REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 1280 / 2009

In the matter between:

SOUTH AFRICAN TRANSPORT AND ALLIED

WORKERS UNION **First Applicant**

W MASINA AND 42 OTHERS **Second and Further Applicants**

and

COLLETT ARMED SECURITY SERVICES CC **Respondent**

Heard: 2 and 3 September 2013

Delivered: 03 October 2013

Summary: Automatic unfair dismissal – application of the provisions of section 187(1)(a) – dismissal of employees principally related to participation in protected strike – constitutes automatic unfair dismissal

Automatic unfair dismissal – dismissal purporting to be for misconduct – no proper evidence of misconduct or that dismissal was for misconduct – principal

reason for dismissal only participation in strike action – dismissal not for misconduct but automatically unfair

Practice and procedure – admission made in pre-trial that strike action protected – employer party bound by such admission and cannot produce evidence to prove the contrary – because dismissal being principally for strike action only proper conclusion that dismissal automatically unfair

Misconduct – derivative misconduct and concept of collective guilt – principles stated – still requires identification of group and opportunity to state case – standard of proof of misconduct remains

Compensation – compensation for automatic unfair dismissal – principles stated – determination of quantum

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JUDGMENT

SNYMAN, AJ

Introduction

[1] In this matter, the applicants referred a dispute to the Labour Court on 26 November 2009 in which they contended that the dismissals of the second to further respondents were automatically unfair as contemplated by section 187(1)(a) of the LRA, in that they were dismissed for participating in protected strike action. The applicants did not seek reinstatement and only sought compensation as relief. The matter came before me for trial on 2 and 3 September 2013 and was concluded on 3 September 2013. The respondent called three witnesses to testify in support of its case, being Colin Mnisi ("Mnisi"), the member of the respondent, Heli Nkosi ("Nkosi"), a security guard formerly employed by the respondent and Sipho Nkambule ("Nkambule"), a supervisor employed by the respondent. The applicants called no witnesses.

[2] Not all of the second and further applicants as listed in the statement of claim remain a party to the proceedings now before me. At the commencement of the matter, it was confirmed that the following second to further applicants remained as party to the proceedings:

Applicant 2:	T A Nkosi
Applicant 5:	E R Msibi
Applicant 7:	D D Madinane
Applicant 8:	J M Mkhonta
Applicant 9:	R N Shongwe
Applicant 10:	S Setiba
Applicant 11:	J M Masina
Applicant 13:	N T Msibi
Applicant 16:	A N Nkosi
Applicant 18:	R Mavimbela
Applicant 19:	N Magagula
Applicant 20:	N Lukhele
Applicant 21:	C Malabela
Applicant 22:	J Mazibuko
Applicant 23:	S Nkambule
Applicant 24:	N Gininda

Applicant 25: E Ncongwane

Applicant 28: D Shongwe

Applicant 33: T M Mahlangu

Applicant 34: T Shiba

Applicant 35: J P Maseko

Applicant 38: A H Ndlovu

Applicant 40: B D Nkosi

Applicant 42: N Nkosi

These applicants will hereinafter and in this judgment be referred to as "the individual applicants".

Preliminary issue

[3] From the outset, this matter has an interesting nuance. In the statement of claim filed by the applicants, it was recorded that on 22 August 2009, the individual applicants had embarked upon a protected strike.[1] In the answering statement filed by the respondent on 9 December 2009, this statement in the applicants' statement of claim was admitted.[2] The parties then conducted a pre-trial in terms of Rule 6(4) and a final and signed pre-trial minute was filed on 14 November 2012, which pre-trial minute recorded as a common cause fact that the strike action embarked upon by the individual applicants as aforesaid was a protected strike.[3] In terms of all the pleadings and the pre-trial minute, the simple case was that the applicants contended that the true reason for the dismissal of the

[1] See page 6 at para 2.20 of the statement of claim.
[2] See page 5 at para 18 of the answering statement.
[3] See page 4 at para 2.14 of the pre-trial minute.

individual applicants was their participation in this protected strike whilst the respondent contended that the real reason for the dismissal of the individual applicants was for misconduct they had committed during the strike and not for participation in the strike itself.

[4] It then appears that at some point in time after the pre-trial minute had been filed, the respondent had a change of heart. Based on what will be further dealt with in this judgment below, I believe this change of heart was motivated by the fact that the respondent must have realised that it had quite some difficulty in establishing that the reason for the dismissal of the individual applicants was misconduct and not participation in the strike itself. This change of heart manifested itself in the respondent seeking to withdraw the admission and common cause fact that the strike was protected and seeking to contend that the strike was actually unprotected and that on this basis, the dismissal of the individual applicants was justified because of their participation in unprotected strike action. When this matter was then set down for trial 29 April 2013, the respondent made formal application to amend its answering statement and case to reflect this new position it adopted as set out above. This application was opposed by the applicants.

[5] The respondent's amendment application was then argued by the parties before Molahlehi J on 30 April 2013. In a written judgment handed down on 2 May 2013, Molahlehi J dismissed the respondent's amendment application. The Learned Judge found that the respondent had not provided a sufficient explanation to amend its pleadings. The Learned Judge and in my respectful view correctly and properly so, also referred to the fact that the admission was actually confirmed in a signed pre-trial minute which is a consensual document binding on the parties and could be repudiated only in exceptional circumstances.[4]

[4] See paras 21 and 22 of the judgment of Molahlehi J dated 2 May 2013.

[6] In determining the explanation by the respondent for seeking to amend its pleadings, Molahlehi J also referred to the fact that when the strike took place in August 2009, the respondent in two Labour Court interdict applications sought to interdict the strike on the basis that it was unprotected and that these applications had failed.[5] Further in this regard and what was before me as evidence in the current matter, was the pleadings in the two applications brought by the respondent in 2009. The first application was brought on 24 August 2009 under case number J 1808/09 and the primary relief sought was a final order that the strike by the employees be declared to be an unprotected strike and that they be interdicted from so striking because of its unprotected nature. In an order dated 24 August 2009, Musi AJ dismissed the application with costs. Undeterred, the respondent then brought a second application on 2 September 2009 under case number J 1873/09 and this time cited some nine of the individual employees as parties to the application. The respondent now sought a *rule nisi* declaring the strike to be unprotected and interdicting the employees from participating in such unprotected strike. The respondent also sought a *rule nisi* interdicting misconduct and unlawful behaviour by the individual employees as cited in the application, for the currency of the strike. On 2 September 2009, the matter came before Van Niekerk J. It is significant that the respondent did not pursue the relief that the strike be declared to be unprotected and that the employees be interdicted from striking accordingly, before the Learned Judge. On 2 September 2009, Van Niekerk J granted a *rule nisi* by agreement between the parties that unlawful behaviour and misconduct by the cited individual employees was interdicted. This rule was later discharged by agreement. What is, in my view, clear from the above is that the Labour Court had already determined in 2009, by refusing to grant the respondent relief in the form a declaration that the strike was unprotected, that the strike was indeed protected.

[7] Molahlehi J considered the previous litigation and the result thereof and the stand

[5] See paras 27 – 28.

then adopted by the respondent throughout the consequent unfair dismissal litigation in the current matter. The Learned Judge further considered the interaction between the parties in preparing for trial. The Learned Judge concluded that the admission by the respondent that the strike was protected permeated throughout the pleadings and litigation process and was perpetual.[6] The Learned Judge, therefore, dismissed the amendment application of the respondent. I am in respectful agreement with the judgment and conclusions of Molahlehi J on this issue. Despite the respondent adopting a consistent stance in the pleadings that it was conceded that the strike was protected, the respondent completely failed to provide those exceptional circumstances necessary for it to resile from the agreement contained in the pre-trial minute. The respondent is thus bound by the admission and common cause pre-trial fact that the strike embarked upon by the individual applicants was a protected strike.

[8] In conducting this matter before me, the respondent sought to establish by way of the testimony of Mnisi and Nkambule that what the employees were striking about was a work practice common in the security industry of security guards being required to rotate between different sites and that this was in any event an essential requirement of the contract between the respondent and its customer, the Mpumalanga Provincial Government. The respondent contended that this rotation of security guards was an agreed condition of the employment of the individual applicants with the respondent in any event. The problem is that testimony can only have one purpose, namely, to illustrate on another ground or basis that the strike is unprotected and this, in effect, seeks to circumvent all the difficulties the respondent has with its case as set out above. The respondent cannot do this and this approach is simply impermissible and incompetent. In *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union and*

[6] Para 30 of the judgment.

Others,[7] the Court held as follows:

> 'A strike may be unprotected for any number of reasons, for example: on procedural grounds, such as that the issue in dispute has not been referred to the Commission for Conciliation, Mediation and Arbitration (CCMA), or that a certificate stating that the dispute remains unresolved has not been issued, or that a period of 30 days has not elapsed since the referral was received by the CCMA, or that 48 hours' notice of the commencement of the strike was not given timeously or in writing (s 64(1)); on the basis that the persons participating in the strike are disqualified from striking, for example, because they are bound by a collective agreement that prohibits a strike in respect of the issue in dispute or they are bound by an agreement that requires the issue in dispute to be referred to arbitration or they are engaged in an essential service or a maintenance service (s 65(1)(a), (b) and (d) respectively); or the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court (s 65(1)(c)).'

The Court then further said:[8]

> '…. In an application for a declaratory order and an interdict on the basis that a strike is unprotected, the employer is obliged to raise all its contentions in that application. It is not entitled to litigate piecemeal with the union and its members. Firstly, it is undesirable that one member of the Labour Court gives a judgment that a strike is protected (on one basis) and shortly afterwards another member of the same court gives a different judgment in regard to the same strike on a different basis - as happened in this matter. Secondly, parties should not be required to incur the expense of bringing or resisting more than one application when the facts are the same and the law is known. Thirdly, the consequences of a declaratory order that a strike is protected are important and far-reaching for the employer, the trade union and its members employed by the employer: a person does not commit a delict or a breach of contract by taking part in a protected strike (s 67(2)); an employer may not dismiss an employee for

[7] (1999) 20 ILJ 82 (LAC).at para 9.
[8] Id at para 11.

> participating in a protected strike (s 67(4)); in the case of an unprotected strike the Labour Court may grant an interdict to restrain any person from participating in the strike (s 68(1)(a)) and may order the payment of compensation for any loss attributable to the strike (s 68(1)(b)). There should be certainty in regard to the rights and obligations of the parties….'

In the light of the above ratio, the point is simple. The respondent had one opportunity to declare the strike to be unprotected and to raise all the grounds why it contended this to be the case. This opportunity it had and exercised in 2009 when it asked the Court to determine this very issue in the interdict applications. The respondent simply cannot come now in these proceedings and on the basis of the exact same factual matrix and try to raise that the strike may be unprotected on another basis or ground not thought of or dealt with before. As the Court finally concluded in *Fidelity Guards*[9] and which, in my view, is apposite in the current matter:

> '…. What the appellant did in the present matter, however, was to attempt to circumvent these provisions of the law by launching new proceedings on the same issue, albeit on a different basis. That it cannot do.'

[9] The Court in *Food and General Workers Union and Others v Picardi Hotels Ltd*[10] dealt with a situation virtually identical to the current matter, except for the fact that in the *Picardi Hotels* case, the Court had in previous interdict proceedings declared that the strike was unprotected and the applicant parties subsequently in unfair dismissal proceedings sought to contend that the strike was in fact protected. Mlambo J (as he then was) said the following:[11]

> 'It is clear therefore that part of the relief sought by the applicants is in effect to reverse the finding made by Grogan AJ that the dispute between the parties

[9] Id at para 13.
[10] (2000) 21 ILJ 1786 (LC).
[11] Id at para 9.

related to a refusal to bargain and that the strike was unprotected.'

The Court concluded:[12]

> '*In casu* there is no dispute that the parties are the same as those before Grogan AJ; the facts on which the applicants' claim for the relief they seek as set out in para 8.1 above are the same as those before Grogan AJ; the relief the applicants seek in para 8.1 is the same relief they sought before Grogan AJ. Therefore for the court to grant the applicants the relief they seek in para 8.1 the court will have to consider the same facts which Grogan AJ considered. This is therefore the classical scenario where the defence of *res judicata* should succeed as far as the relief sought in para 9.1 of the statement of case is concerned. The point *in limine* should therefore be upheld.'

[10] A similar approach was followed in *Food and Allied Workers Union and Others v Key Spirit Trading 193 CC t/a Jimmy's Superspar*[13] where the Court held as follows:

> 'It is common cause that Cele AJ issued a final interdict, having found on the facts that the strike was unprotected. The applicants cannot therefore seek to rely on the protected nature of the strike for the assertion that their dismissals were substantively unfair, nor can they advance reasons other than those determined by Cele AJ as being the issues that gave rise to the strike. This is indeed what is squarely prohibited by the *res judicata* principle. Although the cause of action is different, the determination of the appropriate relief arising from any determination on the substantive and procedural unfairness of the dismissals is dependent, at least partly, on the same issues of fact and law that were before Cele AJ and involve the same parties.
>
> Therefore, the finding that the strike was unprotected and the facts on which it was based fall under the ambit of the *res judicata* rule…'

[12] Id at para 14.
[13] (2011) 32 ILJ 2677 (LC) at para 17 – 18.

[11] I also wish to specifically deal with the issue of the admission of the fact that the strike was protected in the pre-trial minute. Although Molahlehi J touched on this, in his judgment as set out above, it is my respectful view that the effect of this admission in a pre-trial is even more stringent and binding than that the Learned Judge alluded to. As I have said above, a pre-trial minute signed and agreed to by the parties and is a consensual document. It is not a pleading *per se*. It is actually an agreement concluded by the parties to the litigation determining facts and issues. Its consequences in law are the same as any other agreement concluded between two parties and thus must bind the litigating parties on exactly the same basis as any other commercial contract. As such, any party wishing to resile from this agreement has to show exceptional circumstances to justify this, such as, for example, the common law grounds of misrepresentation or force. No case of exceptional circumstances was made out by the respondent. It also appears from the judgment of Molahlehi J that all what the respondent applied for was for the amendment of the statement of defence (answering statement) but never specifically sought leave to resile from the pre-trial minute as a consensual document based on exceptional circumstances.

[12] In *Shoredits Construction (Pty) Ltd v Pienaar No and Others,*[14] it was held as follows, with specific reference to a pre-trial agreement:

> 'Subject to principles of public policy or good morals our common law accepts complete freedom of contract. See *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 8-9; *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) at 767A.
>
> No principle of public policy or good morals appears to be infringed by the agreement, and moreover such can only be struck down 'in clear cases in which the harm... is substantially incontestable'. See *Sasfin's* case at 9C-D.'

[14] (1995) 16 ILJ 390 (LAC) at 393

[13] The Court in *Filta-Matix (Pty) Ltd v Freudenberg*[15] dealt with the issue of a party seeking to resile from that which was recorded in a pre-trial minute and said:

> 'To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pretrial conference would be to negate the object of Rule 37 which is to limit issues and to curtail the scope of the litigation.'

Rule 6(4) of the Labour Court Rules is very similar to Rule 37 of the High Court Rules referred to and fulfils the exact same purpose and these Rules are, in my view, birds of a feather.

[14] The exact same sentiment was echoed in *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another*[16] where the Conradie JA said the following:

> 'It is true, of course, that a pretrial agreement is a consensual document which binds the parties thereto and obliges the court (in the same way as the parties' pleadings do) to decide only the issue set out therein.'

In the same judgment, Zondo AJP (as he then was) held:[17]

> 'I think it is necessary immediately to accept as a point of departure that, where a litigant is a party to a pre-trial minute reflecting agreement on certain issues, our courts will generally hold the parties to that agreement or to those issues. (*Price NO v Allied-JBS Building Society* 1986 (3) SA 874 (A) at 882D-E; *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) at 613E-614D.)'

The learned Judge concluded:

> 'To my mind the cases are consistent that whether or not a party will be allowed to raise or rely upon or introduce a cause of action or issue after a pretrial

[15] 1998 (1) SA 606 (SCA) at 614B-C.
[16] (2000) 21 ILJ 142 (LAC) at para 16 per Conradie JA.
[17] Id at para 83.

agreement or pretrial minute has been concluded in a case depends on whether it can be said that the party seeking to rely upon or to introduce or raise such cause of action or issue has abandoned that cause of action or has agreed either expressly or by implication (I would say necessary implication) not to pursue or rely upon such cause of action or point or has informed the court or the other party that such point or such cause of action or issue will not be relied upon. If he has, he cannot be allowed. If he has not, he can be allowed. This is quite apart from those circumstances where a party would be able to resile from such an agreement on the same basis as he would be able in law to resile from any other contract.'[18]

[15] More recently and in *GE Security (Africa) v Airey and Others,*[19] the Court was again confronted with a situation where a litigating party sought to rely on issues outside the ambit of the pre-trial minute and Waglay DJP (as he then was) said the following:

'The key issue before this court had therefore been settled in the pretrial minute and the respondents were bound by the admission they made therein. See in this respect *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) at 614B-D and *Shoredits Construction (Pty) Ltd v Pienaar NO and Others* (1995) 16 ILJ 390 (LAC); [1995] 4 BLLR 32 (LAC) at 34C-F.

The respondents' counsel submitted, relying on the matter of *Shill v Milner* 1937 AD 101, that the issues in the pretrial minute had been broadened because of a lack of an objection to the questions put to McKenzie… I reject this submission for two additional reasons:

21.1 Firstly, there was never any formal application made to withdraw the admission.

[18] Id at para 93.
[19] (2011) 32 ILJ 2078 (LAC) at para 20 – 21.

21.2 Secondly, the appellant's counsel was not obliged to object to questions which sought to elicit an answer to a common cause fact which had been settled and was entitled to remain silent and argue at the end that the court could ignore the answer of a witness that was at variance with what were the agreed facts. A court does not have the power to go beyond the agreed common cause facts in the absence of fraud or the granting of an application to withdraw an admission….'

[16] I wish to make a final reference to the recent judgment in *Chemical Energy Paper Printing Wood and Allied Workers Union and Others v CTP Ltd and Another*[20] where all the above principles were considered and applied. The Court said the following:[21]

> 'A pretrial minute is a consensual document and, in effect, constitutes a contract between the parties.'[22]

In dealing with the issue of what may be considered to be 'special circumstances' under which a party could resile from a pre-trial minute, the Court said:[23]

> '…. In my view, setting the test for special circumstances as being substantially equivalent to the test for the grant of condonation (as *Rademeyer* does) is too lenient and does not take account of the fact that a pretrial agreement equates to a contract between the parties. Once this is accepted, then special circumstances in the present context should, in my view, be understood as meaning that, in order to resile from the agreement (or part thereof), the applicant must establish a basis for doing so in the law of contract. To my mind, this interpretation accords with *Driveline Technologies* and is consistent with *Kruizenga.*'[24]

Of importance in respect of a factual comparison to the current matter now before

[20] (2013) 34 ILJ 1966 (LC)
[21] Id at para 105
[22] Id at para 105.
[23] Id at para 110
[24] Id at para 110.

me, the Court in applying the above principles concluded as follows:

> 'Against this backdrop, it was, to my mind, imperative for Soldatos to testify in order to establish special circumstances for the withdrawal of the admission/concession. Given that he concluded the pretrial minute, he was the person required to provide this court with a full explanation of the circumstances under which the concession was made and why it is sought to be withdrawn, and to vouch for the first respondent's bona fides in seeking to withdraw the concession made by him…. These two requirements are interlinked and cannot be satisfied without it first being established how the concession (sought to be withdrawn) was made in the first place….
>
> Read mutatis mutandis, the following extract from *Rademeyer* is apposite:
>
> > "In my view the defendant has not come anywhere near to satisfying any of these requirements. The defendant has failed to explain the circumstances under which the concession was made. No basis for the attorney's alleged erroneous belief has been tendered. Nor has the defendant dealt with the instructions the attorney was furnished with regarding this aspect. But it does not end there: the allegation of a *bona fide* mistake stands on its own and nothing further is stated allowing for an assessment thereof.... Finally, the *bona fides* of the attorney being under scrutiny one would have expected him to set out the facts from which an assessment as to his *bona fides* could be made."
>
> Turning to the requirement of justice and fairness…. in the absence of the first respondent having satisfied the first two requirements for 'special circumstances', the broad dictates of justice and fairness cannot, in themselves, serve as a basis for allowing the amendment….'[25]

[25] Id at paras 117 – 119.

I fully agree with the above reasoning and conclusions in the judgment of *Chemical Energy Paper Printing Wood and Allied Workers Union and Others v CTP Ltd and Another*.

[17] Accordingly and in the light of all of the above, this matter must be determined on the basis that the strike embarked upon by the individual applicants on 22 August 2009 was a protected strike. There are in the end four reasons for this. The first is that the respondent is bound by the admission in the pre-trial minute and has never applied for or shown proper cause as prescribed by law to justify why it should be permitted to resile from that which was agreed to in the pre-trial minute.[26] Secondly and insofar as the respondent sought to amend its answering statement to try and escape the admission contained therein, this has been dealt with by Molahlehi J and dismissed and I fully agree with the judgment of the learned Judge. Thirdly, the issue of the strike being unprotected was placed before the Labour Court in 2009 in interdict proceedings and dismissed, which means the issue of the strike being unprotected was, therefore, finally disposed of and cannot be raised again in this case. Fourthly and finally, the new evidence the respondent has sought to present in Court to establish another basis for the strike to be unprotected is either inadmissible or of no value or consequence and must be disregarded in the determination of this matter.

[18] I, therefore, conclude and find that the strike action embarked upon and participated in by the individual applicants on and as from 22 August 2009 was a protected strike. What must now be determined is whether the individual applicants were dismissed because of their participation in this protected strike. I will now set out what I consider to the proper and relevant factual matrix to be

[26] See also *SA Commercial Catering and Allied Workers Union and Others v Sun International SA Ltd (A Division of Kersaf Investments Ltd)* (2003) 24 ILJ 594 (LC); *Minister for Safety and Security and Others v Jansen No and Others* (2004) 25 ILJ 708 (LC); *Minister of Safety and Security v Mashego and Others* (2003) 24 ILJ 1690 (LC); *Fuel Retailers Association of SA v Motor Industry Bargaining Council* (2001) 22 ILJ 1164 (LC); *National Union of Metalworkers of SA and Others v SA Truck Bodies (Pty) Ltd* (2008) 29 ILJ 1944 (LC).

used in the determination as to whether the individual applicants were dismissed for participation in the aforesaid strike. I do not intend to deal with all the other issues and evidence presented by the parties and contained in the documentary evidence not relevant to such determination.

Factual Matrix

[19] The business of the respondent is that of providing contract security services to customers. In September 2008, the respondent procured a contract with the Mpumalanga Provincial Government to provide contract guarding services at various of its sites, which included hospitals, clinics and government departments. The various sites were clustered together in a radius of approximately five kilometers.

[20] The contract procured by the respondent has previously been held by another service provider and the respondent took over all the staff of this other service provider. The individual applicants were some of these staff members so taken over.

[21] According to Mnisi and when the staff was taken over, a meeting was held with them in which they were informed of the terms and conditions of employment applicable to their employment with the respondent and in particular that they would be earning more than the minimum wage prescribed by the security services sectoral determination. In addition and according to Mnisi, it was specifically agreed that that employees would rotate from site to site on the contract as this would prevent familiarity developing on sites with the guards and this rotation was in any event required by the contract with the Mpumalanga Government.

[22] An issue raised in the testimony of the respondent in this matter was whether or not this rotation of guards between the sites was an agreed condition of

employment of the individual applicants. Despite this issue being raised, it is my view that for the purposes of determining this matter, it simply does not matter whether this rotation was an agreed condition of employment. Nothing turns on this. The reason for this will be further addressed hereunder.

[23] According to Mnisi, the respondent received a complaint from one of the hospitals it was guarding, being Embhuleni Hospital, that the guards employed by the respondent had taken food from the hospital canteen which was not allowed and demanded that these guards be removed from site. Mnisi stated that it was decided to rotate these guards out to other sites and conduct a full rotation of about 150 employees. Notices to this effect were given to employees on 10 July 2009. According to Mnisi, most of the employees responded positively to this rotation and accepted the same.

[24] However, some of the employees disputed this rotation and raised the issue with SATAWU. At this time, SATAWU was not a recognised union in the respondent and had no organisational rights with the respondent. On 16 July 2009, SATAWU sent a letter to the respondent and "advised" the respondent to put the rotations (referred to in the letter as transfers) on hold until the respondent and SATAWU could meet to discuss this. It was recorded that transfers could not happen "willy nilly' and should the respondent not comply with the letter, SATAWU would declare a dispute about unilateral changes to conditions of employment to the CCMA.

[25] The respondent's answer to this letter was somewhat disturbing. In a written response on 16 July 2009, the respondent called SATAWU a "loose cannon" and accused it of interfering excessively in the respondent's business despite the above being the very first engagement between SATAWU and the respondent. The respondent sought to call SATAWU "to order" and threatened SATAWU with a High Court interdict. In addition, and on 17 July 2009, the respondent by way of further written notice informed the employees that the rotation would take place

as soon as employees have “logistically settled” within the next 30 – 45 days. It was recorded that employees would be expected to report to their new sites on 17 August 2009.

[26] SATAWU pursued a dispute to the CCMA on 22 July 2009 but it appeared that this dispute was really about organisational rights. It became apparent at the CCMA conciliation proceedings that the basis of this dispute referral actually concerned SATAWU seeking organisational rights in the respondent and this dispute was then settled at conciliation on 14 August 2009 on the basis that the respondent and SATAWU would meet to discuss this issue on 19 August 2009.

[27] The respondent then proceeded to implement the rotation referred to above on 17 August 2009. This led to SATAWU raising a written protest on 17 August 2009 and it called on the respondent not to implement this rotation (transfer). Again, the respondent was informed that should it proceed with this rotation, a unilateral change to employment conditions dispute would be referred to the CCMA. In addition, a group of employees deployed at the Emphuleni Hospital refused to transfer to the other sites they had to rotate to. As a result of this refusal and on 17 August 2009, all these employees were given written notice by the respondent to attend a disciplinary hearing to be held on 19 August 2009 on charges of gross insubordination, intimidation and failure to report to a designated site. These employees included the individual applicants. On 18 August 2009, SATAWU requested the respondent in writing to hold these disciplinary hearings in abeyance until after its meeting with the respondent on 19 August 2009.

[28] Mnisi conceded in his evidence that the disciplinary hearings did not proceed on 19 August 2009. That, however, did not stop the respondent from still dismissing four employees for this misconduct on 19 August 2009. This dismissal of these four employees was however the subject matter of a separate CCMA referral in respect of an unfair dismissal dispute for misconduct and need not concern these

proceedings. None of these four employees are part of the individual applicants in this matter. Suffice it to say, for the purposes of the current matter, that these charges of 17 August 2009 was not proceeded with by the respondent in respect of the individual applicants.

[29] What SATAWU also did was to refer a dispute concerning an alleged unilateral change to employment conditions in respect of its members to the CCMA on 17 August 2009. These members included the individual applicants. In this referral, SATAWU duly completed the section 64(4) notification, calling on the respondent to restore the status quo ante within 48 hours and not to implement the change for 30 days. In effect, the respondent was called upon not to effect the rotation, which SATAWU viewed as a unilateral change to conditions of employment of its members.

[30] As I have referred to above, it simply does not matter for the purposes of this application whether the rotation of employees between the sites was an agreed condition of employment. The fact is that SATAWU and members were of the view that it was not agreed. The dispute referred to the CCMA by SATAWU and the proceedings conducted in terms thereof would have the consequence of it being determined whether rotation was an agreed condition of employment or in fact a unilateral change to conditions of employment of the employees. The respondent was properly called upon not to implement rotation in the interim, pending this determination. The respondent refused to adhere to this demand and proceeded with the rotation. This scenario formed the very basis of the proceedings and events that followed.

[31] On 19 August 2009, SATAWU then gave written notice of strike action to commence on 21 August 2009. This notice was not even necessary. In terms of the referral filed on 17 August 2009, SATAWU and its members would be entitled to embark upon strike action if the respondent did not restore the status quo ante within 48 hours of being called upon to do so without further notice to the

respondent.[27] A further strike notice was given by SATAWU to the respondent on 20 August 2009 in terms of which notice the strike was to start on 22 August 2009. The same contentions apply to this notice as well and once again, it was simply not necessary.

[32] Some correspondence then passed between SATAWU and the respondent's attorneys, in which the respondent's attorneys took issue with the strike notice and contended that rotation was an agreed condition of employment. The respondent contended that the proposed strike would be unprotected.

[33] The strike then indeed started on 22 August 2009. As fully discussed above, this strike action was in fact protected and attempts by the respondent to interdict the strike on the basis that it was unprotected failed.

[34] The retribution by the respondent for this strike action was not only limited to litigation. On 21 August 2009, the respondent advised employees in writing that because of the strike action, their conditions of employment would revert to the provisions of the sectoral determination. This, in essence, meant a reduction in remuneration and less advantageous conditions of employment for employees because of the strike. The respondent also obtained a *rule nisi* against nine individual employees for misconduct and unlawful behaviour during the strike which is referred to above. This issue will also be further discussed hereunder.

[35] On 1 September 2009, the respondent issued an ultimatum to all the striking employees recording that as far it was concerned the strike was unprotected and all striking employees were called upon to report to the "office' on the next Wednesday to make representations and arrange for their re-deployment (being

[27] See Section 64(4) of the LRA which reads 'Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection (1) (a) may, in the referral, and for the period referred to in subsection (1) (a)- (a) require the employer not to implement unilaterally the change to terms and conditions of employment; or (b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.'

the rotation). It was also recorded in this ultimatum that the representations the striking employees had to make was in essence to show cause to the respondent as to why they should not be dismissed for unprotected strike action. It was common cause that the strike continued and the ultimatum was not adhered to.

[36] On 14 September 2009, all the striking employees were dismissed notices by way of a written dismissal notice by the respondent to SATAWU listing the dismissed employees. This notices specifically recorded that the reason for the dismissals was that the employees participated in unprotected strike action and refused to adhere to the ultimatum to return to work. Mnisi, in his evidence, confirmed that the reason for the dismissal of the employees on 14 September 2009 was because of their participation in the strike action. There is absolutely no doubt that the only reason for the employees being dismissed on 14 September 2009 was because they participated in the strike and did not adhere to the ultimatum to return to work. This list of dismissed employees included the individual applicants.

[37] On 17 September 2009, SATAWU referred an unfair dismissal dispute to the CCMA on behalf of the individual applicants, and in this referral it was recorded that the individual applicants were dismissed for participation in the strike and that the strike was legal. After conciliation failed the dispute proceeded to this Court.

<u>The application of Section 187(1)(a)</u>

[38] As I have said above, the strike action of the individual applicants in this matter was protected. This being the case, then the provisions of Section 67(4) of the LRA finds application, which provides that ‘an employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike’. The only exception to this prohibition on dismissal can be found in Section 67(5), which provides:

> 'Subsection (4) does not preclude an employer from fairly dismissing an employee in accordance with the provisions of Chapter VIII for a reason related to the employee's conduct during the strike, or for a reason based on the employer's operational requirements.'

[39] In terms of Section 187(1)(a), a dismissal is automatically unfair if:

> '…. if the reason for the dismissal is- (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV.'

A strike that is in compliance with Chapter IV is a protected strike. Therefore, if the dismissal of employees is for the reason that they have participated in a strike and that strike then turns out to be a protected strike, this dismissal would be automatically unfair. That is precisely the issue in the current matter.

[40] Where is has been shown in evidence there is a nexus between the dismissal of employees and participation in a protected strike, it then becomes for any employer not wishing to be struck with section 187(1)(a) to show that despite this nexus, the actual reason for dismissal is something else, being either operational requirements or misconduct. Where there is a protected strike and employees are then dismissed for circumstances that arose in or flowed from this strike and the employees' participation therein, then there has to be at least on a *prima facie* basis as a matter of principle a nexus between the dismissal and participation in a protected strike. Also, the closer the temporal nexus between the strike and the dismissal, the stronger the inference that the dismissal has something to do with participation in the protected strike. It is then, under these circumstances, up to the employer to place convincing and credible evidence before the Court to show that despite this nexus, it was, for example, because the employees committed assault during the strike that they were dismissed or as another example, it was because the employer lost an important customer during the strike which necessitated the employer to cut back on jobs that caused the

employees to be retrenched. In the current matter, this is exactly what the respondent had to do and what it, in the case it actually brought to Court, sought to do. The case of the respondent clearly was that despite the nexus between the dismissal of the individual applicants and the protected strike, they were not dismissed for participating in the strike but because they committed misconduct in the form of intimidation and/or assault and/or damage to property and/or unlawfully barring access to premises during the course of the strike. If the respondent could show this case had substance, it would avoid being struck with the automatic unfair dismissal provisions. The question now is whether this case of the respondent indeed has substance.

[41] Imperative to the enquiry into whether Section 187(1)(a) would find application is thus the determination of the true reason for the dismissal. To put it simply in the current matter – is it because the employees were striking or is it because they were fighting. In *SACWU and Others v Afrox Ltd,*[28] the Court, in dealing with an automatic unfair dismissal in terms of section 187(1)(a), said the following:

> 'The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilized here…. The first step is to determine *factual* causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of *legal* causation, namely whether such participation or conduct was the 'main' or 'dominant', or

[28] (1999) 20 ILJ 1718 (LAC) at para 32.

> 'proximate', or 'most likely' cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare *S v Mokgethi* at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases….'

[42] In *Kroukam v SA Airlink (Pty) Ltd,*[29] the Court applied this two tier test of factual and legal causation as enunciated in *Afrox* in order to determine whether section 187(1)(d) found application. The Court held that if the 'dominant or principal reason or reasons' for dismissal was a reason listed in section 187(1), the dismissal was automatically unfair.[30] The Court went further and concluded that even if the prohibited reason(s) established for the dismissal were not the dominant or principal reasons for dismissal, a dismissal was nonetheless automatically unfair if, in the words of the Court:

> '…. even if the reasons that I have found to constitute the dominant or principal reason or reasons for the dismissal did not constitute the principal or dominant reasons for the appellant's dismissal, I would still find that the dismissal was automatically unfair if such reasons nevertheless played a significant role in the decision to dismiss the appellant. In my view for policy considerations, where such reasons have influenced the decision to dismiss to a significant degree, the dismissal should be dealt with as an automatically unfair dismissal in order to deter as many employers as possible from entertaining such illegitimate matters as, for example, racism and the exercise of rights conferred by the Act as factors in their decisions to dismiss employees.'[31]

[43] The evidence must be considered as a whole in order to determine the true reason for the dismissal on a balance of probabilities. This in turn means, as the

[29] (2005) 26 ILJ 2153 (LAC)
[30] Id at para 96
[31] Id at para 103.

Court said in *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport,*[32] that the inference drawn from the evidence has to be "the most natural or acceptable inference" and not the only inference, that the dismissal was for a prohibited reason as contemplated by Section 187. Similarly in *Govan v Skidmore,*[33] the Court held that it was trite law that the Court: '…. by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one'. In *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co*[34] it was held as follows:

> 'The process of reasoning by inference frequently includes consideration of various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable).' (emphasis added)

[44] As a very useful summary of the enquiry to be conducted in these kinds of matters, as a whole, I refer to the judgment in *National Union of Metalworkers of SA and others v Dorbyl Ltd and Another*[35] where the Court said:

> 'Section 67(4) of the Labour Relations Act 66 of 1995 (the Act) is clear in its provenance. No employer may dismiss an employee for participating in a protected strike or for any conduct in contemplation of or in furtherance of a protected strike. Section 67(5) on the other hand provides that s 67(4) does not preclude an employer from fairly dismissing an employee in accordance with the provisions of chapter VIII for, inter alia, a reason based on the employer's operational requirements.
>
> In my view the court a quo properly applied the test laid down by this court in *SA*

[32] (2000) 21 ILJ 2585 (SCA) at par 9.
[33] 1952 (1) SA 732 (N).
[34] 1985 (3) SA 916 (A).
[35] (2007) 28 ILJ 1585 (LAC) at paras 24 – 25.

Chemical Workers Union and others v Afrox Ltd (1999) 20 ILJ 1718 (LAC) at paras 32 and 41 in coming to the conclusion that the dismissal was substantively fair. The learned judge was tasked with having to determine the most probable inference to be drawn from the established facts as to the main, or dominant, or proximate, or most likely cause of the dismissal of the individual appellants. The court was alive to the decision of this court in *Chemical Workers Industrial Union v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC); [2003] 11 BLLR 108 (LAC) at para 69 wherein Zondo JP said:

> "When either the Labour Court or this court is seized with a dispute about the fairness of a dismissal, it has to determine the fairness of the dismissal objectively. The question whether dismissal was fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering the question. In other words, it cannot say that the employer thinks it is fair, and therefore, it is or should be fair."'

[45] I will now turn to the evidence in this matter on the basis of the principles set out above. I must immediately say that I was not impressed with the evidence of Mnisi. He was evasive and contradicted himself in several material respects. One issue that stands out was when Mnisi contended that all the employees that were charged on 17 August 2009 were dismissed for misconduct on 19 August 2009, when this was clearly not the case as this would simply be inexplicable having regard to the common cause events that followed. Another issue that stands out is that Mnisi only contended that the individual applicant were dismissed for misconduct when I asked him clarifying questions despite contending in evidence in chief and conceding under cross examination that the individual applicants were dismissed for participating in the strike action. Mnisi's evidence simply cannot be accepted where the same is not supported by the documentary evidence as it stands. The respondent's other two witnesses could not add anything to the issue of the true reason for the dismissal of the individual applicants.

[46] A proper consideration of the evidence can only lead to one logical, natural and plausible conclusion, which has to be that the individual applicants were dismissed for participation in the strike action that started on 22 August 2009 and also for failing to adhere to the ultimatum on 1 September 2009 to cease the strike and return to work. Any contention that the individual applicants were dismissed for misconduct is entirely unsustainable. I arrive at the aforesaid conclusion for a number of reasons. Firstly and immediately, Mnisi actually conceded in evidence that the individual applicants were dismissed for participation in the strike action. Secondly, there is no evidence that any of the individual applicants were ever charged or disciplined for misconduct despite the misconduct issue specifically forming part of the second Labour Court application at the beginning of September 2009 referred to above. Thirdly, the ultimatum of 1 September 2009 makes it clear that the respondent takes issue with what it considered to be unprotected strike action by the individual applicants and called on them to make representations as to why they should not be dismissed for this reason. Finally, this ultimatum is then followed by a notice of dismissal on 14 September 2009 which is self explanatory, and which notice make no reference whatsoever to misconduct. In fact, this dismissal notice specifically records that 'due to the fact that your members went on an unprotected strike the office issued an ultimatum to all employees which was disregarded by your office and please be informed that the following employees have been dismissed with immediate effect.' (sic) Attached to this dismissal notice is then a list of employees which list included all the individual applicants.

[47] The end result is undeniable. Misconduct was never in issue when the dismissal of the individual applicants was effected. It was always about their participation in the strike action, which the respondent at the time viewed as and considered to be unprotected. There was clearly a direct nexus between the dismissal of the individual applicants and their participation in the strike. I may point out that even if misconduct could be considered as also being involved in the decision to

dismiss the individual applicants, then their participation in the strike was still a principal and important consideration in the decision to dismiss them and therefore in terms of the test as enunciated in the judgment of *Kroukam* referred to above this would still be sufficient to constitute an automatic unfair dismissal.

[48] For all the above reasons, I conclude that the true and actual reason for the dismissal of the individual applicants by the respondent was because they participated in the strike action which started on 22 August 2009. As this strike is protected for the reasons I have already given in this judgment, it has to follow that the dismissal of the individual applicants therefore has to constitute an automatic unfair dismissal as contemplated by Section 187(1)(a) of the LRA.

[49] In my view, the following dictum in *SA Transport and Allied Workers Union and others v Platinum Mile Investments (Pty) Ltd t/a Transiton Transport*[36] is an apt comparison with the current matter now before me:

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

[50] Based on all of the above, I have no hesitation in concluding that the dismissal of the individual applicants by the respondent constituted an automatic unfair dismissal as contemplated by Section 187(1)(a) of the LRA.

<u>The issue of relief</u>

[36] (2008) 29 ILJ 1742 (LC) at para 76.

[51] The applicants in this matter do not seek reinstatement but seek compensation. In awarding compensation, this Court must exercise a judicial discretion, and in this respect the normal situation when deciding on compensation is properly enunciated in *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO and Others,*[37] as thus*:*

> *'*The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer.'[38]

[52] What however makes this matter different from that which is "normal" is that the individual applicants in this matter have been automatically unfairly dismissed for exercising what is a Constitutional right in terms of section 23(2) of the Constitution.[39] This placed the dismissal in a somewhat different category to what can be described, for want of a better reference, as an "ordinary" unfair dismissal.

[53] In the case of compensation awards for automatic unfair dismissals, the compensation cap is double that of other unfair dismissals, being a maximum of 24 months' remuneration instead of 12 months' remuneration.[40] This confirms that from a statutory perspective, automatic unfair dismissals are seen in a much more serious light and must have a punitive component.

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[37] (2007) 28 *ILJ* 2238 (LAC) at para 30.
[38] See also *Mohlakoane v CCMA and Others* (2010) 31 *ILJ* 2688 (LC); *SA Post Office Ltd v Jansen Van Vuuren NO and Others* (2008) 29 ILJ 2793 (LC); *Metalogik Engineering and Manufacturing CC v Fernandes and Others* (2002) 23 ILJ 1592 (LC): *Rope Constructions Co (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2002) 23 ILJ 157 (LC); *H M Liebowitz (Pty) Ltd t/a the Auto Industrial Centre Group of Companies v Fernandes* (2002) 23 ILJ 278 (LAC); *Ensign Brickford SA (Pty) Ltd v Shongwe NO and Others* (2001) 22 ILJ 146 (LC).
[39] Act 108 of 1996. Section 23(2)(c) specifically records that every worker has the right to strike.
[40] See Section 194(1) and (3).

[54] Considering the fact that an automatic unfair dismissal is in actual fact arbitrary and prohibited conduct by an employer, *per se*, it has to carry with it a punitive element where compensation is considered. As was said in *Naude v Member of the Executive Council, Department of Health, Mpumalanga*:[41] 'Generally compensation is not a punitive measure, however…, in cases of automatically unfair dismissals a punitive element comes to the fore.'[42] The Court in *Chemical Energy Paper Printing Wood and Allied Workers Union and Another v Glass and Aluminium 2000 CC*[43] authoritatively dealt with this issue. The Court specifically dealt with the issue of the award of compensation in the case of an automatic unfair dismissal in terms of Section 187 and said the following:[44]

> 'The reasons listed in s 187(1)*(a)-(f)* include dismissals motivated by unfair discrimination against an employee directly or indirectly, on any arbitrary ground, including, race, gender, sex, colour, conscience, belief, political opinion, and others. A dismissal of an employee for any one of those reasons strikes at the essence of the values which form the foundations of our new democratic society as enunciated in the Constitution. It is a dismissal that undermines the fundamental values that the labour relations community in our country depends on to regulate its very existence. Accordingly such a dismissal deserves to be dealt with in a manner that gives due weight to the seriousness of the unfairness to which the employee so dismissed has been subjected.
>
> In considering whether or not to award compensation in such a case, the court must consider that not to award any compensation at all where reinstatement is also not awarded may give rise to the perception that dismissal for such a reason is being condoned. This may encourage other employers to do the same. It must

[41] (2009) 30 ILJ 910 (LC) at para 113.
[42] See also *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* (2011) 32 ILJ 1637 (LC) at para 77 ; *University of South Africa v Reynhardt* (2010) 31 ILJ 2368 (LAC) at para 14 and the Court a quo judgment in *Reynhardt v University of South Africa* (2008) 29 ILJ 725 (LC) at para 145; *Viney v Barnard Jacobs Mellet Securities (Pty) Ltd* (2008) 29 ILJ 1564 (LC) at paras 81 – 82.
[43] (2002) 23 ILJ 695 (LAC).
[44] Id at paras 48 – 49. The Court at para 50 also set out some of the factors that have to be considered in exercising the discretion in determining the quantum of compensation.

> also take into account the fact that such a dismissal is viewed as the most egregious under the Act. Accordingly there must be a punitive element in the consideration of compensation.'

[55] Mr Vetten, who represented the respondent, contended that even if the individual applicants were not dismissed for misconduct, then the fact that the individual applicants had committed misconduct is a critical consideration where it comes to the exercise of a discretion in deciding on appropriate compensation. As a general proposition, I have no difficulty with the contention of Mr Vetten that such misconduct would indeed be a relevant consideration in exercising a judicial discretion in order to decide on an appropriate compensation award. The problem, however, with the contentions of Mr Vetten in this regard, and in this matter, is that the respondent has simply failed to prove that the individual applicants actually committed such misconduct.

[56] Mnisi, Nkosi and Nkambule for the respondent all testified that misconduct and unlawful behaviour took place during the strike action. This misconduct consisted of intimidation, the blockading of premises, assault and damage to property. In the absence of any testimony for the applicants to the contrary, I accept that this is indeed the case. The insurmountable difficulty for the respondent, however, is that none of these witnesses ever identified any individual applicant as actually perpetrating such misconduct. Not one of the individual applicants were 'named and shamed' in evidence, so to speak. There was not one shred of evidence presented by the respondent that any of the individual applicants were actually aware of the misconduct and still reconciled themselves with this behaviour and failed to discharge their duty of trust in reporting the actual miscreants to the respondent for appropriate action.

[57] The situation is exacerbated by the respondent's second Labour Court application under case number J 1873/09. In this application, it identified nine individual employees as being involved in the misconduct and unlawful behaviour

and sought relief only against such individuals. None of these individual employees cited in that second Labour Court application are part of the individual applicants in the current matter now before me, save for two individual applicants who could be positively identified as being listed in the second Labour Court application, these individual applicants being J P Maseko and N Gininda. None of the other individual applicants are cited, identified or referred to in this earlier Labour Court application. By way of necessary implication and with the respondent actually having had the opportunity to join all the employees that committed misconduct and unlawful behaviour into these earlier legal proceedings, it must be accepted that those employees not so joined were not part of the misconduct and unlawful behaviour. At best for the respondent, it must be accepted that it could actually only identify nine individual employees as having committed misconduct and unlawful behaviour.

[58] Being confronted with the above difficulty, Mr Vetten then suggested that because some of the striking employees committed misconduct and unlawful behaviour, which I have said I accepted was indeed the case, it was not necessary to identify other individual employees and that all the striking employees could be collectively held to have either committed or be responsible for such misconduct or unlawful behaviour. What Mr Vetten was thus saying, as a general premise, is that because some individuals were identified as having committed misconduct and unlawful behaviour during the strike, all the individual applicants must be considered to have committed the same misconduct as a matter of association. In essence, the case of the respondent, in this regard, is that the application of the concept of collective guilt means that all the individual applicants are guilty of misconduct even if was committed only by some individuals. The problem with this approach of the respondent is that it is just not that simple. In *NUM v Durban Roodepoort Deep Ltd,*[45] the Court said the following:

[45] (1987) 8 ILJ 156 (IC) at 162H-I.

> 'The concept of ''collective' guilt is wholly repugnant to our law and any policy in terms of which all members of any group.... must bear collective punishment for the wrongdoings of some of the members is unacceptable to this court because it runs counter to the tenets of natural justice and is a violation of the well-known principle that a person is presumed to be innocent until proved guilty. There is a failure of justice even if a single person is presumed to be guilty and made to suffer with the rest.'

[59] Since that early judgment, the Labour Appeal Court did recognise the concept of what was termed to be collective misconduct or otherwise called derivative misconduct, in the judgment of *Chauke and Others v Lee Service Centre CC t/a Leeson Motors.*[46] The Court, however, dealt with a different concept to 'collective guilt' as referred to in *Durban Roodepoort Deep*. The principle of collective or derivative misconduct, in the view of the Court in *Chauke*, is the following:[47]

> 'In the second category, two lines of justification for a fair dismissal may be postulated. The first is that a worker in the group which includes the perpetrators may be under a duty to assist management in bringing the guilty to book. Where a worker has or may reasonably be supposed to have information concerning the guilty, his or her failure to come forward with the information may itself amount to misconduct. The relationship between employer and employee is in its essentials one of trust and confidence, and, even at common law, conduct clearly inconsistent with that essential warranted termination of employment (*Council for Scientific and Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 26D-E). Failure to assist an employer in bringing the guilty to book violates this duty and may itself justify dismissal.'

The Court concluded as follows:

[46] (1998) 19 ILJ 1441 (LAC).
[47] Id at para 31 ; The Court in *Foschini Group v Maidi and Others* (2010) 31 ILJ 1787 (LAC) at para 47 approved of this ratio in *Chauke*.

> 'This approach involves a derived justification, stemming from an employee's failure to offer reasonable assistance in the detection of those actually responsible for the misconduct. Though the dismissal is designed to target the perpetrators of the original misconduct, the justification is wide enough to encompass those innocent of it, but who through their silence make themselves guilty of a derivative violation of trust and confidence.'[48]

[60] In terms of the ratio in *Chauke*, the conduct of the actual perpetrators of the unlawful behaviour is not implied on other employees on the basis of some or other form of collective guilt or association. The misconduct of the non perpetrating employees, so to speak, lies in something entirely different. The misconduct of these employees is founded in the fact that these non perpetrating employees, by failing to take positive action and assisting their employer so that those employees that actually participated in the unlawful behaviour can be brought to book, breached their duty of good faith and trust towards their employer. To put it simply – it is not a case of deemed participation in the unlawful conduct but the existence of separate misconduct in the form of a derivative violation of trust.

[61] It is, however, critical that even such derivative misconduct cannot diminish the standard of proof an employer must still comply with to establish the existence of misconduct. The fact is that employees that attract culpability must still be identified. To illustrate this with a simple example – assuming an employer has 100 employees and during a strike some employees participated in unlawful behaviour. Does this now mean that all employees, just because they are employed by the same employer and may have participated in the strike, can now be held accountable for this misconduct by certain individuals on the basis of derivative misconduct just because they are all employed by the same employer

[48] Id at para 33.

and participated in the same strike? Surely not. What if a particular group of employees were not even present when the unlawful behaviour took place and never even witnessed or was aware of the same? The fact is that the group to which this derivative misconduct is applied must be properly identified. In *RSA Geological Services (A Division of de Beers Consolidated Mines Ltd) v Grogan NO and Others,*[49] the Court said the following:

> 'In the opinion of this court, derivative misconduct may diminish the culpability of the employee for the principal misconduct. In no way does it diminish the standard of proof. The employer must prove on a balance of probabilities that the employees knew or must have known about the principal misconduct and elected without justification not to disclose what they knew. If the employer discharges this onus then it may well, as in this case, also discharge the onus of justifying the dismissal on the principal misconduct of participating in, lending support to or associating themselves with the offence. In this case all the employees were charged with participating in the principal misconduct. On the facts the court must infer that all the employees participated in the principal misconduct in the absence of their evidence to the contrary. Derivative misconduct may therefore be an appropriate charge if employees who participated in the principal offence can be distinguished from those who knew about it.'

[62] Similarly and in *Tawusa on behalf of Tau and Others v Barplats Mine Ltd (Crocodile River Mine),*[50] the Court postulated a refinement to the concept of collective misconduct, where the Court said:

> 'Examining the arbitration award in *FEDCRAW and Snip Trading (Pty) Ltd* (2001) 22 ILJ 1945 (ARB); [2001] 7 BALR 669 (P), Dr Grogan refers to what the arbitrator defined as the essence of 'team misconduct' which occurs when employees are dismissed because, as individual components of the group, each has culpably failed to ensure that the group complies with the rule or attains a

[49] (2008) 29 ILJ 406 (LC) at para 49.
[50] (2009) 30 ILJ 2791 (LC) at paras 30–31. See also *SA Municipal Workers Union on behalf of Abrahams and Others v City of Cape Town & others* (2011) 32 ILJ 3018 (LC) at para 56.

performance standard set by the employer. That definition however is refined by the arbitrator, as quoted by Grogan, as follows:

> "In situations of "Team Misconduct' it is ... permissible to act against the entire team if each member has a role to play in attaining the performance standard set for the team. If that standard is not attained *each member must be given an opportunity to explain the team's failure; the person to whom the explanations are given must be objectively satisfied that the team's failure cannot be blamed on any particular member of that team*." (Emphasis added.)

That qualification of a general principle was manifestly not applicable in the instant case. There was no attempt by the respondent to investigate the causes and circumstances of the ostensible loss of production by way of any individual enquiry. The disciplinary proceedings were arbitrarily and precipitously launched against the whole of the section 2 workforce without discrimination. That, on any definition, is an unqualified application of what has been described as the 'repugnant' doctrine of collective guilt and the mass dismissal which ensued on that basis, was, in my view, indisputably unfair.'

It is clear that derivative misconduct is not the same as collective guilt and even if derivative misconduct would be applicable, individual employees must at least still be given the opportunity to explain why they should not be held accountable in terms thereof.

[63] I wish to conclude on this issue with the following reference to the judgment in *Chemical Energy Paper Printing Wood and Allied Workers Union v National Bargaining Council for the Chemical Industry and Others*[51] where the Court dealt with the issue of consistency (selective application of discipline) but held as follows in dealing with the concept of collective misconduct in such context, which ratio would be of equal application to the issue discussed in this judgment:

[51] (2010) 31 ILJ 2836 (LAC) at para 20.

> 'While the principle is correct that all employees who have committed misconduct must be treated similarly unless there is some justification to treat them differently - in cases of collective misconduct an employer can only act against those employees it can prove to have committed the misconduct complained of. An employer is therefore obliged, in situations as obtained in this matter, to charge only those employees against whom it has evidence. If such employees are found guilty the employer may impose an appropriate penalty. An employer cannot, in matters such as this, simply dismiss all of its striking employees because some from amongst them committed serious misconduct. As a consequence, some employees who commit serious misconduct may not be charged or when charged, the employer is unable to satisfy the disciplinary enquiry that each of the employees who is charged is in fact guilty of the misconduct. Hence, where there has been collective misconduct and the employer only charges some of the employees because it only has evidence against them and from amongst those charged some are found to have committed the wrong and are dismissed and a few acquitted, it does not and cannot follow that the dismissal was unfair because of any selective application of discipline.'

[64] The respondent's attempted reliance on derivative misconduct is entirely misplaced. The individual applicants were not identified as being part of the group to whom derivative misconduct could possibly apply. The individual applicants were not given any opportunity to make representations as to why derivative misconduct should not be applied to them. Finally, there was no evidence presented or case made out by the respondent that the individual applicants were actually aware of the misconduct and unlawful behaviour that had been committed and that they failed to act positively to bring the perpetrators to book. The result of the respondent's inability to rely on derivative misconduct must mean that no misconduct on the part of the individual applicants has been proven to exist and this is, therefore, not something I can consider in deciding on appropriate compensation. I will, however, consider the fact that misconduct

indeed exists on the part of J P Maseko and N Gininda on the basis as set out earlier.

[65] It must always be considered that even in terms of section 194(3) which applies in the case of automatic unfair dismissals, compensation must still be 'just and equitable in all the circumstances'. In order to come to a fair and equitable determination on the issue of the appropriate amount in compensation in this matter, I consider the following: (1) The individual applicants had short service with the respondent; (2) the respondent had no cause or justification of any kind to dismiss the individual applicants; (3) the respondent has in fact lost the contract it had with the Mpumalanga Government in terms of which it employed the individual applicants; (4) the issue giving rise to the strike related to the issue of site rotation which is not a significant or highly prejudicial change to employment conditions; (5) the respondent acted as it did not out of mala fides, but because it was of the view (and unfortunately this was a mistaken view) that the strike was unprotected when it was not; (6) the respondent should have been forewarned by the litigation at the beginning of September 2009 that the strike was protected but did not heed the warning and still dismissed the individual applicants on 14 September 2009; (7) I also have some concerns about the respondent's attitude towards SATAWU; (8) a clear message must be sent to employers that this kind of conduct cannot be tolerated; (9) some of the individual applicants have been gainfully employed since their dismissal as is evident from their income affidavits; (11) I consider that two individual applicants indeed committed misconduct; and (12) there was a possible alternative remedy of the CCMA determining whether the issue of rotation was an agreed employment term. Applying these considerations and applying a general sense of fairness, it is my view that an award of 13 months' salary in compensation in favour of each of the individual applicants would be appropriate, save for J P Maseko and N Gininda whom I shall award 10 months' salary in compensation each.

[66] In terms of the supplementary pre-trial minute, the parties agreed that the individual applicants would all submit income affidavits and these affidavits would be used as the basis for calculating compensation in the event of a finding in favour of the individual applicants. The compensation thus payable to the individual applicants as a result of their automatic unfair dismissal by the respondent will thus be calculated on this basis and is set out in the order hereunder, and those individual applicants entitled to such relief are the individual applicants that submitted such income affidavits. As to the quantification of the compensation awarded, all the individual applicants earned a monthly remuneration of R2 100.00 at the time of the termination of their employment at the respondent. A compensation award of 13 months' salary thus amounts to compensation of R27 300.00 awarded to each of the individual applicants. Similarly, a 10 months' compensation award thus amounts to compensation of R21 000.00 awarded to J P Maseko and N Gininda.

[67] As to costs, it must be considered that the applicants were successful in showing an automatic unfair dismissal to exist. The applicants have asked for punitive costs but I can see no reason for this to be awarded. This is simply a case where fairness dictates that costs should follow the result and these costs should be based on the normal party and party scale in opposed trial proceedings.

Order

[68] For all of the reasons as set out above, I make the following order:

1. It is declared that the dismissal by the respondent of the following listed individual applicants constitutes an automatic unfair dismissal as contemplated by section 187(1)(a) of the LRA.

    1.1 N Gininda

    1.2 N Lukhele

1.3 N Magagula

1.4 D D Madinane

1.5 T M Mahlangu

1.6 C Malabela

1.7 J P Maseko

1.8 J M Masina

1.9 R Mavimbela

1.10 J Mazibuko

1.11 J M Mkhonta

1.12 E R Msibi

1.13 N T Msibi

1.14 E Ncongwane

1.15 A H Ndlovu

1.16 S Nkambule

1.17 A N Nkosi

1.18 B D Nkosi

1.19 N Nkosi

1.20 T A Nkosi

1.21 S Setiba

1.22 T Shiba

1.23 D Shongwe

1.24 R N Shongwe

2. The respondent is ordered to pay compensation to the each of the individual applicants as listed in paragraph 1 of this order, save for J P Maseko and N Gininda, in an amount of R27 300.00 which compensation shall be paid to each of such individual applicants by the respondent within 10 days of date of handing down of this judgment.

3. The respondent is ordered to pay compensation to J P Maseko and N Gininda, in an amount of R21 000.00 each which compensation shall be paid to these individual applicants by the respondent within 10 days of date of handing down of this judgment.

4. The respondent is ordered to pay the costs of the matter.

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Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicants:	Mr R Daniels of Cheadle Thompson & Haysom Inc Attorneys
For the Respondent:	Advocate Vetten
Instructed by:	Makhafola & Verster Inc Attorneys