REPUBLIC OF SOUTH AFRICA

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 535/2010

In the matter between:

JACKSON PULE AND OTHERS **Applicant**

and

MVELATRANS (PTY) LTD T/A

BOJANALA BUS SERVICES **Respondent**

Heard: **04 May 2013**

Delivered: **23 May 2013**

Summary: Unfair dismissal- participating in unprotected strike. Duration of ultimatum not affording the applicants time to seek assistance and advice. Duration of ultimatum, is a principle issue- no need to lead evidence. Factors to consider in not granting primary remedy. Employee submitting sick note- Employer's duty to make sure that there is effective communication system about matters of this nature.

JUDGMENT

MOLAHLEHI, J

[1] There are two groups of applicants in this matter who are claiming that they had been unfairly dismissed by the respondent. The one group is represented by Modisakeng Attorneys and the other group, on a *pro bono* basis, by Wright Rose Innes Incorporated. The alleged unfair dismissal of the applicants arose from the alleged failure to comply with the ultimatum which was issued by the respondent consequent to the unprotected industrial action embarked upon by the applicants over a period of three days.

[2] The applicants contend that their dismissal was both procedurally and substantively unfair and seek an order of reinstatement.

The Parties

[3] The applicants are former members of SATAWU and TAWUSA who during November 2009, represented by two other employees, addressed a letter to the respondent indicating that they no longer wished to be represented by the unions and that the respondent should cancel the unions' deductions from their wages.

[4] The respondent conducts a commuter bus service in the North West Province and has depots at both Tlhabane and Mogwase. The respondent provides its services to the commuters through an agreement with the North West Government which amongst others provides for penalties in the event of failure to provide the scheduled services.

Background facts

[5] The issue that led to the dismissal of the applicants arose on 11 November 2009, where at a meeting at the Tlhabane depot, the union representatives tabled a number of complaints, which were tabled as part of the complaints included: (a) salary adjustments, (b) the 15% shares, (c) print-out on offer statement, and (d) adjustments on SNT.

[6] The issue of the shares arose as a result of the purchase of the respondent by Unitrans Passenger (Pty) Ltd (Unitrans). Apparently, the purchase agreement provided that 15% of the shares of the respondent were to be held in trust on behalf of the employees. The complaint of the employees as concerning the holding of the shares in trust was that, that did not benefit them. According to the respondent, in order to address the problem, it purchased these shares and thereafter paid out their values to the employees. The payment seems not to have satisfied the employees. According to the respondent, the dissatisfaction arose from the rumours that the payment was not in full of the value of the shares.

[7] On 17 November 2009, the bus drivers at the Tlhabane depot stopped working and demanded feedback on their complaints. The representative of the respondent, Mr Motitsoe informed them that some of their complaints could not be resolved at plant level and as concerning the issue of the shares they may have to pursue that through the High Court. The drivers, joined by other employees refused to go back to work and later during the course of the afternoon submitted a set of further demands, which included wage increases and subsistence allowances.

[8] The other demands, submitted by the employees included the following: (a) a security guard outsourcing package; (b) refund on leave days; (c) cell-phone, housing and car allowance; (d) bonuses; and (e) new management.

[9] Mr Fleetwood informed the employee's representative that he was not willing to discuss the demands until employees returned to work. The employees disregarded the instruction and on 18 November, they continued blocking the entrances to both depots. The respondent invited both SATAWU and TAWUSA to a meeting at which both unions informed the respondent that the employees were not willing to listen to them.

[10] On 20 November 2009, the respondent launched an urgent application before this Court and obtained an interdict against SATAWU and TAWUSA. The unions did not oppose the urgent application but instead sent an email to the respondent indicating that they distanced themselves from the industrial action. The Court order and the ultimatum were read out to the employees by members of the South African Police Services. The essence of the Court order was to interdict the employees from participating in the unprotected strike. The respondent pointed out to the employees that the Court had declared their strike to be unprotected and illegal. It is further pointed out that the unions were requested to intervene but to no avail. The ultimatum further reads as follows:

> '3. Employees are hereby instructed to return to work for the afternoon shift of 29 November 2009.
>
> 4. Participation in illegal or unprotected industrial action is a serious misconduct and the company will take disciplinary action against those engaged in misconduct. This will lead to the dismissal of the employees.
>
> 5. The company will take disciplinary action against those who fail to adhere to this ultimatum and if failed to return to work by 15h00 on 20 November 2009 this will lead to the dismissal of employees.'

[10] The respondent instituted a collective disciplinary inquiry against the applicants following the issuing of the ultimatum. At the hearing, the applicants arrived accompanied by their attorney, Mr Modisakeng. The

chairperson of the disciplinary hearing disallowed representation by Mr Modisakeng. The applicants then requested a postponement on the ground that they needed to prepare. The postponement was granted until 3 December 2009.

[11] A further postponement was sought by the applicants when the matter resumed on 3 December 2009. And when the postponement was refused, the applicants handed a letter demanding that all charges against them be dropped. When informed that their demand would not be entertained the applicants indicated that they would not participate in the hearing and walked away. The hearing was conducted in the absence of the applicants who were subsequently found guilty and dismissed for misconduct. The relevant clause of the notice to attend the disciplinary hearing reads as follows:

> '2 You are charged with gross misconduct in that:
>
> 2.1 On 20 November 2009 the Labour Court issued an interdict instructing staff to return to work immediately and you did not.
>
> 2.2 The company also gave out an ultimatum instructing you to return to work at 15H00 on 20th November 2009 and you failed to do so."

[12] The notice to attend the disciplinary hearing set out also the rights of the applicants in as far the disciplinary hearing was concerned and in this regard clause 3.1 thereof reads as follows:

> '3.1 They (referring to the applicants) are entitled to be assisted at the disciplinary enquiry by a fellow employee, a shop steward, a union official or a representative of their choice.'

[13] In the amended statement of claim, the applicants contend that their dismissals were substantively unfair because the first respondent dismissed them in circumstances:

'11.1 where those applicants who were present at the depots returned to work after the announcement of the ultimatum;

11.2 where the ultimatum was announced at the Mogwase depot after expiry of the time indicated in the ultimatum;

11.3 where some of the dismissed applicants were not aware of the ultimatum;

11.4 those applicants who were present when the ultimatum was announced did not have sufficient time to reflect on the ultimatum; and

11.5 dismissed some but not all the employees who were on strike at the same time as the applicants.'

[14] As concerning procedural fairness, the applicants contend that the dismissal was unfair because:

'12.1 the applicants were denied the opportunity to choose their representative, notwithstanding the contents of notice of the disciplinary hearing;

12.2 the applicants were not advised of their right to appeal the decision dismissing them.'

[15] In terms of the pre-trial minutes, the following facts are in dispute:

'15.1 The applicants allege that Pule had made arrangements with Letanke to stand in for him in Mogwase depot. The respondent denies this and avers firstly that Pule made no such arrangement, Pule went on strike whereas Letanke did not, and secondly that Pule had no authority to make such arrangement in any event;

15.2 The applicants allege that the following applicants: Dingaan Ngobeni, Johannes Leshi, Silas Motitsoe, Paul Malekutu, Joseph Neef Phalole, Matthew Makgoana, Godfrey Ntsoe, Piet Kgaswane, Ike Malungane and Ephraim Molefe reported at their workplaces, being workshop, at 16H00 on the 20

> November 2009 but as it was closing time and therefore they left and went home. The respondent denies this and avers that none of them reported at the workshop either at 16H00 or at any time on the 20 November 2009. The respondent avers that the workshop closes at 16H30.'

The issues for determination

[16] The issue for determination by this Court is whether the dismissals of the applicants for the alleged failure to comply with the ultimatum were substantively and procedurally unfair. The substantive fairness of the dismissals relates to both the reason for the dismissal and the alleged inconsistent application of discipline by the respondent. The issue of the inconsistency relates to one of the employees whose name appeared amongst the list of those who participated in the strike action and was dismissed but later reinstated according to the applicants.

[17] As concerning procedural fairness, the court needs to determine whether the dismissal of the applicants was unfair because the applicants were denied their representation of choice, being Mr Modisakeng attorney for the first group who at the time was representing both groups.

The case of the first group of applicants

Mr Nokwane

[18] The first witness, Mr Nokwane, testified on his own behalf and on behalf of the following employees who were also dismissed: (1) Mr Willy Motshegoa; (2) Mr Markus Sekete; (3) Mr Nechodemus Maruapula; (4) Mr Lucky Molatlhegi; (5) Mr Skapie Mathabathe; (6) Mr Modisakeng and (7) Mr Bomvise Mngomane.

[19] Mr Nokwane testified that he never heard the ultimate being read on 20 November 2009. He states in his affidavit that the reason for not complying with the ultimatum was because:

> 'My co-applicant and I went home earlier as it was raining and we were locked out of the premises before the ultimatum was read and we did not know anything about the ultimatum. We all went back the following day.'

[20] In his evidence in chief, Mr Nokwane testified that he suffers from high blood pressure and on 20 November 2009 he had not taken his medication for a period of four days. He was as result of this not feeling well and it was for this reason that he went home, resulting in him not being present when the ultimatum was read. Contrary to what he stated in the affidavit quoted above, he testified that he was inside the yard when he decided to leave for home to fetch his medication. In other words, he was not locked outside the workplace.

[21] As concerning the other applicants referred to above, Mr Nokoane testified that the only two people that he saw on the day in question were Mr Lucky Molatlhegi and Mr Skapie Mathabathe. He conceded during cross examination that he had no direct knowledge about the other people whose names appears in the above list. There was some suggestion that he heard about their whereabouts on the day in question at the attorneys' offices when they raised their hands to indicate that they were not present when the ultimatum was read. And as concerning the reason why Mr Molatlhegi and Mr Mathabathe left the workplace he could not tell.

Ms Bertha Mfulwane

[22] In her affidavit testifying both on her own behalf and on behalf of the others whose names appear below, Ms Mfulwane, states that after the ultimatum was read they all went back to work. She stated that the following applicants went back to work with her: (1) Lipkin Lamola; (2) Titus Modibedi; (3) Keneth Kwena; (4) Pinky Matome (5) Lizzy Khonou and (6) Lucky Mpipi.

[23] Ms Mfulwane's version that the applicants listed above went back to work soon after the ultimatum was read, is based on their response

during the consultation with their legal representative. Apparently, what happened at their consultation is that their representative enquired as to who amongst them were present when the ultimatum was read. Those who claimed to have been present raised their hands. It is on the basis of this response given by the people listed above during the consultation with their attorney that Ms Mfulwane stated that they were present at the time the ultimatum was read and that they soon thereafter reported for work. There is no other evidence submitted on behalf of these applicants as to what they did after the ultimatum was read. In terms of the pleadings, these applicants were present when the ultimatum was read. The respondent contends that they did not comply with the ultimatum.

[24] In disputing the version of Ms Mfulwane, the respondent presented the testimony of Mr Pretorius who testified that she (Mfulane) and her colleague, Ms Matome arrived at the workplace at 16h00 carrying plastic backs full of groceries and that they never tendered their services.

Mr Paul Malekutu

[25] In the affidavit, Mr Malekutu testifies that he and those applicants whose names appears below reported for work on 20 November 2009, at 16h00 only to find that it was already knock-off time. According to him, he reported at the workshop with the following people: (1) Joseph Phalole; (2) Mathews Makgwana; (3) Godfrey Ntsoe; (4) Piet Kgaswane; (5) Issac Malungane and (6) Ephraim Molefe.

[26] He testified that when they arrive at the workshop they were told by Mr Barney to go home and that they should come on Monday. He further testified that the ultimatum was read closer to the knock off time. He could not, however, explain why they had agreed in the pre-trial minutes that the ultimatum was read at 13h00. When questioned further during cross examination on this issue he said that the ultimatum was read at 15h00. And later on, he indicated that he could

not recall what time they were at the gate and at what time they were at the workshop.

Mr Thabo Molefe

[27] Mr Molefe testified that he was not present when the ultimatum was read because he could not go to the Mogwase depot where he was based because there were no buses to catch because of the strike.

Mr Kenneth Matuwe

[28] Mr Matuwe testified that he did not report for work at Mogwase on 20 November 2009 because there were no buses travelling between Tlhabane where he was and Mogwase and that is the reason that he was not present when the ultimatum was read.

The case of the second group of applicants

Mr Pule

[29] The first witness to testify on behalf of the second group of applicants was Mr Pule, who was based at the Mogwase depot. He was, however, at the Tlhabane depot on the day the ultimatum was read. He testified that on that day he read both the Court order and the ultimatum at about 14h45 and was in doing so assisted by Mr Methi of the South African Police Service.

[30] Mr Pule testified further that after reading the two documents, he went to Mr Sefanyetsa's office and requested the use of the phone in order to contact Mr Stuurman to inform him that he would not make it for the deadline of the ultimatum as he was still to travel from Tlhabane to Mogwase. After failing to reach Mr Stuurman on his phone, Mr Pule testified that he contacted Mr Letanke, a route controller and arranged that he stand in for him. According to him, Mr Letanke agreed to his request. He further stated that subsequent to this arrangement he contacted Mr Stuurman again and informed him about the arrangement

he had made with Mr Letanke. Mr Stuurman agreed to that arrangement, according to Mr Pule.

[31] Mr Pule reported for his weekend shift on 21 November 2009. He was thereafter served with the letter of suspension on 24 November 2009.

[32] Mr Pule was cross examined at length regarding his participation in the strike including the 17 November 2009 when the Mogwase deport was not yet on strike but Tlhabane was. In his answer during cross examination, he sought to present a picture that he was not on strike but reported at Tlhabane because there were no buses running between Mogwase and Tlhabane.

[33] The respondent argued that Mr Pule was not a credible witness and that his evidence in relation to the alleged arrangement he made with Mr Stuurman should be rejected as a fabrication.

[34] As concerning the fairness of the procedure, Mr Pule testified that the chairperson of the disciplinary enquiry refused them legal representation during those proceedings. The unfairness of the procedure followed during the disciplinary hearing is also attributed to the refusal by the chairperson to recuse himself.

[35] The other point raised by the applicant's in as far as the fairness of the dismissal relates to the alleged inconsistent application of the disciplinary procedure is that Mr Moalusi who is alleged to have not complied with the ultimatum was not dismissed.

[36] Although, in the pre-trial minutes it is stated as common cause that the ultimatum was read at 13h00, Mr Pule disputed that it was read at that time. He testified that the ultimatum at the Tlhabane was read at 14h00.

[37] Mr Pule further testified that during the strike he reported every day for work at the Tlhabane depot even though he was stationed at Mogwase because he stays in Tlhabane and there was no transport to take him

to Mogwase during the strike. He explained that the reason he reported at the Tlhabane depot was to align himself with the strike.

[38] During cross examination, Mr Pule testified that he was not on strike but was "affected" by it in that his duties and function depended on the running of the busses. He also stated that he was not able to attend at Mogwase depot because the respondent did not provide buses to collect him from Tlhabane as was the practice. Although he reported at the Tlhabane depot, he never tendered his services there neither did he report to any manager about his presence at that depot. When asked as to why he did not indicate in his affidavit that he was not on strike in his affidavit, he stated that it was because he was never asked about it.

Mr Leshi

[39] The second witness of the second group of applicants was Mr Leshi who was based at Mogwase depot. He testified that on the day in question, he saw two police officers arrive at the workplace. The two police officers went to the offices and on their return went to where the applicants were gathered. The police officers were accompanied by Mr Mfikana, one of the managers of the respondent. On arrival at the area where the employees had gathered they read the ultimatum.

[40] According to Mr Leshi after the ultimatum was read he together with the others went and reported for work at the workshop where they were based at about 15h45. It being a Friday and the practice being that on such a day they normally knocked off earlier they went straight and took their shower, after which they knocked off. At that time, one of the supervisors, Mr Nkoane was in his office and the other Mr Barney was busy cleaning the floor.

[41] Mr Leshi persisted even during cross examination that the ultimatum was read at 15h45. He disputed that the ultimatum was read at 13h00. He also claimed that he knocked off at 16h15 and further that they were not told to report to any one after the reading of the ultimatum.

Ms Matinku

[42] The third witness was Ms Matinku who testified that she was on the day in question sick and had faxed the medical certificate to the respondent in that regard. It has not been disputed that she was booked off sick from 19 to 20 November 2009.

[43] The respondent conceded to the version of Ms Matinku but contended that she was not entitled to retrospective reinstatement because she ought to have informed the respondent about her case earlier before the commencement of these proceedings.

Ms Mothoagae

[44] Ms Mothoagae testified that the ultimatum was read at 15h45 and soon thereafter she reported for work but found that the area where she worked locked and even the office of his supervisor was closed and the lights were off.

Mr Sepotokele

[45] Mr Sepotokele testified that from lunch he went to work. He came across Mr Sibeko who told him that the ultimatum had already been read. He testified that the reason for returning late at the depot was because he had gone to buy food far away from the depot because the canteen that operated at the workplace and the caravan that sold food outside the gate were not operating on that day. He went to buy food with Mr Setshedi.

[46] Mr Setshedi confirmed what was stated by Mr Sepotokele that they went to buy food away from the workplace because the canteen at the workplace was closed. He stated that on arrival from buying food he went to his foreman at the washing bay. He testified during cross examination that he did not see Mr Sibeko on his return from buaying food.

Mr Ndlovu

[47] Mr Ndlovu states in his affidavit that on 16 November 2009 he discussed with his supervisor, Mr Matsikoe that he required to take leave of absence on 20 November 2009 to attend to his son who needed to be taken to hospital because he had a heart problem. According to him, permission was granted and this was not the first time that he had arranged his leave of absence for this reason in that manner.

[48] The respondent did not dispute that at the time of the ultimatum was read he was not present and that he was at the hospital.

Mr Khunou

[49] Mr Khunou testified that, on the day the ultimatum was read, he had gone to collect his TB medication and had made arrangement in that regard with his supervisor which arrangement he had previously done.

Mr Ngobeni

[50] Mr Ngobeni has since the launching of these proceedings passed away. His estate has not been substituted in these proceedings and, accordingly, that case has not been placed before this Court.

Legal principles

[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 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.'[1]

[54] The purpose of an ultimatum should be an endeavour in good faith, to induce the strikers to return to work.[2] The purposed of an ultimatum was set out in *Modise and Others v Steve's Spar Blackheath*[3] set out 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

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[1] 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.'

[2] 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.

[3] [2000] 5 BLLR 496 (LAC) at para 151.

> 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.'

[55] Mr Orr, for the respondent, argued that the principle of providing reasonable time for the applicants to reflect on the ultimatum does not apply in this case because the applicants did not raise that as an issue or complained that they did not have enough time to consider the ultimatum. He further argued that the applicants have failed to provide a factual basis as to why they belief the respondent singled them out in dismissing them.

[56] In relation to those applicants who contended that their dismissal was unfair because they were not present when the ultimatum was read, Mr Orr contended that it was of their own making as they ought to have made sure that they were at the workplace at all times and particularly after it was indicated that the respondent was approaching the Court for an interdict, which meant that they were likely to be instructed to return to work. He further contended that they ought to have informed their leaders as to where they would be if they were to go away from the workplace.

Evaluation

[57] It is common cause that the applicants participated in the unprotected strike action which lasted for just above two days. It is also common cause that the respondent issued the applicant with an ultimatum on 20 November 2009. Whilst it is common cause in as far as the first group is concerned that the ultimate was issued at about 13h00, there is a dispute as concerning the second group.

[58] A number of the applicants contend that they went back to their workstations as soon as the ultimatum was read, whilst others proffered a number of reasons as to why they did not comply with the ultimatum.

[59] The issue of the fairness or otherwise of the dismissals of the applicants in general turns around the fairness of the ultimatum, in relation specifically as to whether they were afforded sufficient time to reflect on the matter and seek advice and assistance in relation to considering whether or not to return to work and also what the consequences of the decision would if they were refuse to return to work.

[60] The critical issue in the assessment of the fairness of the applicant's dismissal turns around the notice period for them to return to work. Whilst the first group conceded in the pre-trial minutes that the ultimatum was read at 13h00, the second group placed that in dispute.

[61] The version of the second group is that the ultimate was read later than 13h00. This version is more probable when regard is had to the testimony of the two witnesses of the respondent. Mr Niemand and his colleague testified in the affidavit in support of confirmation of the *rule nisi* that the ultimatum was read at 15h00. There is strong evidence that suggests that the ultimatum and Court order with read at the same time. The version that the two documents were read together is highly probable when taking into account the version of the respondent that the two documents were faxed together. It would then follow on this basis that if the Court order was read at 15h00, then the ultimatum was also read at that time.

[62] In seeking to challenge the version of those applicant who claim to have complied with the ultimatum, the respondent contended that their names did not appear on the roll call as having clocked in at 15h00. The applicant's version is that no roll call was made. This evidence was not seriously challenged by the respondent. The respondent also failed to produce proper evidence to support its version regarding the alleged roll call. The document which the respondents sought to rely on in support of its version that the roll call was made is a mechanical register which does not show any clocking in at 15h00. In fact, one of the respondent’s witnesses testified that he did not know anything about the roll call.

[63] The above analysis indicates that the notice period for returning to work had already lapsed at the time the ultimatum was read. The dismissal of the applicant's was accordingly on the basis of this unfair as the deadline for reporting for work had already expired at the time the employees were required to report for work. In fact, this means that the purpose of the ultimatum was not to persuade the applicants to return to work but its underlining objective was to precipitate their dismissal.

[64] The fairness of the dismissal of the applicants would still remain unfair even if the version of the respondent that the ultimatum was read at 13h00 was to be accepted. It means that the applicants were instructed to report for work at 15h00, constituting a two hours' notice period.

[65] If regard is had to the facts and circumstances of this case there can be no doubt that at the time given for the applicants to consider compliance with the ultimatum was insufficient. Although there is no evidence that the applicants complained about the extent of the notice period, the issue is, however, raised in the pleadings. The issue of whether the applicants were afforded sufficient time to consider, whether to return to work in terms of the ultimatum is a matter of principle. I, accordingly, do not agree with Mr Orr that the Court should in considering the fairness of the dismissal of the applicants disregard the notice period because the applicant did not in their testimony complain about it.

[66] In my view, the two hours which the respondent gave to the applicants to revert back to work was insufficient and did not afford them proper opportunity to consider whether or not they should return work and what the consequences of their failure to do so would be. This is more so when regard is had to the fact that the applicants at that stage were no longer members of unions and did not have any formal structure or organisation to advise and assist them in terms of the approach to be adopted in relation to the ultimatum. In these circumstances, it seems to me that fairness required the respondent to have afforded the applicant's the opportunity to go back home and discuss with their

families the implications of refusing to obey the ultimatum. Put differently the individual applicants needed assistance also from their families in weighing their options in as far as compliance with the ultimatum was concerned.

[67] In my view, the dismissal was also unfair in relation to those employees who stated that they comply with the ultimatum. There is in this regard conflicting versions between the testimony of the respondent and that of the applicants. In my view, the version of the applicants is more probable than that of the respondent. The respondent contends that the applicant could not have returned to work after the ultimatum was read because their names do not appear on the record of the roll call. The version of the respondent is not persuasive when regard is head to the inconsistent manner in which it would appear the roll call was made. It would appear that the directive that a roll call be made was given at the higher level but turned out that it was inconsistently implemented by those responsible to do so. In addition to the inconsistent application of the roll call, I find the testimony of the respondent to be unreliable.

[68] In seeking to show that the applicants did not report for work as required by the ultimatum, the respondent a document showing that the buses left the depot at 15h00. This document, in my view, does not assist the respondent's case as there was no evidence as to how it was compiled.

The applicants who tendered the explanation

[69] As appears from above, there is a group of individual applicants who testified that, at the time the ultimatum was read, they were for various reason not present at the workplace. It was for that reason that they did not comply with the ultimatum. The fact that each of them was absent when the ultimatum was read was not seriously challenged. However, what was challenged in some of the explanations tender were certain aspects relating to their reasons for being absent.

[70] It cannot be disputed that despite the weaknesses in the explanation for being absent at the time the ultimatum was read, that none of these applicants deliberately absented themselves to avoid listening to or avoided compliance with the ultimatum. It would seem to me that had the respondent conducted an investigation prior to hastily dismissing all the applicants as a group it would have discovered that dismissal was, in the circumstances, not an appropriate sanction.

[71] I need to point out that I do not agree with the contention of Mr Orr that this group of applicants are themselves to blame for not being present when the ultimatum was read as they ought to have informed their leaders concerning their whereabouts. The argument is unsustainable. As indicated above, this case involves a situation where the employees had resigned from their unions and were dealing with the issues without any formal structure to represent and assist them in coordinating their affairs. There is some evidence suggesting that there were employees who provided some leadership for the applicants. There is no evidence that these two employees were formally recognise as the leaders of the applicants.

[72] In light of the above and taking into account the totality of the facts and circumstances of this matter, I am of the view that on the above grounds alone, the dismissal of the applicants was substantively unfair. I, accordingly, do not deem it necessary to determine the issue of inconsistency as raised by the applicant.

<u>The case of Ms Matinku</u>

[73] The respondent conceded that Ms Matinku was unfairly dismissed because she was on the day in question off sick. The respondent, however, contended that she was not entitled to reinstatement because she failed to raise her issue earlier. In my view, the respondent's contention is unsustainable. In this respect, I agree with Mr Mooki that dismissal is a serious matter that should not be taken seriously. It would seem that the reason that Ms Matinku case was not picked up by the respondent was due to its poor communication system. In my view,

Ms Matinku cannot be faulted for the deficiencies of the respondent's communication systems. She submitted her medical certificate on time and that was never challenged. It was for the respondent to have made sure that it was acting in the proper and fair manner when it dealt with the case of Ms Matinku.

The case of Mr Pule

[74] The circumstances of Mr Pule are not different to the other applicants as concerning the deadline for reporting back for work. He also was not afforded a reasonable time to comply with the ultimatum. More importantly, in his case, he was not at Mogwase when the ultimatum was read he was in Tlhabane where he assisted with the reading of the ultimatum.

[75] There are two conflicting versions as to whether his manager had approved of the arrangement he had made for a colleague to stand in for him at Mogwase. It has, however, not been disputed that he spoken and arranged with his colleague to stand in for him. On the undisputed version, it means that he did not intentionally or deliberately undermine the instruction to return to work. For this reason and the broader reason relating to the notice period to return to work, I find the dismissal of Mr Pule was similarly unfair.

[76] In the alternative, the respondent argued that should the Court find that the dismissal of Mr Pule was unfair, he should not be reinstated because of the letter he addressed to the Department of Labour wherein he levelled several accusations against the respondent including the suggestion that the department should not renew the respondent's contract. The part of the letter, which is critical in considering whether Mr Pule should be reinstated reads as follows:

> 'We further request that Bojanala Bus Company be denied the second tender due to corruption, oppression and discrimination. The company has a very strong influence of turning all the labour unions against their members (workers). Our unions have never been of assistance to

> us, otherwise we should have not taken part in an unprotected strike nor dismissed. Should the Minister find the need to meet with us please feel free to contact Jackie Pule on 0823869035 as there is more to unfold...'

Procedural fairness

[77] Both groups of applicants contended that the dismissal was procedurally unfair because they were denied representation during the disciplinary hearing. It was further contended in relation to the other group that the dismissal was in addition to the question of representation unfair because they were not informed of the right to appeal.

[78] During argument, Mr Mooki contended that the issue was not about legal representation but rather representation in general. He contended that the notice given to the applicant's and the disciplinary code do not restrict representation to internal representatives but also allow even outsiders to represent employees in disciplinary hearings. The suggestion from this contention is that Mr Modisakeng was refused representation not on the basis of him an attorney but rather as an individual.

[79] It is quite clear from the heads of argument and the cross examination of Mr Pule that is Mr Modisakeng was refused representation as the attorney of the applicants and as stated earlier, and that stage he was representing all the applicants. The question that arises is whether the chairperson of the disciplinary hearing in refusing to the presentation exercising the discretion in a fair manner.

[80] It is trite that the question of allowing legal representation lies within the discretion of the chairperson of the disciplinary hearing. On the version of Mr Pule, it is apparent that the chairperson of the disciplinary hearing took the decision to exclude Mr Modisakeng after listening to his submission as to why he should be allowed to represent the applicants.

It would also appear that Mr Modisakeng sought to represent the applicants as their legal representative and not in other capacity.

[81] The applicants have not challenged the reasonableness of the discretion exercised by the chairperson of the disciplinary hearing. Accordingly, to the complaint about the fairness of the procedure in this regard stands to fail.

[82] The complaint about the appeal also stands to fail if regard is had to the testimony of Mr Pule. In this respect, he testified that after their dismissal Mr Modisakeng told them that he 'will appeal and take the matter further.'

The appropriate relief

[83] In light of the conclusion that the dismissal of the applicants was substantively unfair, the next issue to determine, in the circumstances of this case, is the nature of the remedy to make.

[84] It is trite that the primary relief in a case of substantive unfair dismissal, is either reinstatement or the re-employment unless there are circumstances dictating otherwise.[4] The factors to bear in mind when considering whether the applicants are to be deprived of the primary remedy, as envisaged in section 193 (2) of the LRA are discussed in *CEPPWAWU and Others v CTP Ltd and Another,*[5] in that case the court followed the approach in *Republican Press (Pty) Ltd v CEPPWAWU and Gumede and Others*,[6] where the Court held that:

> 'In the present case, the passage of six years from the time the workers were dismissed, all of which fall or consequentially in the appalling the failure of the union to pursue the claim expeditiously, was sufficient in itself to find that it was not reasonably practicable to reinstate or re-employ the workers.'

[4]. See also section 193 (2) of the Labour Relations Act of 1995.
[5] [2013] 4 BLLR 378 (LC),
[6] *Republican Press (Pty) Ltd and Gumede and Others* [2007] 11 BLLR 1001 (LC) at para 22.

[85] In the present instance, it was contended on behalf of the respondent that should the court find that the dismissal was unfair, it should not order full reinstatement because of the delay, failure by the applicant to provide the employment details since the dismissal and the failure by the applicant to attend the disciplinary hearing where they could have made out the case as to why they should not be dismissed. The applicants were dismissed on 3 December 2009

[86] In relation to all the applicant, except for Ms Matinku, I agree with contention of the respondent that it would not be fair to order full and the retrospective reinstatement of the applicants to the date of the dismissal.

[87] It cannot be disputed that the letter which Mr Pule addressed to the Department of labour makes serious allegations against the respondent. The letter also has serious implications for the sustainability of the respondent's business. The letter was, however, written in the context of conflict and tension between the parties and in a situation where Mr Pule filled in the leadership vacuum that had arisen once the employees dismissed their unions. It would seem the respondent in a way accept the role played by Mr Pule. For instance Mr Pule read the ultimatum at Tlhabane.

[88] Mr Pule whilst like all other applicants was charged with failure to comply with the ultimatum. He was not charged with any offence concerning the letter which had been addressed to the department of labour. He, accordingly, did not have the opportunity to deal with the issue of the letter. It did seem to me for this reason it would be unfair to deny him the primary remedy provided for by the law. In my view, nothing stops the respondent, if it feels that the letter constituted misconduct, from taking steps to deal with the issue.

Order

[89] In the premises, the following order is made:

1. The dismissal of the applicants is declared procedurally fair, but substantively unfair.

2. The respondent shall reinstate Matinku, retrospectively to the date of her dismissal without loss of any benefits.

3. The respondent shall reinstate all the applicants, including Mr Pule with effect from 23 October 2012.

4. The respondent is to pay the costs of the applicants.

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Advocate Mooki

Instructed by: Wright, Rose-innes Inc

Rocky Modisakeng of Modisakeng Attorneys

For the Respondent: Advocate Orr

Instructed by: Bowman Gilfillan Inc