotiations in those previous years? - Yes, they were.

And did TAWU's members suspend their strike once the settlement was reached informally before the agreement was signed formally? - All unions complied.'

[114] Mataboge believed that the oral agreement reached on Sunday 29 March 2010 invoked clause 10 also binding TAWUSA. He said so much in an email in response to an email from TAWUSA.

[115] He attended the signing ceremony in Randburg at the offices of SABEA. The ceremony was set for 13:00 Monday 29 March 2010.

[116] Wilson was also present. Wilson is stationed in Cape Town but attended the ceremony. Mr Mankge of TAWUSA and his whole delegation arrived late and indicated that they were present merely to observe the proceedings.

[117] It took a while to ensure that the agreement contained all the issues on which the parties had already settled and to obtain the consensus of the parties to the wording of the agreement.

- [118] The agreement was probably signed after 14:00 but before 15:30. In cross-examination, he thought it was signed just before 14:30 on Monday 29 March 2010. He denied that any further negotiations took place as alleged by TAWUSA. TAWUSA did not sign the agreement.
- [119] It was put to him that SATAWU members also participated in the strike but that they were not dismissed; some were disciplined and only received warnings and others were not disciplined at all.
- [120] At this point, pursuant to an objection, the court ruled that evidence could be led on whether SATAWU members participated and were not disciplined but not to show they were not dismissed and that would constitute a ground of unfairness. The court reserved a final ruling on the admissibility of this evidence for the judgment itself as there was doubt that the pleadings permitted the ventilation of such a dispute.
- [121] He denied that SATAWU members participated in the strike. As he was at head office, he had to rely on information conveyed to him as to whether SATAWU members participated or were dismissed. SATAWU never received any ultimatums.

The evidence of Gary Wilson:

- [122] Gary Wilson, in 2010, was the General Secretary of TOWU and also the team leader of TOWU in the negotiations. He acted as the scribe in the "Labour Caucus" meetings of the three unions.
- [123] He prepared and sent the strike notice on behalf of the three unions.
- [124] They (the three unions) had an arrangement that the three of them (Mndebele, Mataboge and Gary Wilson) constituted the "Strike Committee" leadership. They could not do anything or discuss anything outside of the three of them knowing about it and agreeing on it. And that was the principle they followed.
- [125] On Saturday the 28th March 2010 he was in constant contact with the mediator as he knew from experience that the employers would take the

unions seriously after having received a strike notice. Also the mediator wished to have the dispute settled.

- [126] On Saturday morning, the employers' representative contacted him to inform him that there must be a way to find a settlement. Wilson asked him to make any offer through the mediator. He corrected himself to say that during the morning of the Saturday, he received a telephonic offer from the employer representative. He asked for the offer to be made through the mediator.
- [127] He was in contact with the other two unions and they shared information. He shared the information with Mndebele of TAWUSA and Mataboge of SATAWU. He received the final offer on Sunday.
- [128] TOWU had a clear upfront mandate from its members. When he received the revised offer he conveyed it to his Chairperson and then to the mediator that TOWU accepted the offer.
- [129] He also informed SATAWU and TAWUSA that TOWU accepted the offer. SATAWU informed him that it was accepting the offer and TAWUSA's position on Sunday was that the offer was not accepted nor rejected.
- [130] While speaking to Mndebele over the weekend Mndebele was telling Wilson that Mndebele was in constant contact with his leadership and his members, informing them of the developments. Also that Mndebele was awaiting final approval but the offer seemed to be in line with what TAWUSA could accept. His impression was that they as the three unions were in line with what they could settle on.
- [131] He further testified as follows:

‘Question: What was, did you have any agreement with the other unions before this revised offer was accepted as to what you would probably be willing to accept?’

Answer: Well, obviously during the whole negotiations we had some, you know, revised our offers or our position as we went along. And I think because TOWU had its own position and mandate, we accepted that we would be acting as a collective although we were very close to what our

mandated position was. So even though we, at times, did not agree with the offers or the positions of the other unions, we stuck as a collective to accept on (sic) position to be put forward at all stages. So we never disagreed openly or in front of the employers if we had differences in terms of positions.'

[132] He informed the mediator that TOWU suspended the strike pending signature of the agreement.

[133] The three unions upfront had a process to determine when to settle or to strike. He said that the three parties had an upfront agreement in the strike committee. The agreement was that when they reached deadlock they would wait the 30 days and then issue the strike notice. They agreed that if the offer was acceptable then no union would go on strike. He said:

'So our understanding has always been once there is an offer that was acceptable, that the parties within the caucus agree to suspend the strike.'

And

'And if the offer were (sic) then acceptable and that our members could accept with it and live with it, then the three unions would then call off the strike.'

And

'Question: What was Mr Mataboge's position?

Answer: At that stage when the offer was made, he had to confirm with his constituency. Similarly, Mr Jabu had to confirm with his constituency. But we agreed that we could sell that offer because it was in line, it was close to where our deadlock position was.

Question: And the, what this implied then is that the unions could not on their own agree to suspend the strike without the mandate of their constituencies?

Answer: My understanding was that we had a mandate to which suspend the strike.'

And

'Question: Well... (intervenes)?

Answer: Because we all agreed as a collective to postpone the strike pending the signature.'

[134] He said there was no purpose in going on strike once agreement had been reached. TOWU would have achieved its mandate and the members would be unhappy to go on strike after an agreement had been reached.

[135] On the Monday, he was on his way from his office in Cape Town to attend the signing ceremony in Randburg, Johannesburg and he did not see the email from Mankge stating that TAWUSA had not been consulted on the suspension of the strike. He was unaware that TAWUSA disagreed with the suspension of the strike.

[136] Mankge of TAWUSA and the TAWUSA shop stewards arrived late at the signing ceremony. Mankge indicated that he was present merely to observe. Mankge initially said he was attending to sign the agreement but then did not participate or sign.

[137] He confirmed his signature on the agreement and stated emphatically that he signed the agreement in Randburg. There were no further negotiations during the signing ceremony. The parties ensured that the wording of the agreement was correct and that the agreement contained everything that was agreed between the parties.

[138] When put to him in cross examination that further negotiations took place as the offer did not meet TAWUSA's demands he replied that TAWUSA's demands did not matter as

'We submitted joint demands" and that "We were always under the impression that we were acting as a collective.'

The evidence of Kobus Burger:

[139] Kobus Burger ("Burger") is the General Manager for Human Resources of Buscor and in the 2010 negotiations represented Buscor at SABEA of which it was a member.

- [140] Buscor is the major bus company in the area with some competition from minibus taxis. Buscor transports approximately 150 000 commuters per day which is approximately 80% of the market. The commuters are mainly lower income workers for whom transport costs are a main expense.
- [141] Buscor, when receiving the strike notice, reacted with a defensive lock-out notice.
- [142] During Saturday, Fleetwood contacted him and asked him what Buscor's position would be if the unions were prepared to accept 10% across the board. His response was that Buscor would agree to such an offer being made provided all the remaining items for negotiation were removed from the table.
- [143] Fleetwood again phoned him on the Saturday to say that the offer had been made to the unions and that he was discussing the offer with the other parties. Burger asked Fleetwood to ensure that the offer was made through the mediator.
- [144] The mediator phoned him on Sunday and informed him that two unions had accepted the offer. TAWUSA had not accepted or rejected the offer. Burger understood that because of the settlement, the strike was called off. Fleetwood also informed him that the strike was off.
- [145] Mndebele of TAWUSA phoned Burger on Sunday at approximately 12:00 and asked him what was going on. Burger informed him that there was a settlement. Mndebele said they still had to talk about the issues that were dropped. Burger informed him that the issues were off the table. They did not discuss as to whether the strike was called off.
- [146] By far the majority of Buscor's employees were members of TAWUSA.
- [147] Burger explained that the Buscor shifts commenced Monday morning 29 March as usual. The first buses departed from around 0300 in the morning to carry the roughly 150000 passengers to their destinations.
- [148] The buses from 0300 to approximately 0800 took the public to work. From the depots, they were then supposed to be transported to the suburbs.

- [149] On Monday morning, some buses operated after 08:00. At Malelane, almost no buses operated and at Nelspruit, the services were seriously affected.
- [150] The buses brought passengers into town. The passengers would again require transport from 16:00 onwards.
- [151] Later in the day, the shifts operated in the opposite direction taking the approximately 150000 passengers home.
- [152] Buscor has bus terminals in all the main centres.
- [153] The absence of the commuters from work had a serious impact on the business community where they work in Nelspruit, Malelane, Komati Poort and Witrivier.
- [154] Burger received information that around 09:00 took him to the Nelspruit terminus accompanied by Erasmus and Ngombe who was the company communications officer.
- [155] Burger explained that during 2007, an unprotected strike caused the company serious losses. The passengers were stranded at the terminus and took their frustration out on the buses. People were shot, managers held hostage and buses torched.
- [156] The closer it got to their peak period, the more commuters gathered at the terminus. The end result was the chaos described above.
- [157] Most of the buses were damaged at the terminus. Some were damaged in the townships where their routes originated and ended.
- [158] They were very aware that the closer they got to get to their peak period in the afternoon, a similar situation as in 2007 would develop and that they had to resolve it before then.
- [159] At the Nelspruit terminus, Burger observed drivers and other staff members congregated at the terminal. He and Ngombe were on the arrival side of the terminus where the buses park.

- [160] Various attempts by Ngombe to elicit from the workers the reason for the gathering were unsuccessful. They tried for an hour.
- [161] Present, were Thabethe and Gininda, both regarded as union officials of Tawusa.
- [162] Burger instructed Ngombe to inform the crowd by megaphone that the disputes had been settled, that there was not going to be a strike and that they had to return to work. This happened from approximately 09:00 to 10:00.
- [163] The strikers could hear the announcements above the chanting and singing.
- [164] Buscor moved the buses from the terminal to the show grounds. Burger did not observe any violence when he was at the Nelspruit terminus. No damage to property occurred on the Monday or the Tuesday. There was order in the chaos at Malelane.
- [165] The letter of 29 March 2010 was faxed to the union. The legal department drafted the letter on his instructions to inform the union of the illegal strike. It was sent at 12:33 and it was distributed to the union members.
- [166] Burger went to Malelane as he understood that Mndebele was there. He wanted to engage Mndebele. He saw Mndebele at Malelane but Mndebele ignored them.
- [167] At Malelane, he found a similar gathering of employees. He saw Mr Mndebele in the crowd who ignored him. He was close to Mr Mndebele.
- [168] At Malelane, in his presence, the communication with the note 12:10 was read in SiSwati and English. Burger did not listen to what was conveyed as he was making other arrangements.
- [169] The ultimatum was prepared by Erasmus on the instructions of Burger. They tried to hand it out at 12:10 in Malelane but the employees refused to take it.

- [170] He conceded that he was unsure as to the time it was issued as Erasmus wrote the time on it. According to Burger, it was read out both in Nelspruit and Malelane, although Burger was in Malelane when it was read. Burger was present in Nelspruit when the first ultimatum was issued.
- [171] Ngombe conveyed to him that they insulted him in SiSwati when he had read the ultimatum.
- [172] While he was at Malelane, Fleetwood phoned Burger to let him know the agreement had been signed. Copies of the first and last pages were faxed to Burger's office at 14:43 and then faxed from his office in Nelspruit to Malelane where he received the pages probably at 14:55.
- [173] When Burger received the pages, he instructed Ngombe to convey the information to the employees. Ngombe spoke to them in English and SiSwati. Burger did not listen to what Ngombe said as he was speaking on his phone with the Police.
- [174] Mndebele was still at Malelane when Ngombe read the final ultimatum with the note 15:35 and announced that the agreement had been signed. Afterwards, copies were left on the benches.
- [175] The ultimatum was read out at 14:55 at Malelane as stated on the document. The ultimatum calls upon the workers to return to work not later than 14:30 (25 minutes earlier). They were, however, called upon to return to work within half an hour. Later, he explained that they were required to return within a reasonable period. A reasonable period would have been by "that evening".
- [176] Burger thought that the two ultimatums at Malelane were issued approximately two to two and a half hours apart.
- [177] The final ultimatum also informed them to make representations why they should not be dismissed if they failed to with the ultimatum. Erasmus wrote the time on the ultimatum. Erasmus was also at Malelane.
- [178] The ultimatums were issued with the primary objective to get the employees to return to work, resume duties and avoid possible conflict later in the

afternoon when the peak period started. Buscor also had to comply with its contractual obligations to the Government to transport the passengers.

- [179] The urgency to get workers back to work related mainly to bus drivers and not ticket sellers, technical people and cleaners.
- [180] His view was that he and his colleagues tried from 09:00 Monday morning to get the employees back to work and that the employees had sufficient time to consider and reflect upon the ultimatums.
- [181] In addition, Mr Mndebele who was the chief negotiator of TAWUSA was present at Malelane to hear the ultimatums and to react thereto. He could not recall seeing any shop steward which he could have talked to.
- [182] The union did not ask for more time so as to communicate with its members. Nothing more could be done to convince them to return to work as they had been informed of the signing of the agreement.
- [183] Nobody returned to work that evening.
- [184] Drivers are scheduled from 03:00 to 19:00 or later but administrative staff stops working at 16:00 or 16:30.
- [185] It was a standing instruction that any ultimatum must be sent to the union offices and he believed it was done.
- [186] Burger conceded that the ultimatums he testified to were issued on times differed from the times as pleaded by Buscor.
- [187] Mndebele was the main role player in leading the strike because he knew about the agreement, he was talking to the striking workers and they were not working. He then conceded that he speculated as he did not understand what Mndebele was saying to the employees.
- [188] Burger conceded that the ultimatums did not distinguish between the various categories of workers.
- [189] It was urgent to get the buses going but eventually striking technical staff, ticket sellers, cashiers and clerks were also dismissed. Buscor could not

wait until the next morning as Burger believed what the strikers wanted to see was the signed agreement and that was given to them.

[190] The critical time for violence was from just after 16:00 to 17:50 when the commuters expected to be transported home.

[191] Burger confirmed that he received, from TAWUSA, a letter shortly after 17:00 on Monday in which TAWUSA stated that it accepted that the agreement had been signed and was binding and that the strike would cease. The letter stated that for logistical reasons the message might not reach everyone immediately and the strikers would be told the next day to go back to work.

[192] Burger believed that Mndebele could easily have informed the striking members earlier that the strike was over as he was with them at Malelane.

[193] Burger explained that in the previous years, agreement was reached and the agreement was only signed a week later. Strike notices were issued in the past three years. There was no strike pending signing of the agreement in any of those years.

[194] He believed that because of the settlement reached on the Sunday, no strike could take place as the settlement was binding on all the unions.

[195] According to Burger, two lock-out notices were issued; one on the Saturday in respect of the expected protected strike and a second on the Monday in respect of the unprotected strike. The first lock-out would cease when a settlement was reached.

[196] The purpose of the second lock-out issued on Tuesday afternoon when informing them of the hearing was to prevent the strikers from coming onto the premises to prevent the eruption of violence.

[197] On Monday, the services were completely disrupted at Malelane and "seriously disrupted" at Nelspruit.

[198] The employees also did not return on Tuesday and Buscor then decided to have the disciplinary hearings. Buscor did not want to get rid of its

employees. It wished to get them back at work to avoid passengers creating havoc.

- [199] Buscor did not receive any representations from the strikers by 08:00 Tuesday morning.
- [200] While it had received the letter from the union that the employees would return to work from Tuesday, the employees did not return to work. Some non-union members turned up for work. For that reason, the company decided to commence with disciplinary steps.
- [201] The union did not approach the company prior to the hearing to discuss the matter.
- [202] The disciplinary hearing was scheduled for the next day, Wednesday, at 13:00. Buscor did not receive any application for more time to prepare.
- [203] The union informed the company that Gininda and Thabethe were union office bearers and that Gininda would represent the members with Mndebele.
- [204] The inquiry started late on Wednesday and Burger gave evidence. The union appointed two representatives to the strikers. The strikers were found guilty and dismissed. They unsuccessfully appealed where Mr Mankge represented them.
- [205] As a result of the dismissal of the strikers, TAWUSA at the time of the trial had approximately 20 members left and SATAWU had approximately 51% representation as the recognised union. Buscor had no intention to replace TAWUSA with SATAWU.
- [206] The re-instatement of the dismissed applicants would cause huge disruption at Buscor and would create staff unrest, as new employees had been recruited and trained and at cost as it costs approximately R10 000, 00 to train a conductor/driver.
- [207] Burger conceded that by taking them back (if this is the outcome) in tranches of 20 bus drivers at a time, there would be minimal disruption. The training would be in the form of refresher courses at less than R8 000.00

per person and it is something that happens annually in any event. New equipment had been installed and the cashiers would require retraining.

[208] The employees appointed after the dismissal were appointed on the basis and subject to a re-instatement order. For those that had been replaced, the replacement employees would have to be retrenched.

[209] Buscor issued a notice on 26 March that no ticket sales would take place in view of the strike notice issued a bit earlier. It affected weekly and monthly subsidised tickets affecting the majority of commuters.

[210] The strike was only at Buscor. He corrected himself and confirmed there was a strike at Putco too who applied for and obtained an interdict against the strikers.

The evidence of Patrick Malabela

[211] Patrick Malabela is the operations manager of Buscor for the Nelspruit division and he has been with Buscor for 27 years.

[212] On Monday the 29th, he was on duty and observed the strike at the Nelspruit terminus where he arrived at approximately 10:00 finding bus drivers and other staff sitting where the drivers normally sit when not performing their duties. Some drivers and the admin staff were supposed to be working.

[213] With the assistance of non-striking drivers the buses were moved from the parking area to the show grounds for the safety of the buses.

[214] After 10:00, during the off peak period, some buses still operated at Nelspruit.

[215] He observed Surprise Matabula, a TAWUSA shop steward amongst the striking employees. Alfred Gininda and Bheki Thebetha from the union were also present.

[216] It was agreed amongst management members to engage the striking workers. Malabela was instructed to read certain notices to the strikers.

- [217] In the bundle are three notices. He did not read the first one. The second notice bears a note "14:55". He received this notice without the time inscription on it from Wilson and around 13:00 went to the control room where he read it out over the public address system used to make announcements to passengers and drivers.
- [218] He repeated the procedure three times each in SiSwati and English. He observed no response to the notice. He called upon the workers to return to work by 14:30.
- [219] Malabela then went downstairs to the parking area which is on the other side of the palisade fence dividing the terminus between the arrival (where the parking area is) and departure side where the strikers were to hand them copies and to discuss the contents with them. At the fence, he said to the workers to come and fetch the notice. They looked at him but did not respond otherwise.
- [220] They could hear him as they looked at him when he spoke. The shop steward Surprise Matabula was the closest to him. Matabula, Thabethe and Gininda did not respond. He left a copy of the notice on a spike of the palisade fence.
- [221] The second announcement made by Malabela was made approximately 15:00 and is the one with the inscription "15:35" (with no inscription when he read it). This was the final ultimatum.
- [222] He read it three times in English and SiSwati from the control room and observed the strikers moving away from the terminal building as he read the ultimatum.
- [223] Again, he went down and asked them to take copies. They ignored him. They were not too far away from the fence to hear him and he spoke a bit louder. He could not see Thabethe, Gininda or Mathebula.
- [224] As with the first notice, he left it on the spikes of the fence. The first notice was not on the spikes when he arrived the second time but he had not seen anyone removing it. He left after ten or fifteen minutes.

[225] He was challenged on whether the ultimatums in the bundle were those read at the time and when it was put to him by counsel for the applicants he said:

‘I confirmed that these were the memorandums that were read, even if they are not the same memorandums [indistinct] the information that is on it is the same information as the memorandum that was read on the day of the strike.’

[226] The times to return to work were as specified on the ultimatums.

[227] He denied that the public address system was inadequate and could not be heard in the parking area.

[228] It was put to him that when Ngombe used a loud hailer at Malelane, it was effective and the strikers stopped singing and chanting and listened to him. He was of the view that the public address system was mere effective.

[229] It was put to him that the applicants maintained that they saw him when he put something on the fence – with which he agreed.

[230] At all times, Wilson of Buscor accompanied him.

[231] Some strikers actually returned to work that day and were not disciplined.

[232] At an inspection *in loco*, it was established that the strikers would be able to hear the announcements from the control room.

The evidence of John Ngombe

[233] John Ngombe ("Ngombe") was the communications manager of Buscor. Ngombe was asked by Burger in his official capacity as communications manager to accompany him.

[234] Ngombe had a megaphone with him. He attempted to draw the attention of the strikers by activating the siren first. Once he had their attention, he talked to them in English and SiSwati informing them over the megaphone that the strike was illegal and they had to return to work.

- [235] The crowd sang louder and ignored him. Only Nyalunga was prepared to speak to him and told him to go and speak to Mndebele in the union office. Ngombe saw Thabethe and Gininda from the union amongst the strikers.
- [236] It was impossible to get them to listen as they sang louder. He then moved to the control room at around eleven. The strikers would be able to hear announcements over the public address system where they were in the parking area.
- [237] Ngombe repeatedly read out in English and SiSwati the notice with the time inscription "12:10" (the first ultimatum). He could not remember if the time was written on the document. He remembered calling on them to return to work within 30 minutes.
- [238] When he made the announcements by megaphone and afterwards from the control room, there were no buses in the parking area to make any noise.
- [239] At Nelspruit, some shifts did not operate and some were delayed.
- [240] Burger, Ngombe and Erasmus left for Malelane probably after 12:00 and arrived in Malelane around 14:00. They went to Malelane to convey the same message to the strikers.
- [241] He used the same megaphone. Shortly after their arrival, he asked them to return to work as it was an unprotected strike. He gained the impression that they were waiting for them to arrive and were aware of their presence.
- [242] He, more than once, read out the document with the time inscription "14:55" in English and SiSwati and could not remember whether the inscription was on the document. He called upon them to return to work in 30 minutes (and not 14:30 as the notice read) and to come and speak to management.
- [243] He saw Mndebele close to him amongst the strikers at the terminus. Mndebele must have heard the announcement as thereafter Mndebele insulted him by referring to him as a fat cat eating well like the rich. Ngombe could not say if Mndebele was making an attempt terminate the strike.
- [244] During the afternoon, they received confirmation that the agreement had been signed. Ngombe shortly after receipt of the agreement again in

English and SiSwati read the final ultimatum with the time inscription "15:35". He could not remember whether the handwritten time inscription was on the document.

[245] Again, he told them to return to work within 30 minutes. He also told them that the agreement had been signed. He could not state the time when this notice was read. He could not remember if Mndebele was still there.

[246] When he read the final ultimatum there were passengers waiting to be transported home.

[247] Ngombe recalled that with the 2007 strike he was held hostage and damage was caused to property. Passengers wanted their money back. Buses were stoned and torched.

[248] Ngombe on Sunday 28 March announced over the radio that agreement had been reached and that the strike was called off. The radio has 1.5 million listeners.

[249] He denied that management wanted to dismiss the workers. He had sympathy for the applicants as some were family and others he had known for many years. Some were members of his church as he was a pastor. It was not easy to replace the dismissed drivers. At Malelane, they struggled for a long time. Mechanics with licences assisted with the driving of buses.

Evidence Bernard Frankie Pullen ("Pullen")

[250] Pullen was the Assistant HR Manager at Malelane.

[251] Buscor presented his evidence with a reservation of rights as it had objected to the union relying on an alleged differentiation by Buscor in the disciplinary treatment of SATAWU members and TAWUSA members who participated in the strike.

[252] Pullen was present at Malelane on the Monday at the time of the strike.

[253] He once heard Ngombe reading an ultimatum in English. The workers were called upon within 30 minutes to return to work. Ngombe also informed him

that Mndebele had insulted him. According to Pullen, Ngombe left Malelane after 16:00.

- [254] Burger assigned Pullen to conduct a disciplinary inquiry into the conduct of SATAWU members and non-union members who participated in the strike at Nelspruit, Malelane and White River.
- [255] Two separate hearings were held. One for TAWUSA members and one for the others as the two unions would have wanted their own representatives for their members.
- [256] TAWUSA during the trial furnished Buscor with the names of seven allegedly SATAWU members who participated in the strike but who were allegedly not disciplined. Pullen investigated their records.
- [257] The same ultimatums issued to TAWUSA members were issued to SATAWU members and non-union members.
- [258] Pullen was unable to find a transcript of the disciplinary hearing of the SATAWU members and non-union members.
- [259] SATAWU represented the non-members. The hearing was postponed on 31 March to 7 April as some individuals had not received notice of the hearing.
- [260] The dismissals were backdated to 31 March 2010.
- [261] At the hearing, SATAWU called Simon Nkambule, the Senior Dispatcher of Buscor at Malelane, to present evidence of the whereabouts of the alleged offenders.
- [262] Nkambule obtained the information for his evidence from one L Raath, the operations manager for Malelane.
- [263] The various categories of employees who could not have participated or did not participate were those in the categories drivers not on strike, on night shift, on leave, on sick leave, the drivers of the staff buses and those on suspension at the time.

- [264] Of the seven names provided by TAWUSA, six were identified. They were found not guilty on the evidence of Nkambule. The seventh, Vusi Ndlovu, was not charged with any misconduct.
- [265] No one received a warning as a result of the inquiry.
- [266] Two SATAWU members of the Kafukene White River section were found guilty and were dismissed. They were David Bongani Masina and Dung-Dung Moses Mapanga.
- [267] The date on the provident fund form for the one is incorrectly recorded as 2011 instead of 2010. This is not sinister as the SATAWU National Provident Fund made the mistake, not the company.
- [268] He could not find dismissal letters for the two dismissed SATAWU members. The usual practice in his office was not to issue letters of dismissal unless requested. When his attention was drawn to Erasmus' letter stating that each will be furnished with a letter of dismissal he explained that Erasmus probably had an arrangement with TAWUSA.
- [269] In cross-examination, he was challenged as to why he accepted the evidence of Nkambule without disputing it. Pullen explained that Nkambule was the one who would know as he was in charge of scheduling the staff. There would be no basis upon which to challenge his evidence.
- [270] The cross-examination of Pullen was aimed at showing that the disciplinary hearing did not take place or was a "friendly hearing" designed to absolve the SATAWU members who participated in the strike. Pullen disputed this.
- [271] Pullen communicated with Bongji Mapanga who was the local SATAWU organiser and not with Mataboge and could not say what Mataboge knew or did not know.
- [272] Thirty TAWUSA members were not dismissed.

The evidence of Dawid Lodewikus Wilson ("Dawie Wilson")

- [273] Dawie Wilson, at the time, was the General Manager Operations for the Nelspruit division of Buscor.

- [274] He accompanied Malabela to the control room on two occasions when ultimatums were read by Malabela in English and SiSwati. The first one was read at 13:00 (the second ultimatum following upon the one read earlier by Ngombe).
- [275] They then went to the palisade fence and tried to attract the attention of the strikers. They left the ultimatum on the fence.
- [276] After the final ultimatum had been read, at approximately 15:00, the strikers moved further away from the palisade fence indicating that they had heard the announcement. Again, a copy was left on the palisade fence.
- [277] Dawie Wilson could not say if the time inscriptions were on the two ultimatums when they were read. He did not write the times on the documents.
- [278] The purpose was to get the employees back to work before the afternoon peak period started from approximately 14:30 or 15:00. If the strikers did not return, the plan was to discipline them in terms of the disciplinary code.
- [279] SAPS did not remove the strikers from the parking area.
- [280] Present amongst the workers were two former employees Bheki Thabethe and Alfred Gininda. They had been dismissed by Buscor prior to the strike. They are the Fourth and Fifth Respondents in the claim for damages. They had been identified to Dawie Wilson as officials or organisers of TAWUSA.
- [281] At Nelspruit, there were no buses in the parking area at the time. The announcements were audible. He listened to the speakers which were working.
- [282] In cross-examination, Dawie Wilson said that he remained at the Nelspruit terminus until late at night. When he left, the strikers were still in the parking area. He last saw the strikers in the afternoon and could not say what made them left.
- [283] During the 2007 strike, the damage occurred during the peak period when buses were torched and stoned and staff members held hostage. The company suffered substantial damages.

- [284] The commuters probably had cash tickets as that was what they did in a strike situation. They would travel in and then see what happened.
- [285] At Nelspruit, some routes did not operate and others were late. Some drivers were not on strike.
- [286] Dawie Wilson conceded that the final ultimatum required the strikers to return to work at the same time when the period in which to make representations by those who did not return would expire.
- [287] He was of the view that the employees incited the passengers to turn against the company.
- [288] There was no violence on Monday because the company rendered most of the services. He could not comment on Malelane where no services were rendered and no violence occurred either.
- [289] Buscor had in place agreements with the Provincial Government to transport passengers with subsidised tickets. The subsidy is based on a rate (R16.42) per kilometre calculated on the number of trips on specified routes ("the trips").
- [290] The commuters pay between 40% and 60% of the actual fare depending upon the distance of the route. Where trips could not operate due to the strike (standing kilometres) Buscor could claim 60% of the rate (R9.85 per kilometre). Buscor thus lost 40% of the subsidy in an amount of R446 041.69.
- [291] Buscor could not operate 1166 of the scheduled trips. Buscor kept records of which trips operated. The trips times their distances gave the subsidy amount.
- [292] The calculation was based upon trips that could not operate over three days.
- [293] Buscor also sells tickets (a) for cash, (b) weekly and (c) monthly tickets. The income from tickets is over and above the subsidy. Buscor does not claim for any loss in respect of cash tickets. The weekly and monthly tickets ("the

tickets") are typically sold from the 24th and 25th of the month for the next month.

- [294] Wilson compared the ticket sales for the same two weeks in 2009 with that of 2010 to arrive at the calculated loss for 2010. He used two week period because the loss of sales affected a two week period. The comparison had been done in respect of the lowest sales, average sales and highest sales for the comparative periods.
- [295] When calculating the lowest sales, the lowest number on any day in that period was used for the number of sales. The loss calculated on the lowest number of sales was R336 4312.00. On average, the sales were R4 052 630.00 less than in 2010.
- [296] The sales were audited by an external firm of auditors as the figures went to the Government to justify the subsidy payment.
- [297] Dawie Wilson was aware of the communication issued on 26 March 2010 that the company would not sell tickets as it had received notification of a strike.
- [298] He did not know if the communication was withdrawn. The announcement that the strike was suspended was made Sunday afternoon. The company sold tickets.
- [299] At Malelane, there were no operations for three days. He was unaware of anyone who wanted to work on 30 March 2010 that was prevented from working or excluded by the lock-out.
- [300] When the workers on Monday were asked to return to work they did not. That is why on Tuesday they also did not work. He noted that the ultimatum called upon the workers to return and if not, then to stay away.
- [301] On Wednesday 31 March 2010, they did not work as they had to attend the hearing. The same applies to 1 April. The hearing followed because they did not adhere to the ultimatums. It was their fault that they had to be called to a hearing.

- [302] The third part of the claim is for damages to and replacement of buses. Two buses were torched next to the road and nineteen in the depot. A large number of buses were stoned causing damage to windows and the interior of the buses and in some cases buses were shot at.
- [303] He did not observe the damage being caused except to see how bullets were removed from some buses. He removed two bullets. He did not see the stoning of buses. They obtained statements from the drivers of the buses as to the cause of the damages.
- [304] The damages occurred after the dismissal of the applicants. He personally did not observe who caused the damage. The drivers made reports and he inspected a number of the buses. He personally removed some bullets from some buses. He did not record the numbers of the buses. It could have happened around 14 or 15 April but was due to the strike.
- [305] The repairs were effected at the company workshops by an external service provider. The supporting documents were identified in each case as an invoice, work order and a job card. Buscor would not pay an invoice in the absence of a Work order and a Job card.
- [306] In cross examination, Dawie Wilson conceded that in a number of instances there were no work orders or job cards for those invoices. He was not familiar with the codes reflected on the invoices and could not testify to exactly what the parts or labour were save to make assumptions as to what the invoice inscriptions could mean.
- [307] He also conceded a number of duplications. Buscor would amend its claim by excluding the duplications and the amounts relating to invoices where no work orders or job cards were produced in the trial.
- [308] He insisted that the repairs were necessitated by damage caused as a result of the strike as the damage occurred during that period.
- [309] He reiterated that the union members did not directly cause the damage but that the damage was caused as a result of their conduct. He could not give any other reason as to why the damage could only have been as a result of

the conduct of the strikers and not incurred in the normal course of operations. On average, 10 buses per month sustained damage.

[310] He denied that because some repairs were invoiced during April, that Buscor lumped together all its maintenance repairs with the riot damage and then wanted to claim all of that from the employees.

[311] The exceptional number of buses that had to be repaired resulted in some buses being used with broken windscreens until they could be fixed.

[312] He conceded some discrepancies between the items on some of the invoices and their supporting work orders and the work performed.

[313] He was challenged on the explanation that Phezulu, one of the service providers, used windscreens previously purchased by Buscor and kept in stock on Buscor's premises. He insisted that the cost of these items formed part of the damage suffered by Buscor and that the costs were not duplicated.

[314] He did not have personal knowledge of the repairs as the repairs were done in the workshops.

[315] He conceded that there were different prices charged for ostensibly the same work such as the fitting of windows. In his view the differences could possibly be explained by the degree of difficulty in fitting the windows and windscreens.

[316] In conclusion, he conceded that he did not know how and exactly when the buses were damaged, who the perpetrators were, the exact repairs that were to be carried out and whether the amounts charged were market related.

[317] He could not explain the need for the towing costs claimed except to say it might have been to move the buses to the workshops and to remove them from sites. Buscor also used their fire extinguishers to put fires out.

[318] The total amount spent on repairs claimed by Buscor is as per the notice of amendment.

- [319] Buscor had to employ additional security guards at the depots because of the damages caused to the vehicles and for fear of more damage. The costs of additional security are as per the pleadings. Generally, extra guards were employed for a period of seven days. Dawie Wilson could not say why seven days.
- [320] He conceded that there was no violence at Nelspruit on the Monday. He ascribed it to the fact that some services were continuing. There also was no violence at Malelane where no services were rendered for a period of three days.
- [321] He did not concede that in the absence of violence, there was no need to employ additional security.
- [322] Wilson was unable to testify to the length of the shifts and the dates when the additional security was required. It varied from site to site. He relied on the invoices for the evidence given regarding the expenses for security.

The evidence for the union and the employees

Evidence of Boiling Shongwe

- [323] Shongwe at the time was employed at Malelane area as a bus driver at approximately R1100 per week after deductions. He was a deputy shop steward and member of TAWUSA. He had been employed for 12 years.
- [324] On Friday 26 March 2010, a meeting was held and it was decided to go on strike. It was also agreed that it was necessary for the drivers on Monday to drive the buses to Nelspruit and to the depot at Malelane for the buses to be safe.
- [325] His last shift was on Saturday and he took the bus home Saturday. He did not work Sundays.
- [326] At Malelane, most of the buses stayed at the homes of the drivers. It was the usual practice for drivers to take the buses home at the end of the last shift. He was never told over the weekend there was an agreement between management and the other two unions. He did not listen to the radio.

- [327] He knew that the strike would start on the Monday. The bus stayed at home on Saturday night and the whole of Sunday. The bus was safe at his home as there was no strike at the time.
- [328] On Monday morning, he feared that the people would damage the bus as there would be a bus at his home but no transport service.
- [329] He remembered that buses were damaged in 2007.
- [330] He could not leave the bus at the terminus Saturday or return the bus to the terminus on Sunday night because then he was engaging in strike action before the expiry of the strike notice. Sunday was not his working day and the depot was small and there was nobody to move the buses to create parking.
- [331] On Monday, they took the buses and parked them in the depot as they did not know if the agreement had been signed. During the day, they waited to hear of the signing of the agreement.
- [332] He denied that the strategy was to bring commuters into town only to commence the strike to create problems by the passengers for management.
- [333] He did not foresee a problem if the passengers were brought in while they could not return as they notified the commuters of the strike and the strikers did not know when the strike would end. The commuters had been warned of the strike and the strikers could not be blamed.
- [334] A further reason to go into town was because when the commuters saw an empty bus and there was no service they threw stones at the buses. He could not remember that there were angry passengers in 2007 with the strike and that they damaged buses.
- [335] His shift started at 04:00 in the morning and he left home at 04:00 Monday morning. He picked up passengers without tickets. From Thursday, the management had informed subsidised ticket holders not to buy tickets because of the strike. Most did not have tickets that morning. The drivers and conductors did not collect tickets.

- [336] When they left that morning, they knew they would be on strike that day and would only go in to hand over the buses. The bus was full and he told the passengers they all had to see how to get home as the drivers went on strike.
- [337] Most passengers were workers travelling from home to town going to work. He knew that he would not be taking them home and he told them so. They did not know when the strike would end.
- [338] In cross examination, he stated that as he did not know how long the strike would last, he did not tell them to make their own plans to go home on that day. What he told them when they entered the bus was that they were going on strike and did not know how long the strike would last.
- [339] He informed them so because during the day the strike might be resolved.
- [340] The strike did not end that day and he went home by taxi. He could not say how long the commuters had to wait for a taxi in the light of the increased demand for taxis.
- [341] At Malelane, they walked up to the terminus and at the terminus they were chanting and singing as the strike began. They chanted there until after lunch. He did not have a watch but believed it was until about 14:00 in the afternoon.
- [342] Mndebele, their organiser, arrived there at about 14:00 while they were busy. He addressed them and said he understood management and the two other unions had agreed but that the agreement had not been signed as yet. Mndebele said the strike was legal until the agreement had been signed.
- [343] The organiser also said most of their demands had been excluded from the agreement; they should wait until 15:00 to see if a message came with information on the signing of an agreement. He said that there were white people at Nelspruit telling workers to go back to work because the strike was illegal.

- [344] Mndebele also said the workers should not listen to the white people from management (Ngombe, Burger and Erasmus) until an agreement had been signed. While Mndebele was addressing them the white people arrived. They had a loudhailer. Ngombe started talking on the loudhailer.
- [345] The strikers started chanting and singing and making noise not to hear what Ngombe was saying.
- [346] Mndebele made mention when he came back for a second time when the white people had arrived that an agreement had been reached between SATAWU, TOWU and management but that he was not quite sure of it and that they were waiting to hear if it had been signed.
- [347] At some stage, after 15:00, Mndebele mentioned that it was after 15:00 and he had not received a short message service regarding the signing of the agreement and let him rush to his office. Mndebele had heard something about the agreement having been signed but was unsure. Mndebele left for his office in Nelspruit. They then also dispersed. It was almost sun set.
- [348] Mndebele had his cell phone with him.
- [349] They were not told that afternoon to go back to work. He had been in contact with Mndebele before Mndebele's arrival when he phoned in and Mndebele had told him they had made enquiries but had not been informed as to whether the agreement had been signed.
- [350] On the Monday, he left after Mndebele had left and it was after 15:00. On the Monday, he had to leave Malelane on his regular shift at 16:00 and, thereafter, return for another trip. He left before the peak period started. Peak period for passengers was from four to five in the afternoon. Most workers stop working between 16:00 and 16:30.
- [351] Later he said he did not know how the passengers got home. There were no buses running from Malelane in the afternoon.
- [352] He remembered that buses were damaged in 2007.
- [353] He was aware that if there was an agreement and it was signed then TAWUSA would be bound. He did not think an oral agreement between the

other unions and management would bind TAWUSA. On Tuesday morning, the organiser said that there was an agreement that had been signed and they had to go back to work.

- [354] He denied that the workers, during Monday afternoon, had been told by management at the depot that an agreement had been signed. He also denied that they had been shown two pages of the agreement during Monday afternoon.
- [355] He testified that if he was informed at 14:00 on Monday 29 March 2010 afternoon that an agreement had been signed whilst they were still together, he would have gone back to work. He would only believe an agreement had been signed when they came to him and showed him a signed document.
- [356] They did not listen to anything that management said as management would tell them lies. They sang louder Monday afternoon not to hear the management representatives. They would not listen to Ngombe as they did not want to hear him when he used the loud hailer.
- [357] They as shop stewards would have listened if called to the office by management to explain the position. As a shop steward, he would not listen to management when he was alone.
- [358] He saw management talking to them with the loud hailer but if they wanted to engage the workers they had to engage the organiser. He conceded that the organiser should have engaged management which he did not do. He did not hear any ultimatums as the singing was too loud.
- [359] He said that he did not know what an ultimatum was. The organiser should have shown them the signed agreement. They were told that it was signed not when it was signed.
- [360] He knew Jack Mankge who communicated with them via Mndebele. Mankge had a duty to communicate to them through Mndebele. Mankge had to give the signed documents to Mndebele.
- [361] He did not hear Mndebele insulting Ngombe.

- [362] Mndebele was present when management arrived. They followed his advice not to listen when management arrived.
- [363] Mndebele said that in Nelspruit, the workers were told to go back to work because the strike was illegal. Mndebele said it was legal and they believed him.
- [364] On Tuesday, the senior shop steward, Nthoko, told them the strike was over. He had spoken to Mndebele on the phone. Mndebele had said he had received proof that the agreement had been signed. Mndebele was not present Tuesday morning. He had left the previous day to find a fax and would tell them later.
- [365] He testified that he never asked for it or saw the signed agreement. He did not listen to the radio and did not hear the announcement about the settlement with the other unions.
- [366] He said to them in the morning (Tuesday 31 March 2010) that they had be ready to go back to work. On Tuesday morning, they went back to where they chanted on the Monday.
- [367] While Shongwe was there on Tuesday morning a more senior shop steward than Shongwe was phoned by Mndebele. Mndebele told them that the strike was over and that they had to go back to work. Having been told to go back to work, they walked to the buses. At the workplace, they were informed that all of them who were on strike were not allowed to go to the buses.
- [368] At Malelane depot, there were members of two unions, SATAWU and TAWUSA. Their members were standing together. TAWUSA members and SATAWU members did not work that day.
- [369] They then contacted their organiser and informed him that the gate was locked for them. The organiser said that the same had happened in Nelspruit and the workers were locked out. They were told to hire kombi's and to go to Nelspruit. At Nelspruit, they found the TAWUSA members sitting there.

[370] All the shop stewards were called to the TAWUSA offices. They were told the shop stewards would prepare a document because there was going to be a hearing. The union had sent a letter and management had responded to the letter. The letter from the union was to ask for a hearing. They were told that the letter was about the reasons why they were dismissed.

[371] They were told not to go to the premises and he regarded that as a dismissal. Also when they arrived to pick up the buses on Tuesday morning the person at the depot after consulting management told them they had been dismissed. He could not explain why, in evidence in chief, he did not mention that they had been dismissed.

[372] During the afternoon, they were told there would be a hearing the following day. On 31 March, all of them went from Malelane to Nelspruit. They were told before 12:00 that the hearing would start. It proceeded until 1 April.

[373] They were then informed that management did not agree and that they were all dismissed. He wanted reinstatement.

[374] The main shop stewards at Malelane were Komete and Ntuthuko.

Lucky Morgan Ngobeni

[375] Ngobeni was employed by Buscor as a driver and in March 2010 had been with the company for 8 years. His income was R 1700 per week.

[376] He would like to be reinstated at Buscor.

[377] On 26 March 2010. the drivers had a meeting. In the meeting, it was said that on Monday 29 March there would be a strike. There was a strike on Monday 29 March.

[378] He was supposed to sign in at 03.30 in the morning. On Monday 29 March, he did not sign on. He was at the depot outside Nelspruit. He went to Nelspruit on Monday morning with a lift from a friend and arrived at Nelspruit at approximately 08:30. He went to the place in Nelspruit where buses offload passengers.

[379] He, as usual, had left the bus at the depot and did not take it home.

- [380] At the depot in the afternoon, the organiser arrived and said the strike was over. There was an agreement and they had to go back to work on Tuesday. On Tuesday, he went back to work. A staff bus collected him as usual and took him to work at the depot where he found Mashego who was the controller in the office. He was issued with a bus and continued working.
- [381] Later in the morning, he was instructed to stop working as he was a member of TAWUSA.
- [382] On Monday, he did not see or hear Ngombe actually addressing the workers although he saw him around there. He did not know what he was saying. They were hungry and walked to the Shell garage nearby. He did not hear or see Malabela make any announcement. He did not see him at all.
- [383] He heard and saw Mndebele addressing the workers.
- [384] He was called in and told that it looked as if he was dismissed from work. They were informed the following day that there was going to be a hearing on Wednesday.
- [385] On Monday, he did not see or hear Mndebele as he was not in Nelspruit. Later that afternoon, he went to Nelspruit and was told the strike had been called off.
- [386] His last shift was on Monday scheduled for 10:15 in the morning.
- [387] He was based at Kabokweni where he stayed and worked.
- [388] He was part of the union strike on Monday of which they did not work at all.
- [389] At the union meeting of 26 March, it was arranged with the other workers to meet at Nelspruit depot on Monday. He did not know what time they had to meet on Monday. He only arrived in the afternoon at about 15:00 to 1600.
- [390] He could not say if the other strikers had left the offload area when he arrived.
- [391] They were busy shouting and dancing. He did not notice any announcement made by management to the workers.

Jabulani Percy Mabusa

- [392] Mabusa was employed as a driver and was dismissed during March 2010.
- [393] On the Monday, he got the bus and picked up passengers. He received a call from his manager and waited for his manager. His manager said there was no strike and to pick up passengers.
- [394] He went to Nelspruit at around 10:00. Mndebele was talking to the workers. They were where the buses turned. When he arrived, there were no strikers in the off-loading area.
- [395] Mndebele said they must behave well and not disturb incoming buses. Mndebele was leaving and was expected to come back and inform them how negotiations took place.
- [396] He did not see Ngombe, Malabela or Burger addressing the workers.
- [397] He remained there until they were ordered by a SAPS officer to leave and they left. He could not say what time.
- [398] On 30 March, he went to work. He signed on and took a bus and went to his first loading base where he loaded passengers as usual. He received a call from his assistant manager who said that he had to return to the bus depot. He returned to the depot. Many drivers were stopped from driving buses.
- [399] They were informed that the strike was over and had to go back to work on Tuesday. Mndebele informed them late in the afternoon on Monday. He was informed outside the terminal close to the terminal where they met in the morning.
- [400] He worked afternoons as his shift finishes after picking up passengers in Nelspruit at 1600 to Mapoko. He would arrive at Mapoko at 1730. On Monday, he did not make that trip because he was striking.
- [401] He did not see members of management putting notices on the palisade fence. It was possible that they were there but he did not see them. It was

possible that announcements were made by management that the strike was illegal and they had to go back and that he did not hear them.

[402] On Tuesday, he was not told that he was suspended and would have to face a hearing. He was aware that there was going to be a hearing. The leaders of the union went to the hearing. The hearing was with the union representatives and management. He was dismissed after a hearing.

Witness Nzodwa Joyce Nose

[403] She was employed by Buscor as a bus driver driving a staff bus transporting staff members such as drivers to their workplaces.

[404] On Monday morning 29 March 2010, at 02:30, she took the staff bus and collected drivers from 0300. She then had a break until the afternoon. Her afternoon shift comprised picking up staff from 17:00 to 18:00 knocking off at 20:30 to 21:00.

[405] In the afternoon, she did not see any buses travelling and could not take a bus to go and fetch the staff bus.

[406] On 30 March, she took her vehicle and went to the depot. There were no buses and the depot was closed. She then drove to the Malelane offices where the drivers were sitting. They said to her they had been dismissed. She joined them. On 30 March, she drove to Nelspruit with her vehicle and was accompanied by others. One of the passengers was a SATAWU member.

[407] At Nelspruit, she was told that the shop stewards were in a meeting.

[408] Some of the employees, including Nose, had left before they reported back and she did not go back to work that week.

[409] On the following week, she was phoned and asked why she was not at work whereupon she went to Malelane after explaining that she had been dismissed. At Malelane, security turned her away but after enquiries were made she was allowed in and told to take a bus and start working.

[410] She spoke to Ndobe and Nkambule there.

- [411] At Malelane, no person worked on 29 March or that week and no buses were operating from Malelane as the depot was serviced from Nelspruit.
- [412] When she returned to work, she observed that members of SATAWU were working normally. The SATAWU members that she saw working had been on strike on the Monday.
- [413] Busco dismissed her on 4 June 2010. Barry Pullen to whom she reported to called her in and asked her why she was still working as members of her union had been dismissed. She explained that she had been called to work. Pullen said that he would investigate if she was on strike. If she were on strike, he would dismiss her. (This evidence was never put to Pullen when he testified.)
- [414] She conceded that when at work a machine that she operated was not working she was dismissed after an inquiry and not for striking.
- [415] She was aware that there was an inquiry that involved her about the strike. Thereafter, she was called and told to go back to work. She confirmed her company number and that it was her name that appeared on the list provided by Nkambule at the inquiry and that it was Nkambule who told her to return to work.
- [416] She was unaware that three SATAWU members on strike had been dismissed.
- [417] She did not know Makhubela, Maphanga and Masina who were dismissed

Witness Johannes Butibuti Mashele

- [418] He was employed at Buscor since 2008 as a bus driver at R1200 per week at the time.
- [419] On Monday morning, he completed his morning shift. When he arrived in Nelspruit, he saw the strike in progress. He parked the bus and joined strike.
- [420] Mndebele was present. Mndebele said the strike proceeded as nothing had been signed.

- [421] During the course of the day, the police arrived. After 12:00 but before lunch, the police told them to leave the parking ground. Ultimately, they left the parking ground.
- [422] On Monday, Ngombe called them back to work. They were singing and chanting. Ngombe had a loudhailer and he could hear what Ngombe was saying.
- [423] He did not hear that Ngombe mentioned 30 minutes. When he was talking on the loud hailer they were still singing.
- [424] He was uncertain of the time that he saw and heard Ngombe but it was in the morning. It could have been 10:00. He did not see Burger with him. They sang very loud. They did not stop singing when he spoke.
- [425] Ngombe said they should stop the strike as it was not lawful. They had to go back to work as what they were doing was wrong.
- [426] He did not see Ngombe going to the control room and did not hear him making an announcement from there. There are speakers in the sheltered part of the depot. He could not dispute that people could hear announcements in the parking area from the speakers. He only saw him with the loud hailer.
- [427] He left the parking area after the police dispersed them which was sometime between 12:00 and lunch time. They were not in the parking ground when the leaders of the union arrived after 15:00.
- [428] He did not see any notices on the palisade fence between the terminus and the parking area as he was a distance away and could not see that area. He was not there after lunch and would not hear ultimatums read out in the afternoon after 15:00.
- [429] Jabu Mndebele told them that he understood that people had signed the agreement and that it bound all of them and that the following day they had to go back to work.

- [430] The following day they were supposed to work. He phoned the driver Silawule who had to pick them up. He said they were not supposed to work because management said so and they had to go to town.
- [431] They went to the union offices in Nelspruit. They were told there was a hearing which they were supposed to attend.
- [432] On the following day, they again came back and were accompanied by the union leadership to the hearings. They left the representatives at the hearing which took the whole night. The leaders came back to them and informed them they had been dismissed.
- [433] He was dismissed for the strike and wanted to go back to work.
- [434] He knew Thabethe and Gininda. They were present on 29 March. He heard they had a position in the union but could not say what positions. The two were there where they were singing.
- [435] He knows Malabela the operations manager. He did not see him there on 29 March or heard any announcements from him.
- [436] Mndebele spoke to them at the union offices during the afternoon of 29 March.
- [437] His shift started 12:00 am until 07:30 and then he had a break to the afternoon and was supposed to work again during the peak hour and finished 20:30.
- [438] Mndebele said to them the other unions had signed and they were now bound by the agreement. He accepted that information from Mndebele. Mndebele said they should inform the others and he said to go back to work the next day. He trusted the information from the union organiser.
- [439] When asked why he did not go back at 16:00 when his shift recommenced, he said that the buses had been removed. He did not go back at 16:00 because he listened to what the leaders said.
- [440] It was not possible to go back as it was already after 16:00 and at 16:00 and he had to be at Bella Donna which was 10 km away and the buses had

been removed. If management wanted them to work, then they should not have removed the buses.

[441] The Union offices are not a few blocks away. It is a 20-25 min walk. Mndebele said that they should go back to work the next day and other people had already left. He left the meeting with the union at approximately 17:30.

Surprise Mokoena

[442] On 26 March 2010, he was in the employ of Buscor as a driver at R1800 per week. He commenced employment in 1991 and was dismissed during the strike. He wanted reinstatement.

[443] On 26 March 2010, he was at the training school of Buscor.

[444] On Monday, he did not go to work as he decided to return to work after the strike. On Monday, he arranged with a colleague with a bakkie to travel together to the parking ground where the buses parked.

[445] He saw Mndebele while he was there. Mndebele addressed the workers that day. He said that they should not damage the property of the company and he would return after having gone to Malelane.

[446] He knows Gininda. Gininda addressed workers at Nelspruit saying that Mndebele had instructed him to tell them not to cause damage but that they could sing and toyi-toyi.

[447] Asked about an agreement to end the strike, he said they were waiting for a reply from head office.

[448] He did not see Ngombe on 29 March. He saw Malabela.

[449] He was leaning against the palisade fence. The three came from the control room approaching them where they were sitting against the palisade fencing. As they approached, the other group walked away and he sat there. Malabela called him and he told him to receive the memo from him and read it to the workers.

- [450] He said he could not do so because he was not an organiser. He told Malabela to contact the organiser.
- [451] The police were present in the vicinity on 29 March. He saw them in the morning. He could not say if the police did anything to the strikers as he had left and when he returned they had left.
- [452] He did not hear anything on 29 March on the public address system. He said the "machine" in the control room was not clear. They used the loud hailer.
- [453] He did not know how it came about that the strikers left the parking area.
- [454] There was an announcement made to the effect that the workers had to go back to work. Ngombe said within 30 minutes, they had to go back to work.
- [455] Malabela did not make an announcement.
- [456] The memo was pinned to the palisade and the wind blew it away.
- [457] When Mndebele returned from Malelane, he took the shop stewards to the union offices to check at the fax machine as he had not received a short message service. They went to the offices after 16:00 in the afternoon. Mndebele found paper at the fax machine.
- [458] When they returned, they called them together. Mndebele said that he had just received a document that said the strike was called off and the following morning people had to go back to work. This was about 16:30. Mndebele said TAWUSA did not sign the agreement.
- [459] He was at the entrance of the loading zone on the butchery side when this was announced.
- [460] He went back to work that Tuesday. He reported for duty at the depot but was denied access by the person in charge. He asked for reasons and was told that management wanted them to report at Nelspruit. He went to Nelspruit.
- [461] At Nelspruit, Mndebele said he had been phoned and told the workers had been chased away from the depots. He remembered that he had called all

shop stewards together and would write a letter to the management of Buscor.

- [462] There was a disciplinary hearing on 31 March which he did not attend. The result was that the hearing carried on to 1 April and they were dismissed.
- [463] On 29 March, he was at the loading area and did not see Ngombe at all but he saw Patrick Malabela with a piece of paper. He did not see Ngombe at 10:00 as that was when he went to find food.
- [464] It was before approximately 13:30 when Malabela approached the workers with the notice which he put on the fence.
- [465] He did not carry a watch. At the place where he bought food, people said they were in a hurry to catch the 11:30 bus. He went for food only one time and when he returned the police had left.
- [466] He returned and joined the workers. Only a few were left.
- [467] He went to the garage to buy a cold drink. Then he returned to parking area.
- [468] He did not hear Malabela making an announcement over the public address system. He denied that the speakers could be heard in the parking area unless they had been replaced since.
- [469] When Malabela arrived, he was next to the palisade. He asked the witness to read out the ultimatum. He was only a member of the union and not a shop steward.
- [470] Mndebele was at Malelane. Gininda was present. Gininda was still working for Buscor but he was on suspension. Gininda was in charge of the shop stewards at Buscor.
- [471] Gininda was not close. He was further down. With most of the strikers near the butchery.
- [472] When asked if the notice had to do with the strike, he replied that he did not see what was written on it and refused to admit that it could have had anything to do with the strike.

[473] He said Malabela had to phone Mndebele who was at Malelane. He did not tell Malabela to look for Gininda as there were many people and he could not say if he was there.

[474] He did not take notice or find Gininda.

[475] Malabela then put the notice on the spike. He did not read the notice. Malabela insisted that he had to read it out but that was not his work. Malabela then turned around and went in the direction of the terminal building.

[476] He heard nothing from management over the loud hailer or the public address system to say go back to work.

[477] After Malabela had left, he did not go and speak to the shop stewards or Gininda.

[478] It was late when Mndebele arrived. It was 16:00 or 16:30. There were not many people left when they were called together by Mndebele. He then told Mndebele that Malabela brought him a notice to read but the notice had been blown away.

[479] Notices must be given to the organiser or shop stewards. He did not call a shop steward as Malabela did not tell him to call a shop steward and no one was near him.

[480] Malabela knew who to contact.

Witness Mzwake Godfrey Mashabane

[481] He had been employed by Buscor as a driver at R1100 per week and dismissed for participation in the strike.

[482] On 29 March his shift started at 04:00 and while on his way to Malelane with passengers, he learned that the strike was on.

[483] At Malelane, he was told by management to park the bus at the depot. He went back to the Malelane terminus and joined the strikers who were singing and chanting.

- [484] He heard Mndebele saying to them there would be white people who would come and say that the strike was not legal but that we should not take notice of them.
- [485] When he returned after buying food, he was a little distance away from the others.
- [486] The white persons arrived with Ngombe who had a loud hailer. He had forgotten the names of the white people. Ngombe first put on the alarm of the loud hailer to attract their attention but they continued with the singing and chanting.
- [487] He heard Ngombe saying to go back to work as the strike was not lawful. He gave them 30 minutes to go back to work. It was 15:30 to 16:00 when the ultimatum was given. Ngombe said within 30 minutes they had to return or they would be dismissed.
- [488] He only saw the loud hailer and no documents with Ngombe. He did not remember Ngombe saying that the agreement had been signed. It was possible that he said so but he did not hear it.
- [489] The workers did not know what to do as the shop stewards controlled them and had to tell them what to do.
- [490] They did not receive any results that day from the shop stewards. By about 16:00, their organiser was not there and they had not received a response and they left without knowing what was going on.
- [491] On the following morning, they received information that the two unions had signed the agreement and that it was then binding on them to go back to work.
- [492] They went to the depot to collect their buses and found the gate locked. Security said those on strike could not enter as they had been dismissed. The shop steward contacted their organiser who was in Nelspruit and said the same had happened there.
- [493] They all went to Nelspruit to meet the organiser. The shop steward called them to the union offices where they were told that the shop stewards

would prepare a letter to meet with management. The letter was written and taken to management.

[494] They were told that the hearing would be on Wednesday. They went for the hearing and met at the parking ground. They nominated persons for the negotiations with the employer. They waited outside to the following day. Mndebele came out and said no agreement could be reached with management and that they had been dismissed.

[495] On Friday, they were called to Malelane and received their notices that they had been dismissed.

[496] SATAWU members also participated in the strike. They were not dismissed. He remembered one and it was Gumedze.

[497] Gumedze is the same as person as SV Gumede. Miss Gumede is a member of SATAWU. She was singing and chanting and thus participating in the strike.

[498] He had no knowledge that at the hearing, the evidence was that she did not participate in the strike. He knew nothing of that hearing.

Mbhuti Alfred Gininda

[499] He knew of the strike of 29 March 2010 but on Friday 26 March, he was not there.

[500] He was dismissed prior to the strike but his case was still at the CCMA. He was dismissed on 28 April 2009.

[501] He agreed that he had been dismissed but was still challenging the dismissal. TAWUSA was also not paying him but only asked him to help.

[502] Before his dismissal, he had been the chairperson of the shop stewards at Buscor. On the 29 March, he was still acting as the Chairperson of the shop stewards.

[503] He refused to admit that he was an official. He was then referred to the letter in the bundle which was read into the record. It is on a Tawusa letterhead issued under name of Z Mankge, addressed to Buscor for the

attention of Burger and Erasmus. It is headed "Collective Disciplinary Hearing" and states that "... Alfred Gininda our office bearer will represent the employees..."

[504] He identified the letter as the one that authorised him as an office bearer. He then agreed he was an office bearer of the union.

[505] On 29 March, the organiser Jabu Mndebele telephoned him. He said that he had to come to the office as the workers were on strike. He had to assist the union. He went to the office and then went to the parking ground in Nelspruit. He did not go to Malelane. He went to the employees.

[506] Management took the buses away. The workers started singing and chanting.

[507] On 29 March, he saw Ngombe approaching the employees where they were singing and chanting. He did not know what Ngombe told them as he was too far away. He did not see Malabela.

[508] Mndebele went to Malelane and left him and Thabethe there to monitor the situation. He did not address the workers. Only if the workers were causing damages would he personally have to speak to them. He denied having addressed the workers as Surprise had testified.

[509] Mndebele, before leaving for Malelane, had spoken to the workers and told them not to touch the company property. They were monitoring the position until the police arrived. He could not say what time did the police arrived.

[510] The police arrived and said the owner did not want them on the premises. The workers dispersed and went a distance away.

[511] They waited until the afternoon when the organiser returned. He could not remember the exact time. It was 16:00 or after 16:00.

[512] The organiser called all the employees together. Most workers had already left. He said the agreement had been signed. It was already late and those who still could have to take up their shifts and the others must go back to work the next day.

- [513] He knows Mashele. He could not comment on what Mashele said, i.e. that Mndebele had said the workers had to go back the next day.
- [514] He would not comment on Surprise's evidence who also said that Mndebele told them to go back to work the next day.
- [515] He was again called on 31 March and told the employees were charged and must go to a hearing at 13:00 on 31 March. They went to management. The hearing continued until 1 April. The Chairperson said all the employees had been dismissed.
- [516] He did not instigate the strike and did not influence the employees to engage in a strike on 29 March 2010. It was a legal strike as he saw the certificate at the office.

M Magagula

- [517] During March 2010, he was employed by Buscor. He was employed from 1988 as a driver earning R 8300 per month. He was dismissed during the strike and wanted reinstatement.
- [518] On 29 March, he was on strike. He went to town at about 07:00 to meet the other workers and started singing freedom songs.
- [519] The shop stewards were also there.
- [520] Nobody else addressed the workers that morning and they had last been addressed on the Friday. On Friday, they were told not to cause damage.
- [521] While they were busy singing, Gininda was saying not to damage anything. He agreed with Surprise on this point.
- [522] Gininda's role was to monitor the employees and to warn them not to damage property. He could not say if Gininda said anything else as he was not next to him all the time.
- [523] He knows Thabethe and he was present. Thabethe also said not to damage property and to yield for the incoming buses. Gininda was a marshal and Thabethe too and there were other marshals present.

- [524] The police arrived to see if they had damaged anything. At about 12:00, the police said the employer had said they had to leave. They left the parking area.
- [525] On 29 March, he saw Ngombe at the parking ground at around 10:00. Ngombe had a loud hailer and was talking through it. He could not hear everything because of the singing.
- [526] They were not interested to hear what he said as they were waiting for a report from Mndebele.
- [527] He heard Ngombe saying that the strike was unprotected and that the employer might actually dismiss them. Ngombe also told them to go back to work. He knew he might be dismissed because that was what Ngombe said.
- [528] He saw Burger with Ngombe and Malabela a distance away on the other side. He saw Burger and Ngombe made the announcement from the shelter and that was when he saw Burger and Ngombe.
- [529] He did not hear an announcement through the public address system by Ngombe about the strike. He did not hear any announcement over the public address system on 29 March. There were people talking over the system but they could not hear because of the singing.
- [530] He did not see or hear Ngombe in the control room. He heard someone making an announcement but could not say who that was. It was possible that it was Ngombe or Malabela on the public address system.
- [531] It is possible that it was 10:30.
- [532] He was present in court when Ngombe gave evidence.
- [533] If it was not for the singing, they would have heard what was said over the system.
- [534] He did not follow the announcement because the speakers were not rigged up properly for where they were standing and sitting. Because of the loud hailer, he assumed Ngombe repeated the same message. Before the strike,

they could not reach a driver through the public address system and had to go from bus to bus looking for him.

- [535] Ngombe addressed the crowd after he had arrived, left again and returned with Burger when he had a loud hailer and it was after 10:00. He again saw Ngombe on the parking area at 11:00.
- [536] He saw Malabela around 10:00. When he saw Malabela, he was approaching the palisade fence. He did not see what he did thereafter.
- [537] The police dispersed the crowd around 12:00. The police did not use force or teargas and only addressed them. When the police told them to leave, the toyi-toyi ended. He did not know where the others went. When the police dispersed them, Malabela was no longer there.
- [538] He saw Mndebele in the morning when they were waiting. He was singing and chanting with them. Mndebele did not in the morning address the workers.
- [539] He was in court when Malabela testified. It was put to him that Malabela said the announcements had been made at 13:00 and then 15:00. He said that he was sure that at 13:00 they had already left.
- [540] He went to the union offices at 15:00 and sat there with other people. Later, Mndebele came out of the offices. At the offices, the number of strikers was smaller as at the parking ground.
- [541] He did not know if some workers were still at parking ground.
- [542] When Mndebele returned from Malelane, he told them of the agreement. It was about 16:30.
- [543] There was a meeting held where it was announced that the agreement had been signed after Mndebele had returned from Malelane. He came out of the office and said two unions had signed. TAWUSA did not but they all had to go back to work.
- [544] The workers were not happy as they did not sign.

- [545] When put to him that Gininda had said that Mndebele told those workers who still could that they should go back to work and the others the next day, he agreed.
- [546] He did not know of any meeting at the parking ground. He left at about 17:00.
- [547] He had left his bus at the depot and decided the next day to go and collect the bus and then to start working. His shifts that week started from 0400 and he had a break from 0800 and at 1600 resumed his shift to 20:00.
- [548] He did not go back for the 16:00 shift because he was at the meeting. They were addressed to 17:00. His depot was at Mapogo and that would take 90 minutes to get there and then get the bus and come and collect passengers in Nelspruit.
- [549] He denied that he could have assisted passengers as they would have left by the time he reached Nelspruit. He then agreed that he could have offered help with the passengers. There were buses parked in Nelspruit.
- [550] He knew that it was true that when the passengers did not have buses then they got angry and that damage was caused in the 2007 strike.
- [551] He denied having knowledge of any buses being damaged in the 2010 strike.
- [552] On 30March, the staff bus did not arrive to pick him up. He was informed not to pick up his bus but instead to report at Nelspruit.
- [553] There was a disciplinary hearing on 31 March. He did not testify. The hearing resulted in his dismissal. The organiser Mndebele and other persons attended the hearing on their behalf.

T Ndlovu

- [554] On 26 March, he was in the employ of Buscor as a driver (from 2008) at R1200 per week and he was dismissed for striking.
- [555] He said that the strike was legal and he wanted reinstatement.

- [556] On 29 March, there was a strike and he did not go to work. He went to the Nelspruit terminus. All of them were there. Other workers than drivers were also on strike.
- [557] He saw Ngombe who had a loud hailer in his hand. He did not hear him addressing the workers.
- [558] He saw Malabela on 29 March with Ngombe but did not see Malabela addressing the workers.
- [559] He did not hear any announcement over the public address system.
- [560] He saw Gininda but Gininda did not address the workers. He saw Thabethe who toyed toyed with them.
- [561] Thabethe also did not address the workers. He would have seen and heard Thabethe addressing the workers.
- [562] He was informed by counsel that two witnesses had said that Gininda addressed the workers. He did not know of it. Mndebele addressed all the workers. He said that the strike was proceeding and that the workers must picket but not cause damage to any property and they had complied. They did not interfere with any buses or any workers not joining the strike.
- [563] The police arrived and watched them. The police said it was better to leave the place as they might start shooting at the strikers. While previous witnesses never mentioned a shooting one policeman said they might shoot at them. He understood that they were ordered to leave. It was 12:00 and everyone was leaving in groups.
- [564] The strike would end when the organiser told them to go back to work.
- [565] After 17:00 on Monday Mndebele told them it was over and they had to return to work. He explained that there was an agreement signed and the next day they had to go back to work. He did not go back to work on the same day because it was not possible as his bus was at Masoi which was 45-50 km from Nelspruit and it would take an hour to get to Masoi. He had to pick up passengers from Nelspruit. When he was told that the strike was over, it was long after his knock off time of 17:00.

- [566] On Tuesday he went to work. He did not resume work. His supervisor Du Plessis told them not to work. They were told they were dismissed.
- [567] He phoned Mndebele and told him what they had said at the depot and the all went to the terminals at the drop zone to meet the organiser. There were shop stewards present.
- [568] The majority of the strikers were there. They were saying they had been prevented from starting work and told to go to Nelspruit. Later Mndebele came and said there was a letter to attend a hearing. There was an agreement amongst them to meet 11:00 of the next morning as the hearing was set for 13:00. The hearing proceeded with 9 people representing the workers. They included Mndebele, Thabethe and others.
- [569] The employer had chosen the format of the hearing and the employees elected their representatives. The outcome of the proceedings was that they had been dismissed. The hearing took place through the night until 11:00 the following day when they were informed.
- [570] The appeal hearing confirmed the dismissal.
- [571] He did not know that there were two hearings, one for the SATAWU members and one for the TAWUSA members.
- [572] During the strike, he saw SATAWU members on strike. They were not dismissed. He recalled the names of T Nyundu, Mazibane and Yvonne. S Gumede was at Malelane. He denied that they were on night shift, sick leave or did not participate in the strike.
- [573] The night shift started at 15:00 or 16:00 to 01:00 or so.
- [574] Counsel for Buscor indicated that he would not repeat questions on issues covered with the other witnesses. He intended to deal only with new issues. Counsel for the employees reserved their rights.
- [575] He had not told his lawyers about the SATAWU people before he went into the witness box. He was not present during the trial when the names of SATAWU members were given to Buscor.

[576] Counsel for Buscor recorded that Buscor had been prejudiced by the list provided and by now adding new names to the list.

[577] Miss Gumede did not work in the same section as he did. Also not in the same Depot. She worked at Malelane and he worked at Masoi. He travelled from Masoi to Nelspruit and not to Malelane. Before the strike, he had travelled between Malelane and Nelspruit.

[578] He saw her and knew her and that was why he said that she was on strike. She was not off duty at the time as she was a bus driver and he knew her shift and spoke to her one on one.

[579] He did not know that the SATAWU members were also charged and that she was one of them and found not guilty. All that he knew was that she was on strike and he had no knowledge of what Nkambule said at the enquiry regarding why she was not on strike. He could not dispute what was said at the enquiry as he was not there.

[580] On 29 March, in the parking area at Nelspruit, he did not hear any ultimatum being read.

[581] He was not there when Mndebele supposedly told workers that an agreement had been signed and that they must go back to work. He was told later that the strike was over. Mndebele, the organiser, at 17:00 told him by telephone it was over.

[582] He was not present when Mndebele addressed the workers

Dawie Lodewikus Wilson (recalled)

[583] The public address system was installed in July 2009.

[584] The public address system did not change between installation and March 2010 and was in good working order. The volume settings have also not been changed.

Zack Mankge

[585] He is the secretary general of TAWUSA.

- [586] TAWUSA prepared its demands and the other two unions prepared their demands. To expedite the process, the demands were forwarded to the Bargaining Council as consolidated demands. In consolidating the demands, some of the respective unions' demands fell away. There were eighteen demands.
- [587] They agreed what the bottom line on each of those demands was.
- [588] Mr Ravuku, a Commissioner, conducted the negotiations between the parties.
- [589] On Sunday 28 March 2010 at around 15h00, he was informed by the Commissioner that a revised offer had been made. He was not told the details of the offer. Around 18h00, he was told that the offer was 10% and he indicated that as it was not a working day, he could only comment on the offer on Monday.
- [590] Because of the internal mandating committee procedure, the revised offer could only be dealt with on 29 March 2010. He received the email only on the Monday.
- [591] He denied that there was an agreement between the three unions to present a united front and that no trade union would bargain on its own with the employers. There was no agreement other than a "sort of solidarity" between the unions to achieve the same goal.
- [592] They jointly agreed the consolidated sets of demands with a fall-back position. TAWUSA's fall-back position was 11%. As unions, they had to meet if anything less than 11% was offered.
- [593] It was disappointing that the other two unions accepted the offer without TAWUSA's agreement.
- [594] The meeting in Randburg was not attended by TOWU. SATAWU had one representative in the form of Mataboge. It had been impossible to obtain a mandate to settle at 10%.
- [595] The agreement was signed between 14h30 and 15h00. The agreement was not signed by TAWUSA or TOWU.

- [596] He participated in the negotiations to finalise the agreement but could not agree to 10% across the board.
- [597] The strike was legal as all the formalities had been complied with. The strike would only become illegal when an agreement had been signed by two unions. An oral settlement between two of the unions and the employers was not binding on TAWUSA.
- [598] There had never been a practice in terms of which a strike would be called off once the unions or some of them orally accepted an offer.
- [599] According to him, all of the members of all the unions were on strike on 29 March 2010.
- [600] He understood that Towu would also sign and issued a notice that the workers should go back to work on 30 March which was the next day. The notice was issued also to each individual employer.
- [601] It was not practically possible to return to work on 29 March. He had to inform each branch official who had to inform the members at the depots. All the other employees accepted the notice to report for duty the next day.
- [602] On 30 March 2010, he informed Mndebele to inform the members to report for duty. He faxed him a copy of the notice as sent to Buscor that the members would officially report for duty on 30 March.
- [603] He did not receive any response from Buscor to his letter informing Buscor that the members would return on 30 March.
- [604] He saw copies of the ultimatums issued around 12h10 and 15h35 when he returned to his office after the meeting in Randburg. The ultimatums suggested that the members were on an unprotected strike which was untrue. The strike only became unlawful when the agreement had been signed.
- [605] It was a national strike and members went out on strike at the various employers nationwide.

- [606] The notice to Buscor and other companies went out around 16h45 to 17h00 on 29 March 2010.
- [607] Buscor sent a letter to his office at about 19h00 on 29 March when no one was in the office. He saw the letter at 08h00 on 30 March 2010 when he arrived at the office. The letter had called for representations as to why the company should not dismiss the members for partaking in an unprotected strike. The representations had to reach Buscor before 08h00 on 30 March 2010. It was impossible to comply with the request. By that time, he had also been informed that members had reported that they had been dismissed.
- [608] It was wrong to issue ultimatums prior to the signing of the agreement.
- [609] Calling upon the members to return within 30 minutes was too short. It was impossible to leave the union offices in Nelspruit and within 30 minutes speak to every single worker. In any event, the strike was protected until then. It was impossible to comply with such an ultimatum if it had been issued.
- [610] When an ultimatum is issued, the union normally would quickly arrange a meeting with the members to explain the ultimatum to them. The ultimatum should also be given to the employees. It could be resolved within one day.
- [611] The letter from Buscor saying that the strike occurred on 29 and 30 March was incorrect as the employees were informed to return to work on the 30 March.
- [612] As far as he was concerned, there was still a dispute which required a meeting on 29 March and this dispute would remain live until an agreement had been signed binding all parties. TAWUSA, in any event, had not agreed to the dropping of the demands that were still in dispute. TAWUSA would have pursued those demands had it not been for the signing of the agreement that bound TAWUSA.
- [613] The members of TAWUSA tendered their services all along which tender had not been accepted by Buscor. TAWUSA wanted reinstatement retrospective to the date of dismissal.

- [614] There was no violence during the strike. No conduct on behalf of the union or its members warranted payment of any compensation.
- [615] The disciplinary enquiry was followed by an appeal where the dismissal was confirmed.
- [616] Buscor informed the union that as a result of the dismissals that it intended terminating the recognition agreement as the union representativity decreased.
- [617] He was the chief negotiator and not Mndebele. He disagreed with the evidence of Mataboge and Wilson on this point. Mndebele should have reported to him any events that occurred over the weekend. Nothing had been reported to him.
- [618] During the morning, members had been informed and contacted regarding a new mandate.
- [619] He did not communicate with Mndebele at 18h00 on Sunday to inform him of the revised offer. He denied that Burger or anybody else had discussions with Mndebele on the Sunday regarding a revised offer.
- [620] He would only call off the strike after having received written confirmation of an acceptable offer.
- [621] He insisted that Burger was only formally informed on the Monday of the acceptance of the offer by the other two unions.
- [622] According to him, the demands were consolidated demands. In terms of the consolidation, there was a "backup" (fall-back position) of a final position on each of the items. Any changes or withdrawal of demands had to be done by the three unions together. There never was a meeting after the revised offer was made. Therefore, the other two unions did not have a mandate to accept the revised offer.
- [623] When referred to the press announcement downloaded at 20h51 on 29 March 2010, where Mndebele said that nothing had been signed although a settlement was reached, he could not say whether Mndebele had spoken to

the media. Mndebele, in any event, did not have authority from Mankge to issue a press statement.

[624] At the time of the trial, Mndebele was not an organiser for the union anymore. The union had dismissed him.

[625] The fall-back position was 11% and not 10%. He agreed with Wilson that all three unions needed a fresh mandate to settle.

[626] He disagreed with the email from the Commissioner and contended that negotiations could continue until the agreement had been signed. He disagreed that it was merely going to be a signing ceremony.

[627] On Monday, he had no knowledge that SATAWU and TOWU had suspended the strike.

[628] He confirmed that on the Monday, he sent the following email to the other two unions:

‘We refer to the above and wish to record that neither SATAWU nor TOWU have agreed with us on the suspension of the strike. We therefore record that we do not agree to suspension of the strike.’

[629] This was confirmation that the strike could only be suspended by agreement amongst the three unions. He again denied that there was a practice previously in terms of which when oral agreements were reached with unions and management to settle a wage dispute, strikes were suspended pending the signature of the settlement agreement and as soon as it was signed the strike would be called off.

[630] He maintained that Mataboge did not have a mandate to sign on behalf of SATAWU. He was not saying that the settlement agreement was invalid. According to him, TOWU could only have signed the agreement long after he had left the meeting at around 15h00.

[631] His attention was drawn to a copy of the telefax bearing a transmission record of 14h43 on 29 March. He disputed this evidence on the basis that the relevant pages did not contain the initials that he expected to have been there.

- [632] He was unaware of the -ut notice from Buscor and quite surprised to see such a notice as it was an industry strike.
- [633] The bus drivers had to bring their buses to the terminus which would be a safe place. Where buses were left overnight at the depot there was no need to drive them into town. According to him, nobody in fact took a bus from a depot to the terminus. He denied that it was the objective to bring the buses to the terminus with passengers to irate the passengers in the afternoon as they could not go home.
- [634] He denied that although most of the members were either in Nelspruit or Malelane where Mndebele was that the notice period was long enough because Mndebele could immediately communicate with the members.
- [635] According to him, only members of other unions would sing louder in order not to hear communications from management. If it happened, the union would distance itself from such conduct.
- [636] The union in fact obtained a mandate from all of the offices before the afternoon meeting when the agreement was signed.
- [637] As much as 80% of the workers would not have been able to go back to work immediately once the agreement had been signed. In addition, he did not receive any written reply to his letter that was sent off at about 17h00 on 29 March.
- [638] According to him, having had discussions with the members, they had not received any ultimatum.
- [639] The assistant general secretary was at the office and would have received copies of the documents sent to the office during the day. The assistant general secretary was aware of the meeting in the afternoon when the issues would be resolved. In addition, it was a protected strike and there was no need to reply to the ultimatums.
- [640] He had no knowledge of an application for the interdict launched by PUTCO at the time. It was to interdict the strike as an unprotected strike.

- [641] He admitted that Buscor replied to his letter sent off at 17h00. It was by way of the fax sent at 19h00 which he only saw the next morning.
- [642] He had a discussion with Mr Carr of Bowman Gilfillan representing the employers and persuaded him not to launch the application on behalf of PUTCO. He was unaware of any claim for payment of compensation brought by PUTCO against his union.
- [643] He denied that the letter of 19h00 was a response to his of 17h00.
- [644] According to him, his members were dismissed on the Tuesday prior to the disciplinary hearing as they were not permitted to work.
- [645] The union members were very disciplined and would not have left until they had known what would happen the next day. He could not comment on the evidence that some had left before 17h00 when Mankge sent out his communication.
- [646] He did not know whether an announcement was made at Malelane similar to the one that Mndebele made at Nelspruit.
- [647] He could not give a satisfactory explanation as to how the drivers would get to their buses left in town where they normally kept their buses at home overnight. Those drivers were not normally conveyed by staff buses.
- [648] The purpose of continuing with the strike on the Monday morning was to elicit a better offer from the employers.

Wonder Nicholas Mathonsi

- [649] He was a store clerk at Buscor and dismissed for striking.
- [650] He saw Mndebele at Nelspruit after 08h00 when Mndebele told them that nothing had changed and that the strike would proceed.
- [651] He saw Ngombe with a loud hailer in his hand. Ngombe was using a loud hailer but he could not clearly hear what was said.
- [652] He saw Ngombe for the second time when he was saying that they should stop what they were doing as it was unlawful.

- [653] He did not hear or see Gininda or Thabethe addressing the workers.
- [654] The shop stewards had to monitor the strikers.
- [655] He did not see Burger or Malabela at Nelspruit.
- [656] Ngombe did not use the public address system nor did he hear any other communication through the public address system.
- [657] After Ngombe made the announcement, he personally left with Mndebele to Malelane.
- [658] At Malelane, Mndebele told the strikers that the employer had not responded to their demands.
- [659] He saw Ngombe at Malelane with the loud hailer in his hand. He made an announcement that the workers had to go back to work because the strike was illegal. He had some piece of paper in his hand which he placed on the benches. He did not read the papers.
- [660] He did not see Burger attempting to speak to Mndebele. At about 15h00, he went to Nelspruit with Mndebele. They went to the union offices. Mndebele had received a telephone call from Johannesburg before they left.
- [661] He was informed by Mndebele that according to the telephone call there was a document at the union offices that Mndebele had to see. It had to do with an agreement.
- [662] They went to the union offices as there were no employees left at the terminus. At the union offices, the employees said that they had left the terminus because they were disbursed by the police.
- [663] Mndebele then said to the workers that he had not yet received the documents but it had been explained to him what it contained. He had received information that the two other unions had agreed to a 10% increase.
- [664] He further informed the workers that all the unions were bound by the agreement and because it was already late they had to go back the next

day. Some workers had already left. He personally phoned one of the shop stewards informing him that on Tuesday they would go back to work.

[665] Mndebele also tried to contact other people who were not there. The fax arrived after 17:00 when they were still there. The fax explained that they had to go back to work the next day. The fax was the one coming from Mankge.

[666] The stock of 40 windscreens normally was depleted within two weeks due to damage.

[667] They also regularly had to do upholstery.

[668] On 30 March, he reported for duty and was told to go to Nelspruit.

[669] Thabethe left the union and he heard that he was working with another union.

[670] Mndebele is in the Witbank area and the relationship between him and the union was not good.

[671] Ngombe could have said that they had to go back within 30 minutes and it is probable that he did not hear it because of the singing.

[672] He was a shop steward.

[673] They left Nelspruit after 11:00. It was a while after Ngombe had spoken through the loud hailer. Ngombe must have spoken before 10h00.

[674] Less than an hour later, Ngombe made a further announcement both in SiSwati and English.

[675] He did not read the papers that Ngombe put on the benches because there was an official of the union present and any papers should have been given to the official.

[676] He did not hear Mndebele making rude remarks to Ngombe.

[677] The call that he received at Malelane was from Zack and he had to explain to the workers about the telephone call. He explained to the workers that he

had received a message that the other two unions were in agreement and that they might be signing such an agreement. They then left Malelane at about 15h00.

[678] It was possible that after the meeting at the union offices which was before 17:00 Mndebele went to the parking area and also addressed members there.

[679] The drivers who still had to finish shifts could not go back because the buses had been taken away.

[680] He would not be able to comment on how many buses had to be repaired after he was dismissed for striking.

Solly Madumo

[681] He was employed by PUTCO at Pretoria as a senior human resource officer.

[682] He was a member of TAWUSA and also deputy chief shop steward and the secretary of the Pretoria branch.

[683] The three unions constituted a committee to co-ordinate the strike and another committee to seek mandates. He was a member of the committee which was supposed to seek mandates.

[684] The unions agreed on a minimum of an 11% increase. In Pretoria, no single person from SATAWU or TAWUSA worked on that day. Everybody joined the strike.

[685] Mankge phoned him about developments and asked whether they would accept anything below 11%. The members did not wish to accept anything below 11%.

[686] Gary Wilson was not present at the afternoon meeting in Randburg.

[687] The 10% increase was not what the unions agreed upon as acceptable.

[688] After it had been communicated that the agreement had been signed, the workers were told to take their buses back to Mpumalanga.

[689] The drivers were instructed to transport passengers for free.

[690] PUTCO did not dismiss any employees (TAWUSA members) for striking.

[691] They left the meeting in Randburg at about 15h03.

[692] He saw the buses at Pretoria between 16h00 and 17h00 transporting passengers.

[693] PUTCO did not show any one of them a court order relating to the strike.

The legal principles

[694] As the applicable legal principles relating to (a) the right to strike, (b) the status of pre-trial minutes, (c) the functionality of a strike and (d) the law relating to ultimatums are all relevant in this matter and they are set out below before they are applied to the facts.

[695] It is necessary to consider the nature and ambit of the right to strike before consideration is given to limitation thereof by custom or by agreement and whether the substratum of the strike has fallen away and whether the strike was still serving collective bargaining.

[696] It is also important to determine the status of the union as it has been contended that the union in this case was a "minority union" judged by the facts of this case.

The right to strike is entrenched in the South African law and regulated by the Constitution and the LRA:

[697] The Constitutional Court in *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another*¹¹ placed the right to strike in perspective by saying the following:

[13] In section 23, the Constitution recognises the importance of ensuring fair labour relations. The entrenchment of the right of workers to form and join trade unions and to engage in strike action, as well as the right of trade unions, employers and employer organisations to engage in collective bargaining, illustrates that the

¹¹ [2003] 2 BLLR 103 (CC) at para 13.

Constitution contemplates that collective bargaining between employers and workers is key to a fair industrial relations environment.... This case concerns the right to strike. That right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system.

[698] The LRA defines the right to strike as:

‘The partial or complete concerted refusal to work... by persons who are or have been employed by the same employer... for the purpose of... resolving a dispute in respect of any matter of mutual interest between employer and employee...’

and

‘Section 64. Right to strike and recourse to lock out

- (1) Every employee has the right to strike and every employer has recourse to lock out if-
- (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and-
- (i) a certificate stating that the dispute remains unresolved has been issued; or

....

and after that-

- (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless-

....

- (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation;

....'

[699] In considering the proper meaning of the LRA in relation to strikes, one has to have regard to section 1 of the LRA which sets out the purpose of the LRA -

'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are:

....

- (d) to promote-
 - (i) orderly collective bargaining;
 - (ii) collective bargaining at sectoral level;
 - (iii) employee participation in decision-making in the workplace; and
 - (iv) the effective resolution of labour disputes.'

[700] The Constitutional Court went on to say:¹²

'The first purpose of the Act is thus to give effect to constitutional rights. Secondly, the Act also makes clear that it is intended to give legislative effect to international treaty obligations arising from the ratification of International Labour Organisation (ILO) conventions. South Africa's international obligations are thus of great importance to the interpretation of the Act. Thirdly, the Act seeks to provide a framework whereby both employers and employees and their organisations can participate in collective bargaining and the formulation of industrial policy. Finally, the Act seeks to promote orderly collective bargaining with an emphasis on bargaining at

¹² Ibid at paras 26 and 27

sectoral level, employee participation in decisions in the workplace, and the effective resolution of labour disputes.

[27] The Act contains a further important interpretive instruction. Section 3 provides that:

“Any person applying this Act must interpret its provisions –

- (a) to give effect to its primary objects;
- (b) in compliance with the Constitution; and
- (c) in compliance with the public international law obligations of the Republic.”

[701] Once again this provision emphasises that the Act is to be interpreted to give effect to constitutional rights and to international law obligations. It then mentions the Conventions:

[29] There are two key ILO Conventions relevant to the issue at hand: the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). South Africa is a member of the ILO and has ratified both these Conventions.¹³

[702] The right to goes with the enforcement of collective bargaining.¹⁴

[34] Of importance to this case in the ILO jurisprudence described is firstly the principle that freedom of association is ordinarily interpreted to afford unions the right to recruit members and to represent those members at least in individual workplace grievances; and secondly, the principle that unions should have the right to strike to enforce collective bargaining demands.’

[703] Although the *Bader Bop* case dealt with the right to strike to acquire organisational rights, the principle remains the same for all collective bargaining demands.¹⁵

¹³ Ibid at para 29

¹⁴ Ibid at 34.

¹⁵ Ibid at para 36.

[36] Taking these two principles together, it can be said that the jurisprudence of the enforcement committees of the ILO would suggest that a reading of the Act which permitted minority unions the right to strike over the issue of shop steward recognition, particularly for the purposes of the representation of union members in grievance and disciplinary procedures, would be more in accordance with the principles of freedom of association entrenched in the ILO Conventions. Similarly, it would avoid a limitation of the right of freedom of association in section 18 of our Constitution; and the rights of workers to form and join trade unions and to strike; as well as the right of trade unions to organise and bargain collectively entrenched in section 23 of our Constitution.’ (Own emphasis)

[704] It is this clear that the right to strike is embedded in the South African law and the ILO conventions adopted by South Africa.

The purpose and effect of pre-trial minutes

[705] It is necessary also to consider the status of pre-trial minutes as notwithstanding a pre-trial meeting having been held and minutes having been produced some disputes arose between the parties as to what the issues were to be determined by this Court.

[706] The Union wished to introduce evidence that purportedly would show that SATAWU members also participated in the strike but were not disciplined or dismissed. Buscor objected to the evidence on the basis that it was not a pleaded issue and did not form part of the agreed issues for determination by this court.

[707] The court has formulated the purpose of a pre-trial minute in cases such as *NUMSA v Driveline Technologies (Pty) Ltd and Another*.¹⁶

[94] I think I find support in certain authorities for my view that, generally speaking, a pre-trial minute redefines those issues which appear from the pleadings (and not issues relating to a cause of action which falls outside the ambit of the pleadings). In *Filta-Matix* (supra) at 614C Harms JA, speaking in the context of the object of rule 37 in the High Courts, said: “If a party elects to limit the ambit of his

¹⁶ [2000] 1 BLLR 20 (LAC) at para 94.

case, the election is usually binding.” I think this sentence may well support my view because the election to limit one’s case that is referred to must be a reference to the limiting of one’s case as pleaded and not as can be pleaded at a later stage if an amendment is granted by the court. Also, when Harms JA refers at 614B to the object of rule 37 in the High Courts as being “to limit issues and to curtail the scope of litigation”, this must, in my view, be a reference to limiting issues as they appear from the pleadings.’

[708] Myburgh AJ concluded as follows after considering various relevant authorities:¹⁷

‘[108] As I interpret this judgment, where a party in a pre-trial minute abandons a point, or agrees (expressly or by necessary implication) not to pursue/rely on the point, or otherwise informs the opposing party that the point will not be relied upon, then he will not be allowed to do so at a later stage, unless he is able to resile from the agreement on a basis upon which he would in law be able to resile from a contract.’

[709] Myburgh AJ also referred to the authority that a pre-trial minute is a consensual document and, in effect, constitutes a contract between the parties.¹⁸

[710] Having regard to the contents of the minute I held that the evidence as to whether other individuals participated in the strike and whether they were disciplined or dismissed was inadmissible as the pre-trial minute defined the issues in dispute and the minutes do not include this as an issue in dispute for determination by this court.

[711] In addition, the union did not in explicit terms pursue this aspect in argument. Counsel for the Union in argument informed the Court that it would argue those matters raised in its heads but that he would not argue any other matters in dispute although those matters (whatever they might be) were not conceded or abandoned.

Evaluation of the facts and events and applying the principles

¹⁷ *Chemical, Energy, Paper, Printing, Wood and Allied Workers’ Union and Others v CTP Lt and Another* [2013] 4 BLLR 378 (LC) at para 108.

¹⁸ *Shoredits Construction (Pty) Ltd v Pienaar NO and Others* [1995] 4 BLLR 32 (LAC) at 34E–F.

[712] The parties are in agreement that as from the conclusion of the collective agreement TAWUSA was bound by the agreement and the strike (if it had previously been protected) from that time onwards indisputably became an unprotected strike.

[713] It is for that reason necessary to determine when exactly the strike became unprotected.

When was the collective agreement that bound all parties concluded?

[714] The parties tendered conflicting evidence on when exactly the collective agreement binding all the parties was concluded and further whether it was signed on behalf of TOWU at all.

[715] The origin of the dispute about the signing of the agreement is to be found on the pleadings where TAWUSA challenged it and in evidence where TAWUSA's case was a denial that the employers' improved offer had been accepted by the other two unions during the Sunday preceding the strike that commenced on Monday.

[716] In the face of this challenge, the pre-trial minute, however, records, and that was also the evidence, that on Sunday, 28 March 2010 at 14:35, the mediator sent an email to representatives of SABEA and the three trade unions communicating, *inter alia*, that the revised offer had been accepted by TOWU and SATAWU.¹⁹

[717] The same minute further records that the two parties accepted the offer on Sunday. The pre-trial minute (inelegantly to say the least), however, also records that it was in dispute whether the revised offer of SABEA was accepted by SATAWU and TOWU, the majority trade union parties, on Sunday 28 March 2010.²⁰

[718] These conflicting statements in the minute became irrelevant as the evidence was overwhelming that SATAWU and TOWU accepted the revised offer on Sunday 28 March 2010 and they communicated their acceptance to the Commissioner who then in turn disseminated this

¹⁹ Pre-trial minute at para 3.14.

²⁰ Pre-trial minute at para 4.2.

information in the email referred to above. The email indicated that the signing ceremony would be on the Monday to be arranged by the Bargaining Council. By Monday, it was simply a matter of arranging for the signing of the agreement that recorded the settlement.

[719] The meeting was set for 13:00 Monday afternoon at the offices of the Council in Randburg, Johannesburg. TAWUSA, in the trial, contended that Gary Wilson, TOWU's representative, was absent from this meeting. He could therefore not have signed the agreement at the meeting. TAWUSA, however, did not contend that the agreement was invalid or not binding. TAWUSA contended that the collective agreement probably had to be faxed to him from Randburg to Cape Town for signature which would have delayed the conclusion of the agreement.

[720] The Council's constitution does not require the collective agreement to be signed. The collective agreement was concluded when the employer party and two of the unions agreed to a written document reflecting the terms of the agreement agreed amongst them. Provided TOWU agreed to the contents, the written collective agreement was concluded when they all agreed on the terms. There was no evidence that TOWU, at any time, disagreed with its contents. The collective agreement was concluded whether it was signed by TOWU.

[721] The probabilities show that the collective agreement had been concluded (and in fact was also signed by the parties thereto, including TOWU) sometime between 14:30 and 15:00 on Monday 29 March 2010. In argument, the Union contended that it was signed around 14:30 on the Monday. The probabilities favour such a conclusion.

[722] The evidence of Mataboge and Gary Wilson is convincing and is in accordance with and supported by a copy of the first and last pages of the collective agreement (signed by Gary Wilson on behalf of TOWU) having been faxed to Burger in Malelane. There is no reason to question the fax transmission report on those pages recording the transmission time as 14:43 as the time it was faxed from Randburg. That also accords with the view that the agreement was signed around 14:30.

- [723] On the probabilities, the collective agreement was concluded at approximately 14:30 Monday afternoon.
- [724] The strike by TAWUSA, if it had been protected, became unprotected from approximately 14:30 on Monday 29 March 2010.
- [725] The next question would be whether there is a basis to find that the strike on the Monday was unprotected by virtue of (a) an agreement between the unions or (b) a past practice to suspend the strike or (c) because the "collective dispute" had been settled and the strike had lost its functionality or substratum?

Was there a binding agreement to suspend the strike?

- [726] Buscor contended that whole of the strike on Monday was unprotected. Buscor contended that the suspension of the strike by TOWU and SATAWU was binding upon the minority union from the moment agreement was reached, i.e. the offer was (orally) accepted by the two unions, *inter alia*, by reason of an alleged agreement concluded amongst the three unions at the commencement of the wage negotiations to the effect that once an oral agreement has been reached with the employers, the strike would be suspended.
- [727] TAWUSA clearly disputed such an agreement as alleged by Buscor. Zack Mankge, on behalf of TAWUSA, by email,²¹ on Monday 29 March 2010 at 11:15, informed the other parties that he did not agree with a suspension of the strike as there was no such an agreement between SATAWU, TOWU and TAWUSA to suspend the strike. Its position remained that the collective agreement had to be signed before it became binding on TAWUSA. It was in dispute at the trial who was TAWUSA's main negotiator was. On the probabilities, Mndebele was the person sitting in on the negotiations while Mankge was the more senior person but being absent from the actual negotiations. Mndebele did not testify and in the absence of his evidence one has to rely on the evidence of those who testified to the existence of the agreement.

²¹ Bundle at page 48.

- [728] Buscor relied on the evidence of amongst others Mataboge for the existence of this alleged agreement. From the summary of his evidence, it is clear that he did not go so far as to claim such an agreement amongst the three unions.
- [729] The evidence of Gary Wilson is also unconvincing in this regard. He did not unequivocally testify to that such an agreement.
- [730] Buscor failed to persuade the Court that there was such an agreement.
- [731] For Buscor to rely on such an alleged agreement, it had to show that there was an agreement amongst the unions for the benefit of the employers. It further had to show that the employers knew of and accepted the benefit of the agreement. There was no evidence to show that Buscor knew of the alleged agreement, accepted the benefits thereof or relied upon it.
- [732] The position would have been different had there been such an agreement to which Buscor was a party but there was no such evidence.
- [733] The argument that the strike was unprotected by reason of an agreement to suspend the strike fails.

Was the strike suspended through practice and custom?

- [734] It is not disputed that SATAWU and TOWU suspended strike action with effect from Monday, 29 March 2010, and officially did not participate in the strike on that Monday.
- [735] Buscor contended that, in any event, through custom and practice an industry strike such as this one, in this sector, became suspended the moment the majority parties reached agreement irrespective as to when such agreement was reduced to writing or when it was signed by the parties as provided for in the constitution of the council.
- [736] Mataboge's evidence on which Buscor relied at best was that in the past "the strike" would be suspended pending signature of a collective agreement. The examples that he gave, however, related to settlements reached during the cooling off period and not after a strike notice had been

issued, in which case no further industrial action in any event was contemplated or pending.

[737] Mataboge did not give any specific example where a strike notice had already been issued and the strike was then called off between the commencement date of the strike and the time of signing of the agreement.

[738] Burger's evidence in this regard too was not specific and was unconvincing.

[739] The evidence referred to in the previous paragraphs does not on a balance of probabilities show that TAWUSA was bound to suspend the strike by reason of an existing practice or custom.

[740] Buscor simply has not shown that there was such a practice or custom or a binding practice or custom that would either terminate the strike or suspend the strike.

[741] In view of this finding, it is not necessary to consider whether in law past custom or practice are strong enough to lawfully suspend strike action rendering a strike that follows unprotected.

[742] The next question is whether the strike lost its functionality when the two unions (majority) accepted the revised offer on Sunday thereby rendering the strike on Monday unprotected?

The functionality of a strike

[743] The employer submitted that the functionality of the strike ceased when two of the three unions prior to the commencement time of the strike accepted the employer's offer. This is particularly true in this case, so the argument goes, because the "majority" unions for purposes of the collective agreement (that would bind everyone) accepted the offer and removed the dispute.

[744] Buscor relied specifically on the *Passenger Rail Agency of SA v SA Transport and Allied Workers Union and Others*²² for its submission that the strike by the members of only the one union on Monday was no longer functional to collective bargaining.

²² (2012) 33 ILJ 2659 (LC).

- [745] In the *Passenger Rail* case, the union issued a strike notice in respect of two strike demands, namely, the suspension of the CEO and the head of security; and that a forensic investigation be commissioned to probe possible acts of misconduct.
- [746] On the return date, the court held that the strike was unlawful because the first demand in itself was unlawful and the second demand had been *substantially* complied with.
- [747] Landman AJ, as he then was, dealt with the functionality of a strike as follows in *Afrox Ltd v SACWU and Others; SACWU and Others v Aprox Ltd*:²³

‘A strike can terminate in various ways. One way for a strike to terminate is where the strikers abandon the strike. This normally takes the place of an unconditional return to work. Another possible way, for there are probably other ways, (Cf “Some aspects of the termination of a dismissal lock-out” 1994 Contemporary Labour Law 79–83) is by the disappearance of the substratum. If the *casus belli* is removed, for example, by the employer conceding to the demands of the strikers or by removing the grievance or by resolving the dispute then the foundations of the strike fall away. The strike is no longer functional; it has no purpose and it terminates. When the strikes terminate so does its protection. It is not in the interests of labour peace for a strike action to be continued in such circumstances even in the case of a protected strike.’ (own emphasis)

- [748] The court, in *Ceramic Industries Limited v NCBWU*,²⁴ confirms that it follows that:

‘... as soon as the issue in dispute which gave rise to the strike has been settled, any strike which continues beyond this point cannot have such purpose because the whole reason for using such economic muscle falls away.’

- [749] The Court also questioned the functionality of a strike in the context of violence in *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union and Others*:

²³ [1997] 4 BLLR 382 (LC) at 406.

²⁴ [1997] 5 BLLR 547 (LC).

‘When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.’²⁵

[750] Professor Rycroft commented as follows on the functionality of a strike in the context of strike violence:

‘These suggestions are grounded on the constitutional understanding of a strike; it is for the purposes of collective bargaining. If behaviour during the strike is destructive of that purpose then the protected status has been jeopardised.’²⁶

[751] This particular strike was not violent and the functionality argument cannot be based on that aspect.

[752] Another example where the dispute was resolved and the strike ceased to be functional is the *SA Post Office Ltd v CWU and Others*²⁷ matter where Molahlehi J held:

[14] The key issue in this matter is whether or not the parties had reached an agreement in terms of which the dispute concerning the issue of the salary anomalies at the applicant’s workplace was resolved. The fact that the agreement was not signed is of little significance. What is important is the consideration whether the objective facts and the circumstances of this case support the contention that an agreement was reached regarding in particular the issue of salary anomalies...

[15] In my view, for the reasons set out below, the objective facts in this matter support the contention that an agreement which resolved the issue in dispute was reached between the parties.

[17] An offer may be accepted orally, or by signature of the proposed agreement or through conduct. When a collective agreement is concluded by way of conduct the action related to such acceptance must indicate the unequivocal intention to be bound by the

²⁵ (2012) 33 ILJ 998 (LC) at para 13.

²⁶ Can a Protected Strike Lose its Status? *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union and Others* (2012) 33 ILJ 998 (LC) (2013) 34 ILJ 821 at 827.

²⁷ [2010] 1 BLLR 84 (LC) at paras 14, 15 and 17.

agreement. And finally, one essential requirement of a binding collective agreement is that the rights and obligations of the parties should be expressly defined therein.'

[19] In *Ceramic Industries t/a Betta Sanitaryware v NACBAWU*,²⁸ the court, held that an agreement need not be signed by all the parties to it in order to satisfy the requirements of a "collective agreement" in terms of section 213 of the LRA."

[753] The Labour Appeal Court in the *Modise and Others v Steve's Spar Blackheath*²⁹ case assumed the following:

[5] Following upon *dicta* by Goldstone J in *Barlows Manufacturing Company Ltd v Metal and Allied Workers Union and others* 1990 (2) SA 315 (W) at 322H–I and by Golden JA in *SA Commercial, Catering and Allied Workers Union and Others v Transkei Sun International Ltd t/a Wild Coast Sun Hotel, Casino and Country Club* (1993) 14 ILJ 867 (TKA) at 874F–I, the respondent contended that, in so far as the demand was that it and the other Spar stores should bargain regionally with SACCAWU, that was a demand which was impossible to achieve because there was no regional bargaining structure in which regional bargaining could take place. On behalf of the appellants it was conceded that, if the demand was found to be the one contended for by the respondent, then such demand was incapable of achievement. For purposes of this judgment I will assume, without deciding, that the demand was the one contended for by the respondent. I will also assume, without deciding, that the dicta of Goldstone J and Golden JA referred to above under the old Act that a demand which is incapable of achievement would render a strike illegal are correct." (Emphasis added).

[754] As previously indicated in a discussion of the *Bader Bop* case above, the right to strike is part and parcel of the process of collective bargaining. This view was followed in *SA Transport and Allied Workers Union and Others v Moloto NO and Another*.³⁰

²⁸ [1998] 11 BLLR 1120 (LC).

²⁹ [2000] 5 BLLR 496 (LAC) at para 5.

³⁰ (2012) 33 ILJ 2549 (CC) at para 59.

‘Another feature of the right to strike is that it is an integral part of the collective bargaining process. As noted in *Bader Bop*, the committees engaged with the supervision of the ILO conventions have asserted that the right to strike is essential to collective bargaining. This was also recognized in the First Certification case.’

[755] The right of trade unions and employees to strike is not simply an end in itself but a means to an end and exist specifically in the context of the process of collective bargaining. That end is the resolution of the impasse which exists in the collective bargaining process at the time when this mechanism is invoked. In the context of the right to strike as being part and parcel of the collective bargaining process, the Court in *SA Airways (Pty) Ltd v SA Transport and Allied Workers Union*³¹ held that:

‘...The structure of the Act is one in which the right to strike is drawn from the institution of collective bargaining. The right to strike, fundamental as it is, is thus not an end in itself - the resolution of disputes through collective bargaining remains the ultimate objective.’

[756] In *Equity Aviation Services (Pty) Ltd v SA Transport and Allied Workers Union and Others*,³² Zondo JP (as he then was) said that ‘collective bargaining is normally expected to result in the conclusion of a collective agreement.’

[757] This means that collective bargaining and the right to strike must be applied for the purpose of reaching agreement.

[758] Buscor argued that the strike lost its protection when the main role players agreed that the dispute underlying the strike had been resolved. It is argued that in this case the employers' organisation and two of the three unions were the main players as they were the ones that would sign the collective agreement binding the third union. They were the majority that would eventually conclude the agreement binding TAWUSA.

[759] Buscor argued that when these parties reached agreement on Sunday, the *casus belli* was removed and there was nothing left to strike over. As between them, the three role players, they resolved the issue in dispute in

³¹ (2010) 31 ILJ 1219 (LC) at para 22.

³² (2009) 30 ILJ 1997 (LAC) para 76.

that sector and they had achieved the outcome the collective bargaining set out to achieve.

- [760] For this submission to succeed Buscor must show that at sectoral level, as is the case here, agreement between the majority parties would finally settle the dispute between all the parties and not only amongst those who agreed to the revised offer or it must show that a strike by the third union did not constitute collective bargaining and could not eventually result in an agreement.
- [761] It is accepted that the original strike was to be a strike pertaining to "collective bargaining at sectoral level" as contemplated in section 1 of the LRA.
- [762] It is further accepted that the three unions issued a joint strike notice to the employers' organisation and that the notice related to the demands of all three unions as they formulated the demands from time to time.
- [763] It is also true that according to Mankge, TAWUSA intended its strike to continue until it obtained a satisfactory offer from the employers' organisation or until it was bound by the collective agreement.
- [764] As far as TAWUSA was concerned, some of the issues in dispute remained alive until the collective agreement was concluded. Those issues related to conditions of employment and matters of mutual interest. It was not in dispute that the settlement excluded some of the demands of the unions.
- [765] This argument essentially says that there is a limitation on the right to strike where a minority union carries on with a strike in the face of an agreement by the other parties that will terminate that strike. What is the nature of a sector strike then?
- [766] The strike in the sector is a strike for purposes of the LRA. Section 64(1)(b)(ii) does not create a different category of strike (in a sector) to which other considerations apply. It merely creates a practical way to inform a number of employers of a strike.

- [767] The LRA does not provide for the termination of a strike by when one or more parties in as in the circumstances of this case decide to settle. Section 65 of the LRA places limitations on the right to strike. It does not provide for a limitation on the right to strike where the majority unions settle their dispute with the employers.
- [768] Appendix "A" to the bargaining council constitution provides a mechanism to the employers to bring an end to the dispute in the sector and the sector strike where the majority unions accept an offer that resolves the dispute amongst them.
- [769] The very existence of this mechanism dispels the notion that by agreement between the majority unions only or by custom or practice acceptance of the offer by the majority unions would terminate the strike or remove the *casus belli* in respect of the remaining (striking) union.
- [770] The right to strike belongs to each worker. I find nothing in section 23(5) of the Constitution of 1996 or sections 64 or 65 of the LRA that deprives a worker of his or her right to strike when another union reaches agreement with the employer party in respect of the same issue(s) in dispute.
- [771] On the evidence, TAWUSA continued with the strike as part of its collective bargaining process to see if it could extract further concessions from the employers as to how futile that effort might have been.
- [772] I find that as some demands remained on the table for TAWUSA, the strike remained functional to collective bargaining. If, on the evidence it was shown that the withholding of labour was for a purpose other than obtaining a better dispensation, then it would have followed that the strike was unprotected from the beginning.
- [773] Whether the demands of the three unions been complied with substantially as was the case in the *Passenger Rail Agency* case thereby rendering the strike unprotected?
- [774] In my view, the *Passenger Rail Agency* case is distinguishable on the basis that in that case the union had its own demands met substantially.

- [775] In this case, TAWUSA contended, and this was not disputed, that there remained a number of unresolved issues as between the employers and TAWUSA. The other two unions abandoned those demands in favour of a settlement. Meeting the demands of the two other unions is not the same as "substantially" meeting the demands of all three unions or that of the remaining union who wishes to pursue the collective bargaining process to its final end.
- [776] It cannot be said that TAWUSA's strike had no further collective bargaining purpose, how futile its strike might have been. For TAWUSA, there were unresolved matters of mutual interest to pursue.
- [777] The workers had the right to commence and continue with their strike, through their union, until such time as the collective agreement became binding upon them. This occurred at approximately 14:30 Monday afternoon.
- [778] The authorities (referred to above) relating to the functionality of a strike are distinguishable on the facts of this matter. In one of them, it is suggested that members of one union may be deprived of the right to strike where the other (majority of) unions in the sector have settled their disputes. The *Modise* case does not refer to unattainable demands in the sense of excessive demands but rather relates to demanding something over which the employer has no say (a centralised bargaining structure) and cannot implement. That was not the case *in casu*

The ultimatums

- [779] The principles governing ultimatums have been stated on numerous occasions.
- [780] A convenient summary of the role of an ultimatum is to be found in *Pule and Others v Mvelatrans (Pty) Limited*³³ where Molahleli, J said the following:

[51] It is trite that participation in an unprotected strike in our law is misconduct which may result in dismissal of those employees who participate in such a strike. However, participation in an unprotected

³³ (Case JS 535/2010) [2013] ZALCJHB 84 at paras 51 and 54.

strike does not in terms of Item 6 of the Code of Good Practice: Dismissal, automatically lead to a fair dismissal. In this respect section 68 (5) of the Labour relations Act of 1995 provides:

“(5) Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of good practice: Dismissal in Schedule 8 must be taken into account.”

[52] The fairness or otherwise of a dismissal arising from participation in an unprotected strike action has to be assessed taking into account the facts and the circumstances of a given case. The factors to take into account in terms of the Code of Good Practice: Dismissal, include (a) the seriousness of the contravention of the of the law, (b) attempts at complying with the requirements of the law and (c) whether or not the strike was in response to unjustified conduct of the employer.

[53] The evaluation of the substantive fairness of a dismissal arising from an unprotected strike entails also consideration of whether an ultimatum is clear and unambiguous. If that is the case a further inquiry is to be conducted in terms of Item 6(2) of the Code of Good practice which inter alia provides as follows:

“The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it.”³⁴

[54] The purpose of an ultimatum should be an endeavour in good faith, to induce the strikers to return to work.³⁵ The purpose of an

³⁴ This principle was applied even during the previous labour dispensation. In *Liberty Box and Bag Manufacturing Co (Pty) Ltd v Paper Wood and Allied Workers Union* (1990) 11 ILJ 427 (IC) at 435A-C and *NUMSA and Others v Dita Products (Pty) Ltd* [1995] 7 BLLR 65 (IC) at 78, the Industrial Court in dealing with this issue had, amongst others, the following to say: ‘(c) Sufficient time, from the moment of giving the ultimatum, must elapse to allow the workers to receive the ultimatum, reflect upon it, and to respond thereto by either compliance or rejection.’

³⁵ See *Motor Transport Workers Union obo David Sehularo v G4 Services (Pty) Ltd* (JS 1108/09) [2012] ZALCJHB 112 (12 October 2012) at para 36.

ultimatum was set out in *Modise and Others v Steve's Spar Blackheath*³⁶ as follows:

"... It is, in the first place, a device for getting strikers back to work. It presupposes the unlawfulness of the strike, otherwise it could not be given but it does not sanction the misconduct of the strikers. It is as much a means of avoiding a dismissal as a prerequisite to effecting one. One is tempted to say that strikers are put in *mora*. The point is that both under the 1956 regime and under the present one the question of dismissing a striker can only logically arise after non-compliance with an ultimatum."

Were the ultimatums issued?

[781] Having found that the strike became protected from 14:30 Monday afternoon, it is necessary to consider the matter of ultimatums.

[782] The ultimatums were in dispute firstly because according to TAWUSA they were not issued at all, secondly, if they had been issued, that they had been issued prior to the signing of the 2010 collective agreement and, thirdly, because the period in terms of the ultimatum(s) given for the strikers to return to work was allegedly too short.

[783] I find that on the evidence that a number of ultimatums were in fact issued.

At Nelspruit

[784] I first deal with the issuing of the ultimatums and then with their validity.

[785] On the probabilities, a first ultimatum was read out by Ngombe around 10:00. Ngombe by megaphone repeatedly read out in English and SiSwati the notice with the time inscription "12:10" (the first ultimatum).

[786] He in English and SiSwati informed them over the megaphone that the strike was illegal and they had to return to work within 30 minutes.

[787] Malabela then around 13:00 went to the control room where he read out the second ultimatum over the public address system which was used to make

³⁶ [2000] 5 BLLR 496 (LAC) at para 151.

announcements to passengers and drivers. He repeated the procedure three times each in SiSwati and English. He called upon the workers to return to work by 14:30.

[788] Malabela then went downstairs to the parking area which is on the other side of the palisade fence dividing the terminus into the arrival (where the parking area is) and departure area, where the strikers were present, to hand them copies and to discuss the contents with them.

[789] What is important is that the final ultimatum was issued by Malabela at approximately 15:00 and is the one with the inscription "15:35" (probably with no inscription on it when he read it).

[790] He read the final ultimatum from the control room three times in English and SiSwati and observed the strikers moving away from the terminal building as he read the ultimatum which indicated to him that they had heard the contents of the ultimatum.

[791] Again, he went downstairs and asked them to take copies. They ignored him.

[792] As with the first notice (the first ultimatum), he left a copy on the spikes of the palisade fence.

[793] According to Malabela, he called upon the workers to return by the time stated in the third and final ultimatum. That cannot be correct as he read the ultimatum approximately 15:00 and the notice recorded a return already by 14:30.

[794] The evidence of Dawie Wilson that the announcements would have been audible to the workers at Nelspruit is accepted. There is other evidence that also supports this conclusion.

[795] There were no buses that could really interfere with the announcements and the workers were to blame to the extent that, as some witnesses admitted, the workers through their own conduct attempted to make it impossible for them to hear any announcements.

At Malelane

- [796] Ngombe issued two ultimatums at Malelane.
- [797] Shortly after their arrival Ngombe asked the workers to return to work as it was an unprotected strike. He more than once read out the document with the time inscription "14:55" (the second ultimatum) in English and SiSwati. He called upon them to return to work in 30 minutes (and not by 14:30 as the notice read) and invited them to come and speak to management.
- [798] During the afternoon they received confirmation that the agreement had been signed. Ngombe shortly after receipt of a faxed copy of part of the agreement again in English and SiSwati read the final ultimatum with the time inscription "15:35".
- [799] Again he told them to return to work within 30 minutes. He also informed them that the agreement had been signed. He could not state the exact time when this notice was read. On the probabilities this ultimatum was read at approximately 15:00 notwithstanding what was written on the notice.
- [800] The workers at Nelspruit and Malelane had been told not to listen to management and they clearly were not intent on listening to any announcements or ultimatums from management, also not to the final ultimatum.
- [801] Buscor, by telefax, sent copies of all the notices and ultimatums to TAWUSA without receiving any response thereto until after 17:00 on Monday.

The validity of the ultimatums

- [802] The first and second "ultimatums" at Nelspruit are relevant only to show that TAWUSA should have recognised the insistence of Buscor for the workers to return to work. At the time of their issue, there was no unprotected strike and no valid ultimatum could have been issued.
- [803] All the "ultimatums" issued prior to 14:30 were invalid ultimatums as at the time there was no unprotected strike constituting misconduct on the part of the participating employees.

- [804] The exact time when the third ultimatum at Nelspruit was issued is in dispute and in doubt. It is, however, accepted that on the probabilities one was issued at approximately 15:00.
- [805] At Malelane, the first ultimatum only served to have indicated to the union that the company was serious to get its workers back to work once the strike became unprotected.
- [806] The final ultimatum issued at Malelane at approximately 15:00 after receipt of confirmation of the signing of the collective agreement is the only valid and therefore important ultimatum.
- [807] This is the only valid ultimatum issued at Malelane in respect of the unprotected strike. By this time TAWUSA's general secretary had already known that the strike had become unprotected. Something that he should have anticipated from the time when he learned about the Randburg meeting that was set for the signing ceremony.
- [808] That being the case, the issue of a final ultimatum at Nelspruit became somewhat academic. The members of the union were in any event waiting to hear from their union representatives about the signing of a collective agreement as Boiling Shongwe and others testified.
- [809] There is no dispute that the union knew all along that the strike would be over once the agreement had been signed.
- [810] The union expected the agreement to be signed that afternoon or during that day and expected the agreement to be binding upon them. For TAWUSA, the conclusion of the collective agreement was the only issue standing between a protected and unprotected strike and that was the only real issue to be addressed by an ultimatum.
- [811] The evidence of Boiling Shongwe suggests that Mndebele was still present at Malelane when Ngombe announced (by way of the third and final ultimatum) that the collective agreement had been signed.
- [812] According to Shongwe, Mndebele, at approximately 15:00, knew of the signing of an agreement but lacked confirmation in the form of a text

message. If that is not so then Mndebele at approximately 15:00, in any event, was expecting confirmation of the signing of the agreement and he had left for Nelspruit to find such confirmation. The evidence of Shongwe must be accepted in the absence of an explanation by Mndebele.

[813] Mankge, the general secretary of TAWUSA, by approximately 14:30 knew without having had knowledge of any specific ultimatum having been issued by any specific employer, that the strike (in the whole of the industry) had become unprotected by reason of the conclusion of the collective agreement. He also knew that his members had to return to work.

[814] The purpose of the valid ultimatum, in this matter, was to get the workers back to work after the agreement had been signed. There was no need for the strikers or the union to consider any other aspect. It was a matter of compliance with the collective agreement to end the strike and get the workers back at work.

But were the ultimatums fair?

[815] It is necessary to consider some of the events of the day to assess the fairness of the valid final ultimatums at Malelane and Nelspruit.

[816] Burger and others explained the procedure followed before and during the issuing of the various ultimatums. The evidence that Burger and his group went to Malelane to make engage with the union organiser and that they failed to do so because of his reluctance falls short of the requirement that the employer should engage the union before issuing ultimatums.

[817] Mankge left the meeting at Randburg after 14:30 and returned to his office knowing the strike had become unprotected.

[818] From his office, he sent a generic fax to the employers' organisation, the individual employers and to the organisers and officials of the union to inform them that the strike was over and that the union members had to return to work. He did this without any reference to an ultimatum from Buscor. He knew they had to return to work.

- [819] The strikers were reliant upon Buscor (through ultimatums) and its union representatives to tell them when to return to work. The official position of TAWUSA after signature of the agreement was that the strike was over and that the workers had to return to work. The union further unilaterally decided that for practical reasons its members would be advised only to return to work the next day. As such, there was no outright rejection of the final ultimatum.
- [820] The response from the union only at 17:00, however, stands to be criticised against the knowledge that the union knew and expected the agreement to be signed that day. The union also knew that from 15:00 onwards was peak time for the commuters to return home. The union knew its industry. It knew that a strike during the peak period would hurt the employers. It also knew that because the buses were brought to the depots in the morning the safety of the buses was at risk as long as the employees did not resume work.
- [821] The union could prior to the Randburg meeting have taken reasonable steps to be ready to convey to its branches and members as soon as possible after the signing ceremony the message that the strike was over and to have the members ready to return to work as soon as possible once the protected strike became unprotected. This was not done.
- [822] Mankge's explanation that he went to the Randburg meeting as the meeting was arranged for purposes of further negotiations is in conflict with persuasive evidence that the meeting was arranged as a signing ceremony only. His explanation is an attempt to explain away the delay in getting the workers back to work.
- [823] The sum total of Mankge's evidence suggests that he attempted to place the meeting as late as possible during the afternoon and that he tried to avoid an argument that he should have prepared at a much earlier stage to inform his union organisers of the signing of a collective agreement.
- [824] There is also no explanation why the union staff at the office did not send out the message that the strike was over.

- [825] In what preceded the valid final ultimatum and also having regard to the fact that the general secretary probably was attending the meeting in Randburg while the union organisers were present on the ground, it was still unfair of Buscor to require the union and its officials to assist to get the workers back to work within 30 minutes of the ultimatum.
- [826] There is no evidence to suggest that Buscor earlier in the day attempted to call a meeting of shop stewards in an attempt to get its employees back to work. The uncontested evidence for TAWUSA was that a shop stewards' meeting would also have been the appropriate way to convey and receive the ultimatums and for TAWUSA to clarify its position.
- [827] In my view the respondent did not follow a proper procedure in issuing the final ultimatums. In terms of the Code and the Labour Court decision in *National Union of Mineworkers & Others v Billard Contractors CC and Another*³⁷ it was incumbent on the respondent to engage with the Union before issuing the final ultimatums. This, the respondent failed to do. There is no evidence that the Respondent attempted to telephone the union representatives or through the shop stewards to engage the union official prior to issuing the ultimatums.
- [828] Engaging the union prior to the final ultimatums would have given the parties the opportunity to determine the timeline for the return to work.
- [829] The conduct of Buscor was based on the wrong premise that the strike had been unprotected from the outset. Buscor's conduct demonstrated that it realised that to issue one ultimatum would be insufficient thus the two ultimatums issued at Malelane and the three at Nelspruit. The final ultimatum at Malelane and Nelspruit, however, came at a critical time immediately prior to peak time. Even so, too little time was allowed for the workers to return to work.
- [830] The union knew that on a previous occasion during a strike, substantial damage was caused to company property by irate commuters. Buscor reasonably expected similar behaviour and tried to avoid it by issuing ultimatums. It was entitled to issue a short ultimatum.

³⁷ (2006) 27 ILJ 1686 (LC)

[831] The valid ultimatums required the employees within thirty minutes to return to work. The period granted to the strikers to comply and return to work in this matter was too short even given the background thereto and the fact that the union knew the strike would terminate some time that day.

[832] At the same time, the union acted unfairly in instructing its members only to resume duty the next day.

Were the dismissals substantively fair?

[833] The next investigation is into the fairness of the sanction of dismissal after the ultimatums had been issued.

[834] I with respect agree with the Labour Appeal Court³⁸ where it said:

"In my view the determination of substantive fairness of the strike-related dismissal must take place in two stages, first under item 6 when the strike related enquiry takes place and secondly, under item 7 when the nature of the rule which an employee is alleged to have contravened, is considered. It follows that a strike-related dismissal which passes muster under item 6 may nevertheless fail to pass substantive fairness requirements under item 7. This is so because the illegality of the strike is not "*a magic wand which when raised renders the dismissal of strikers fair*" (*National Union of Mineworkers of SA v VRN Steel* (1991) 12 ILJ 577 (LAC)). The employer still bears the *onus* to prove that the dismissal is fair".

[835] Item 6 of the Code is not a rigid piece of legislation:³⁹

" ... item 6 of the Code is not, and does not purport to be, exhaustive or rigid but merely identifies in general terms some factors that should be taken into account in evaluating the fairness of a strike dismissal. He therefore opines that in determining substantive fairness regard should also be had to other factors including the duration of the strike, the harm caused by the strike, the legitimacy of the strikers' demands, the timing of the strike, the conduct of the strikers and the parity principle. I agree with this view as the consideration of the further factors ensures that the enquiry that is conducted to determine the fairness of the strike-related dismissal is much broader and is not confined to the consideration of factors set out in item 6 of the Code."

³⁸ NUM v Mofokeng & 45 others LAC case JA 51/11 at 15

³⁹ Ibid at 16

- [836] The relevant considerations are dealt with below.
- [837] TAWUSA complied with the statutory requirements for a protected strike when it embarked upon the strike. The protected strike became unprotected at approximately 14:30 on Monday 29 March 2010.
- [838] The union officially communicated its compliance to the employers and its members with the legal position after the agreement had been signed.
- [839] The union acted unfairly towards the employers in the industry in advising its members to return to work only the next day. The union's believe that it was impractical to expect the workers to immediately return to work was a one sided decision. There is no reason why the union could not inform its members to resume their duties immediately. For those who could not, it would have been a good defence in any subsequent hearing.
- [840] Some strikers at Nelspruit understood the communication from Mndebele to return to work immediately if at all possible, otherwise to return to work the next day. For various reasons almost without exception, they did not resume their duties on that day.
- [841] Other strikers understood the communication to mean to return to work only the next day which they tried to do.
- [842] Some drivers were present at Nelspruit and for them to return to work, they had to travel to various depots to find their buses to convey passengers. This could have been avoided to some extent, had the union properly planned this particular strike knowing in advance of the inevitable termination thereof Monday afternoon. The strikers should have been informed to return to work immediately.
- [843] Buscor's position between 16:00 and 17:00 when the communication was made to the strikers at Nelspruit that the strike ended was contained in the final ultimatum.
- [844] The final ultimatum issued around 15:00 spelt it out that those strikers who had not returned within thirty minutes of the ultimatum did not have to return, were locked out and were going to be disciplined.

- [845] It is not in dispute that on 29 March 2010, Buscor sent a letter⁴⁰ to TAWUSA inviting it to make representations by 08:00 on 30 March 2010 as to why its members should not be dismissed for participating in an unprotected strike.
- [846] The contravention of the law by the Applicants was not serious. When they were informed that the strike had become unprotected, their union agreed that they would go back to work.
- [847] The union, however, acted unfairly in not immediately informing its members immediately to return to work and in failing to have planned a prompt return to work after signature of the agreement. The union knew what the effect of a delay in return to work on the employer would be later in the afternoon.
- [848] Having regard to these considerations, the dismissals were substantively unfair. Dismissal was too harsh a penalty for their participation in this particular very short unprotected strike.

Were the dismissals procedurally fair?

- [849] Buscor, in the final ultimatum during Monday afternoon, informed the union that the union had to make representations to be received by the same time that the ultimatum expired which on the evidence would have been by 15:30.
- [850] In a later telefax sent to the union at approximately 19:00, the union was invited to make representations as to why the company should not dismiss those who had participated in the strike which representations had to reach the company on or before 08:00 on the morning of 30 March 2010.
- [851] No response was received to this latter invitation. Mankge explained that there was no time to use the opportunity to make representations as he only became aware of the telefax on the morning of the 30 March.
- [852] Buscor informed the union of the collective disciplinary hearing set for Wednesday 1 April 2010 at 13:00 to determine the fate of the strikers.

⁴⁰ Bundle at page 60.

- [853] Buscor set a similar hearing for the SATAWU members and non-union members who participated in the strike.
- [854] Of the SATAWU members and non-members who had participated, Buscor dismissed two individuals. No one who participated only received a warning.
- [855] The result of the hearing was that the applicants on annexure A were found guilty and were dismissed.
- [856] They appealed and the appeal failed and the dismissal of the applicants was confirmed retrospectively.
- [857] The applicants had an opportunity to attend a hearing. They were represented. The issues at the hearing should have been confined to whether the strike was protected until 14:30 and whether sufficient opportunity was given to the strikers to return to work.
- [858] I find that the procedure was not unfair given the circumstances of this case.

The legal position relating to remedies

- [859] The Constitutional Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁴¹ considered the issue of appropriate relief in the form of reinstatement, retrospectivity and the period of retrospectivity that could be imposed.
- [860] The Court pointed out it was trite law that in the event of an unfair dismissal of strikers the primary remedy is reinstatement but that a Court or arbitrator has a discretion as to the extent of the retrospectivity of a reinstatement order.⁴²

[36] The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at

⁴¹ 2009 (1) SA 390 (CC).

⁴² *Ibid* at para 36

placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator... The court or arbitrator may thus decide the date from which the reinstatement will run ... The ordinary meaning of the word "reinstatement" means that the reinstatement will not run from a date after the arbitration award. Ordinarily then, if a commissioner of the CCMA orders the reinstatement of an employee, that reinstatement will operate from the date of the award of the CCMA, unless the Commissioner decides to render the reinstatement retrospective. The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly".(own emphasis).

- [861] The employer has not advanced any persuasive reasons why it was 'not reasonably practicable' to reinstate the applicants. It is there for appropriate to reinstate the employees.
- [862] The next consideration is the extent of the retrospectivity of the reinstatement order.
- [863] The Court should take into account all relevant factors to determine the extent of retrospectivity (if any):⁴³

'In the case of re-employment or reinstatement, the statute provides two mechanisms for the management of such concerns. First, section 193(2)(c) provides that the remedies of reinstatement or re-employment need not be ordered if the court or commissioner is satisfied that it would not be "reasonably practicable" for the employer to reinstate or re-employ the employees. Secondly, that statute provides that a court or commissioner has a discretion to determine the extent of retrospectivity of the order of

⁴³ Ibid at para 43.

reinstatement or re-employment. In exercising the discretion a court or an arbitrator may address, among other things, the period between the dismissal and the trial as well as the fact that the dismissed employee was without income during the period of dismissal, ensuring however, that an employer is not unjustly financially burdened if retrospective reinstatement is ordered or awarded.' (own emphasis)

[864] The Labour Appeal Court in the *Mediterranean Textile Mills (Pty) Ltd v SA Clothing and Textile Workers Union and Others* case applying the principles in the *Equity* case had the following to say about the exercise of the discretion⁴⁴:

'However, Mr Schumann conceded that the question of 'back pay' was a matter within the discretion of the court, which discretion had to be exercised 'equitably.'

[865] The Labour Appeal Court in the *Mediterranean Textile Mills*-case⁴⁵ having decided to reinstate the employees proceeded to consider the test to apply and the extent of the retrospectivity of the reinstatement:

'[43] However, the only issue for critical consideration is the extent of retrospectivity of the employees' reinstatement. This is a matter in respect of which I am not convinced that the Labour Court gave due and sufficient regard to, particularly given, amongst others, the above-quoted observation made by the Labour Court itself on the obvious and objective dire financial straits of the appellant currently, as well as at the time of the dismissals. On this basis, therefore, the pronouncement by the Labour Court (at paragraph [57]) that "[w]hatever challenges come the way of the respondent, it should be able to comply with the order of re-instatement which the applicants have shown an entitlement to" is, with respect, neither consistent with the court's own factual finding aforesaid on the appellant's financial capacity nor the principle that "fairness ought to be assessed objectively on the facts of each case". In *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others*,²⁴ the Appellate Division (as it was then known) stated as follows:

⁴⁴ *Mediterranean Textile Mills (Pty) Ltd v SA Clothing and Textile Workers Union and Others* (2012) 33 ILJ 160 (LAC) at para 24.

⁴⁵ *Id* at para 43.

"Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances (*NUM v Free State Cons* at 446I). And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act."(Own emphasis)

The appropriate relief

- [866] There are a number of relevant factors in determining the appropriate relief.
- [867] Firstly, the strikers who testified all testified that they wanted re-instatement. The union also asked for this relief for all its members.
- [868] Fairness dictates that, in this case, the court must have regard to the conduct of the employer, the applicants and the union in determining the appropriate remedy. Having decided to reinstate the applicants, the court must consider the extent of the retrospectivity of the order. The court has given consideration to the aspects that follow.
- [869] The union, in the form of Mndebele, probably from Sunday 28 March 2010 and latest Monday morning knew that its strike could only be for a very limited period and would terminate probably Monday afternoon. Mndebele did not testify to dispute this and the conclusion is that he knew when the strike would terminate.
- [870] The union must have realised that while it was entitled to strike, its strike probably was futile in view of the fact that the rest of the industry had settled their differences. TAWUSA nevertheless had the right to strike and cannot be blamed for it but it should have realised that its strike was doomed to be over by the afternoon of Monday 29 March 2010.
- [871] TAWUSA knew that it was critical for Buscor to transport as many passengers as possible during the afternoon peak period and, thereafter. This was to avoid what to the knowledge of the union happened on a previous occasion when considerable damage was caused to buses by irate passengers.

- [872] Mankge in fact realised that the workers had to return to work as soon as the strike became unprotected. On the facts of this matter, TAWUSA nevertheless failed timeously to take adequate steps to ensure effective communication to its members to return to work as soon as possible after the strike had become unprotected. Mankge testified that the assistant secretary was in the office at the time of signing of the agreement and there is no explanation why a communication could not have gone out earlier than 17:00.
- [873] The union knew that the employer would suffer financially especially during the afternoon peak period and failed to give any consideration thereto when advising its members to return to work the next day.
- [874] The union unilaterally decided to inform the employer and its members that its members would return to work the next day. There is no reason why it should not have informed its members to immediately return to work where possible.
- [875] The union frustrated the employer's attempt to effectively communicate with its employees by encouraging them to sing louder when announcements were made (as Mndebele did) and by advising them not to listen to what management conveyed to them.
- [876] The evidence was that the employer would have to incur costs in retrenching its current workforce and retraining most of the applicants at a cost.
- [877] The union, in terms of an amendment to its papers, proposed a phasing in of the applicants. I deal with the proposal order below.
- [878] That is not to say that Buscor is blameless. Buscor unfairly dismissed the striking employees after a short unprotected strike that commenced about the time when the valid ultimatums were issued.
- [879] It is fair to all parties to limit the order to pay back pay to a maximum of 12 months' remuneration.

Costs

[880] The parties submitted that costs should follow the result. There is no reason to order otherwise.

The claim for compensation

[881] That leaves for consideration the employer's claim for compensation. The claim is premised on the basis that the strike was unprotected from 08:00 Monday morning, alternatively from the moment that the collective agreement was signed at 14:30 Monday 29 March 2010 until the expiry of the last shift Monday night.

[882] The claim is brought in terms of the LRA:⁴⁶

"68. Strike or lock-out not in compliance with this Act.—

(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction—

...

to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct, having regard to—

whether—

attempts were made to comply with the provisions of this Chapter and the extent of those attempts; the strike or lock-out or conduct was premeditated; the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute; and there was compliance with an order granted in terms of paragraph (a);

- (ii) the interests of orderly collective bargaining;
- (iii) the duration of the strike or lock-out or conduct; and
- (iv) the financial position of the employer, trade union or employees respectively.'

⁴⁶ Section 68 of the LRA.

[883] The court has considered the requirements that a claimant must satisfy in order to claim compensation:⁴⁷

‘It is manifest that in relation to a strike, three requirements must be satisfied before the question, whether compensation as contemplated in sub-section 1(b) is to be awarded, and if so, in what amount, arise for determination. In the first instance, it must be established that the strike does not comply with the provisions of Chapter IV of the Act. Secondly, the party invoking the remedy must establish that it has sustained loss in consequence of the strike. Thirdly, it must be demonstrated that the party sought to be fixed with liability participated in the strike or committed acts in contemplation or in furtherance thereof. This much is evident from the provisions of sub-section 1(a) which, in its delineation of the nature of the acts which might legitimately form the subject matter of an interdict or restraint, identifies who might be held accountable therefor. The Legislature plainly intended to embrace the same class in relation to the Court’s competence to award compensation.’

[884] It is the second requirement that requires special attention:

‘... the party invoking the remedy must establish that it has sustained loss in consequence of the strike.’

[885] “In consequence of the strike” or in the words of the LRA “any loss attributable to the strike” has received little attention by the courts.

[886] It is clear that actual loss of income caused by a strike qualifies as a loss attributable to a strike. In this regard see *Mangaung Local Municipality v SAMWU*⁴⁸ where the Labour Court held that the only damages arising from an unprotected strike itself could be claimed and not damages for the conduct of striking employees. The Labour Court, accordingly, refused to compensate the employer for loss of income resulting from non-striking employees being blockaded from working by the striking employees. The loss of income was held not to be covered, however, the Court held that losses occasioned by the striking employees’ refusal to work were recoverable.

⁴⁷ *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* [2002] 1 BLLR 84 (LC) at 89.

⁴⁸ (2003) 23 ILJ 405 (LC).

- [887] Wilson in evidence explained the calculation of the loss of the subsidy over the two week period following the strike. The calculation of the loss does not include any losses sustained on the Monday. If it does the claim is misplaced as on the Monday the operations were primarily disrupted by a protected strike. During the protected part of the strike at Malelane, all operations ceased and at Nelspruit only some buses operated.
- [888] Buscor has not discharged the onus to show that on Monday, it suffered a financial loss occasioned by the striking employees' refusal to work during the unprotected part of the strike.
- [889] Any loss suffered after that is attributable to the unfair dismissal of the applicants and not the unprotected strike that officially was called off by TAWUSA in its 17:00 communication Monday afternoon.
- [890] The evidence supporting the claim for damage caused to the buses on the facts must fail as it is probable that commuters and not strikers after the strike caused the damage.
- [891] The claim for a loss as a result of additional security services must fail for the same reason.
- [892] The parties submitted that in respect of this aspect of the trial costs should also follow the result.

I make the following order in case J1604/10:

- [1] The dismissal of the Applicants listed on schedule "A" attached hereto was substantively unfair but procedurally fair.
- [2] The Respondent is ordered to reinstate the Applicants Who are not deceased or have reached retirement age) listed in schedule "A" hereto with effect from the date of dismissal subject to the condition that each of the Applicants shall be entitled only to a maximum of twelve months' back pay.
- [3] The Respondent is ordered to pay each of the Applicants referred to in the preceding paragraph the amount due to each of them (subject to the condition that each of the Applicants shall be entitled only to

twelve months' back pay) in twelve equal instalments the first of which shall be payable within ten days of the date of judgment and the subsequent instalments shall be payable on the first day of the succeeding eleven months.

- [4] The Respondent is ordered to reinstate the Applicants to be reinstated on the following terms:
- 4.1 The Respondent shall not be obliged to allow bus drivers to immediately commence with their duties.
 - 4.2 Bus drivers shall undergo the employer's annual refresher course for five working days in groups of not less than twenty before being allowed to resume their duties. The refresher course shall include training or re-training in the use of on-board equipment.
 - 4.3 The refresher course shall commence not later than ten days from the date of judgment.
 - 4.4 The employer shall within ten days of this court order furnish the First Applicant at its head office and its Nelspruit office with a schedule which contains the list of names of drivers and the dates on which they should report for duty, being the date on which they shall first undertake their refresher course.
 - 4.5 The programme for training or refresher courses shall be continuous and uninterrupted during normal working days until all Applicants in that category have resumed their employment.
 - 4.6 The list of drivers shall be compiled on a FIFO (First in First in) basis with the employees who joined the Respondent earlier being those entitled to resume duty earlier strictly in accordance with their employment date order.
 - 4.7 Applicants who are awaiting their turn to resume duties shall not be entitled to remuneration, unless the employer shall

have defaulted on the schedule, in which case the applicant concerned shall be entitled to remuneration from the date of default as if he or she had actually resumed his or her duties.

4.8 Sub-paragraphs 4.1 – 4.7 shall apply to cashiers and ticket sellers, save that in their case, the period of retraining shall be two days.

4.9 All other applicants shall be entitled to resume their duties forthwith.

4.10 It shall be open to the employer to waive the benefits of staggered resumption of duties by agreement with the First Applicant.

[5] The employer shall pay compensation to those Applicants on Annexure "A" (if any) who have on or before the date of this judgment reached retirement age. The compensation shall be calculated from the date of dismissal to the date of retirement provided that each such Applicant shall not be paid more than 12 months remuneration. The remuneration shall be paid within 15 (fifteen) days of this judgment.

[6] The employer shall pay compensation to those Applicants on Annexure "A" (if any) who are deceased on the date of this judgment. The compensation shall be calculated from the date of dismissal to the date of death provided that each such deceased Applicant's estate shall not be paid more than 12 months remuneration. The remuneration shall be paid within 15 (fifteen) days of receiving a valid claim from the estate of the deceased Applicant.

I make the following order in Case J2316/10

[7] The Applicant's claim for compensation is dismissed.

[8] The Applicant is ordered to pay the costs.

Coetzee, AJ

Acting Judge of the Labour Court

Appearances:

For Applicant: Advocate F R Memani

Instructed by: Meduping Lehong Inc

For Respondents: Advocate Paul Kennedy SC

Instructed by: Bowman Gilfillan Inc