IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO. JS38/07

In the matter between:

DAVID MASILELA AND OTHERS	Applicants
and	
REINHARDT TRANSPORT (PTY) LTD	First Respondent
J.J ENSLIN	Second Respondent
D.J REINHARDT	Third Respondent
ROBERT AXER	Fourth Respondent

JUDGMENT

BHOOLA J :

Introduction

[1] The applicants were dismissed for participation in an unprotected strike on 6 November 2005. They deny that they were on strike and contend that their dismissals were substantively and procedurally unfair in terms of section 188(1) of the Labour Relations Act No 66 of 1995 ("the LRA"). They seek relief the following relief:

> *"1.1 Directing that the dismissal of applicants was procedurally unfair, and determining the dispute in a manner it deems fit and appropriate.*
>
> *1.2 Directing that the conduct of the applicants bargaining for their rights and requesting clarities (sic) from respondents on failure to pay their wages in accordance with rules and guidance incorporated in the main court (sic) agreement constitutes not an unprotected strike, and that they were collectively bargaining for their rights,*

1.3 Directing that dismissals by respondents of all applicants was substitutively (sic) unfair in that it (sic) not for a fair reason.

1.4 Determine the disputes in (sic) manner it deems appropriate and directing the first respondent to, inter alia

a) reinstate the applicants, with no loss of benefits, or on no less terms and conditions that (sic) those which prevailed prior to dismissals.

b)compensation in terms of sections 194(1) and (2) LRA 66 of 1995 as amended as follows : I) R90248.40=each applicant =total sum of R14078750.00.

c) prescribed rate of 15,5 interests act(sic), 75 of 1995.

d)costs of this actions (sic).

e)further and/or alternative relieves (sic).

ALTERNATIVE TO PARAGRAPHS 1.3 AND 1.4 ABOVE

1.5 Should the above Honourable court establish that the applicants were on an unprotected strikes (sic) and that their conducts (sic) constituted unprotected strike, and determine the dispute, in a manner appropriate and directing that the respondents failed to act in accordance with procedures incorporated in the provisions of sections 64 and 65 of LRA 66 of 1995, as amended."

[2] The second respondent is cited in his capacity as a Director of the first respondent. The third respondent is cited in his capacity as a Director/owner of the first respondent. The fourth respondent is cited in his personal capacity as General Manager of the first respondent. No relief is sought against the second to fourth respondents, and the claim is not opposed by them.

Background

[3] The common cause facts are as follows:

(a) The applicants were employed as long and short distance truck drivers by the first respondent prior to their dismissals for unprotected strike action on 6 and 7 November 2005.

(b) The first respondent conducts business as a road haulage operator and was at all material times a member of the Bargaining Council for the Road Freight Industry ("the Bargaining Council")

(c) The applicants were at all material times members of two trade unions, namely AMAWU and SAACOWU, and were weekly paid employees subject to the terms of the Main Agreement of the Bargaining Council.

[4] The issue in dispute is stated in the pre-trial minute as being "whether the applicants were on an unprotected strike and whether the ultimata issued were fair, in clear terms and timeously given".

[5] The identity of the applicants was in dispute and was resolved at the commencement of the trial by the removal of certain applicants. Although the applicants' case is that some applicants were dismissed despite not having been on strike, no evidence was led as to the identity of these individuals, save for one witness who testified that he only returned from Durban at noon on the day of the strike in question.

The Applicants' case

[6] Despite the inelegant drafting it would appear that the applicants allege the following in their statement of claim :

(a) They had sought to raise various grievances with the respondents on 6 November 2006. They approached the Bargaining Council for assistance as a result of which it dispatched an agent, Francis Matsepe ("Matsepe"), to investigate their complaints.

(b) They were employees of the first respondent from about 1990 onwards in terms of contracts of employment that stipulated they would be paid on an hourly basis.

(c) They requested meetings with management on various occasions in order to address their grievances but management failed to attend such meetings or address their grievances.

(d) On 31 October 2005 they submitted a handwritten list containing 18 complaints to management, which stated their grievances, *inter alia*, as relating to subsistence allowances, hourly based pay, tarpaulin allowance, lack of respect from controllers for drivers, and traffic fines. They requested that these complaints be addressed with their union. The complaints remained unresolved and the first respondent then introduced a labour broker, McLabour, with the intention of replacing employees who had expressed dissatisfaction with the failure to address their complaints.

(e) Endless meetings were held which failed to resolve their grievances, and correspondence was sent to the First respondent in this regard dated 4 July and 25 August 2006.

(f) On 6 November 2006 the applicants notified the First respondent of their intention to hold a meeting to seek clarity on complaints dating back to 1990. It was intended that the meeting would be held for a few minutes during working hours and they did not intend to interrupt normal work. Instead, they were dismissed.

(g) On 9 November 2006 the applicants lodged an unfair dismissal dispute with the Bargaining Council, which was conciliated on 23 January 2007 but was not resolved.

[7] The first respondent denies in its statement of defence that it failed to pay for overtime or paid below the minimum wage prescribed by the Bargaining Council. Regular audits were conducted by the Bargaining Council and feedback was provided

to the parties by Matsepe. AMAWU had been de-registered and the only registered union operating at the first respondent was SAACOWU. The first respondent denies that the applicants were employed by it from 1990 and attached documentary evidence confirming that David Masilela ("Masilela") was appointed as a contractor in 1998, and signed a contract of employment in March 2003. A works council existed, which consisted of shop steward representatives and regular meetings were held, which were properly minuted. A good relationship existed between management and the employees. It was admitted that in 2005 the first respondent began to subcontract labour through a labour broker, McLabour, but this did not affect any of its existing employees. It denied that employees were ever dismissed for expressing dissatisfaction about workplace issues. All grievances and issues were settled at the various meetings between the parties.

Evidence presented by the applicants

[8] The applicant led the evidence of three employees, David Masilela, Fuzile Futshane and Bennet Motaung, who were employed as truck drivers prior to their dismissals.

David Masilela

[9] Despite the applicants' contention that they were employed from about 1990 onwards, the documentary evidence and pleadings confirm that Masilela was employed as a contractor and only became an employee with effect from 1 March 2003. However, he disputed his signature on his contract of employment of March 2003 despite the same signature appearing on other documents which were undisputed. His version in this regard must be rejected on the probabilities.

[10] The witnesses for the applicants denied that they had embarked upon unprotected strike action on 6 November and claimed that they were waiting to meet with the Managing Director ("MD") of the first respondent in order to discuss their unresolved grievances. The MD had previously invited them to discuss their problems

directly with him. They had obtained the requisite permission for the meeting from the fourth respondent, and were confused when he advised that the MD was not available since they had seen him entering the premises.

[11] Their complaints, according to Masilela, were that the controllers (supervisors of truck drivers) were implementing the "wrong system" and the first respondent was refusing to pay traffic fines incurred by drivers. In addition, 45 drivers had apparently been dismissed and replaced by "agents" (which he explained was a reference to subcontractors employed by labour brokers).

[12] After the dismissal of the applicants on 7 November (although Masilela and Motaung insisted they were dismissed on 6 November, the so-called letters of dismissal they referred to were in fact certificates of service) they were offered re-employment on the condition that they became subcontractors and accepted payment based on a "load system" rather than an hourly rate. Some employees accepted the new terms and were re-employed.

[13] Although it was alleged that employees who had not been present at work on the day were nevertheless dismissed, no evidence was led on the identity of such employees nor did they testify. The only evidence in this regard was that of Futshane, but although he had not been there in the morning he clearly associated himself with the conduct of the strikers when he returned from his trip. His attempt to explain his conduct as simply an attempt to ascertain progress with the "meeting" because he had to return to the premises to refuel cannot be accepted on the probabilities especially given that he admitted he had grievances of his own and associated himself with the conduct of his co-employees. His explanation that his truck keys had been handed in and belongings removed from his vehicle did not explain his failure to continue with his deliveries as per his controller's instructions.

[14] Masilela's evidence was that the applicants were prepared to return to work but wanted the load system issue resolved. He persisted in his version that as at 6

November he was not being paid on an hourly basis, notwithstanding evidence to the contrary appearing from his pay slip. He said that after a previous national strike the first respondent had acceded to the demand relating to hourly based pay, but it subsequently tried to unilaterally change this. He was referred to the minutes of a meeting of 31 October 2005 which recorded that the first respondent had agreed to make payment on an hourly basis and not per load, in line with the Main Agreement. He then changed his version during cross examination to admit that payment had initially been made on an hourly basis but after some time management had reverted back to the load system. The load system appears to have been developed to incentivise truck drivers, and provided for them to receive 7% of the turnover of their deliveries per week. Under the dual wage system they received the greater of load-based or hourly based pay. Masilela conceded in cross examination that they stood to earn more on the load or dual wage system but that they still insisted on hourly pay. He testified that the dual wage system was dangerous as it led to drivers undertaking deliveries despite being tired, in order to increase their earnings.

[15] None of the applicants' witnesses were aware of the procedure for dealing with pay-related queries, and advanced spurious reasons for not raising the issue with the payroll department or completing a written complaint form. Masilela implied that when he had previously raised an issue relating to his pay, he was punished by being removed from driving responsibilities.

[16] Although the fourth respondent met with shop stewards at 7:00 on the day of the strike when they handed over a handwritten list of demands, the evidence of the applicants was that they continued waiting for a meeting with the MD. Masilela however denied that any demands had been presented to management, and when the handwritten list was shown to him he denied that he had seen it and claimed to be illiterate. He appeared to have no subsequent difficulty however when questioned on the contents of other documents in the bundle from which it was clear that he was not illiterate.

[17] Masilela's grievance related to warrants of arrest issued in respect of unpaid traffic fines for which he claimed the first respondent was liable. He denied that the traffic fines issue had been resolved despite this being apparent from the minutes of a meeting with the trade union official and shop stewards on 31 October 2005. The minutes recorded that the parties had agreed that the first respondent would be liable for traffic fines incurred as a result of company error, but that drivers would be responsible for fines relating to parking, speeding and overloading vehicles. Masilela however persisted in his denial that the matter had been resolved on this basis.

[18] Masilela testified that after meeting with management and at about 8:00 on 6 November, the shop stewards reported back to the workforce and advised them to return to work on condition that they agreed to payment on the load system. At that time they were still on the premises but left when they were evicted by management at around 9:00 when the first ultimatum was issued and management demanded the handover of keys to the trucks from the drivers. The police were summoned and arrived at the premises but left shortly after they were informed by the workers that they were not on strike. He denied that the first ultimatum was only issued at around 11:45 or that the management and shop stewards had been involved in meetings until about noon that day. On his version there were about 118 employees on strike at the time. He further denied that two trade union officials, Jan Phala and Andries Nkadimeng as well as shop stewards attended a further meeting with management at 15:00, and claimed not to know the two union officials since the only official he knew was Mr. Madolo. It appeared that at some point the union had been deregistered and Masilela said that as at the day of the alleged strike the union had already been "disqualified".

[19] He denied that he knew Matsepe, or that Matsepe had conducted audits of the first respondent's compliance with Bargaining Council agreements following a previous unprotected strike in November 2005 in which the grievances of the employees concerned payment below the minimum prescribed rates.

[20] Masilela conceded that certain of the demands on the handwritten list presented to management were new demands, including the alleged communication problems with the controller Hennie (which he said grievance involved two other controllers as well), and cross border allowances, although he persisted in his denial that the issues relating to the pay system, tarpaulin allowance, shop steward meeting rooms and traffic fines had not been resolved despite clear documentary evidence to the contrary based on minutes of meetings and agreements with the union and shop stewards.

[21] Previous unprotected strikes had occurred in October 2005, March and July 2006 and Masilela denied all the material facts related to the circumstances in which these strikes occurred or that the issues raised were resolved. He also disputed his signature on his contract of employment as well as the applicants' statement of claim, although he recanted somewhat in cross examination but claimed that he had been forced to sign the statement of claim by the applicants' former attorney of record. His evidence was that the fourth respondent had agreed to a meeting with the MD two weeks before. He denied that the dismissals were effected on 7 November notwithstanding that this was the applicants' case in their statement of claim, and persisted in his allegation that they were dismissed on the day of the strike but only received formal notices to this effect on 7 November. He denied having seen or received the open offer issued to employees to return to work, which remained open until 10 November. He denied that the applicants were on strike and testified that they were ready to work and were in possession of their loading documents and keys. He denied that the attitude of the workers was that they would only return to work if their demands were met.

[22] In re-examination he was asked whether he knew Phala or Motaung and he denied having met them at all. However in response to a question put to him by the court as to who the elected shop stewards were, he confirmed that Motaung was a shop steward.

[23] Masilela denied receiving any of the ultimatums that were issued, or the offer of re-employment circulated by the respondent. He avoided giving direct answers to

questions and often launched into detailed explanation of irrelevant issues. His evidence was in essence a bare denial of every material fact and he feigned ignorance when it was convenient to do so. Masilela was in all respects an unsatisfactory witness and his evidence must be rejected on a balance of probabilities.

Fuzile Futshane

[24] Futshane testified that he had driven back from Durban on the day of the strike and had been aware of the meeting planned for 6 November. When he arrived at the premises at about noon he handed his truck keys to the controller and joined his colleagues outside the premises to find out what had happened with the meeting. He denied that he had associated himself with the strike or that he had deliberately returned to the premises instead of continuing with his deliveries, and said that the real reason for not continuing to deliver was that he had to re-fuel his vehicle. He was aware of the list of complaints that had been lodged with management and stated that the complaints related to non-payment of overtime; travelling on weekends and holidays without pay as well as the system of an hourly pay. His evidence was that the applicants had met with the MD previously about these complaints and he had promised to address them. The employees had general permission to hold meetings provided it was not during working hours, and they accordingly did not require permission for the specific meeting on 6 November.

[25] When he arrived at the premises he was informed that his controller had tried to call him to tell him not to come to the premises on account of the strike, but to continue with his deliveries. He was not given a reason for his dismissal and he denied that they were on strike. When Madolo met with management on 7 November he informed them that management offered to re-employ only those who agreed to contract through labour brokers. He confirmed that the applicants had received the ultimatums issued by management. He contradicted Masilela's evidence that the gates were open and trucks were driving in and out of the premises, and said that all the trucks were parked and no deliveries were being undertaken hence he feared for his life if he was seen continuing with deliveries. However he also claimed that if his controller had instructed him to

continue with his deliveries he would have done so. He initially testified that he approached his colleagues only to find out what the outcome of the meeting with the MD was, but admitted that he had a number of grievances of his own. He admitted that the list of demands had been submitted to management and confirmed that those were the demands of the employees on that day. He confirmed that ultimatums had been issued to employees, which he said were on “a small paper”, and that there had been a final ultimatum which he understood to state that if they did not return to work at a certain time they would be dismissed. He confirmed that they were dismissed on 7 November and that employees who arrived for work that day were turned away and given notices of dismissal. They were prevented from entering the premises by security guards with dogs, who only allowed employees contracted through the labour broker into the premises. He did not see or receive the open offer for re-employment issued by the first respondent.

[26] He had a grievance relating to non-payment for overtime but was not aware of the internal procedure pertaining to pay queries and denied having ever seen the pay query form. He had raised his with his controller and was told to discuss it with the payroll person in the office but he had no access to the office. He forwarded his complaint to a shop steward and when he returned from a long trip found that the shop steward had been dismissed in his absence and hence his grievance remained unresolved. He had complained to Masilela and Elias Sibanyoni, another shop steward, and they raised the issue with the fourth respondent, but he was subsequently informed by Masilela that after he raised the grievance he had been prevented from undertaking driving duties. He did not approach another shop steward for assistance because he thought it would result in another dismissal and decided not to pursue the issue. He also testified that they had never met Matsepe in regard to the issue of non-compliance with the Main Agreement. However, when his pay slip was introduced into evidence recording all his overtime hours he was unable to dispute that he had been paid for as well as Sunday work. He admitted that his demands differed from Masilela’s. He also admitted that they had no cause for complaint in regard to the tarpaulin issue, and that this had been resolved when management had agreed to pay drivers R30- per day

despite this not being a requirement of the Main Agreement. He was unable to dispute that this payment was also specified on his pay slips.

[27] insofar as the statement of claim referred to “endless” meetings between the parties that had failed to resolve issues in dispute, he claimed to only be aware of the one meeting with the MD when he indicated that workers should approach him directly to discuss their problems. He explained that he was not always aware of shop steward briefings and he had no access to any shop-steward given his work load.

[28] He denied that the open offer for re-employment had been attached to the windows of the offices facing the area where the employees gathered outside the gates, and was unable to explain why some employees would then have acted on the open offer and sought re-employment. He testified that even if he had wanted to continue with his duties on the day of the strike he was prevented from doing so as his keys had been handed in and his belongings removed from his vehicle on arrival. He was not aware of the 15:00 meeting with management and shop stewards and denied that the applicants had been briefed by shop-stewards after this meeting. Even if he had wanted to return to work the access to the premises was blocked by security guards with dogs who had a list of employees and informed him they were not permitted to enter. He saw his name on the list and this confirmed that he was not allowed on the premises, hence he did not seek re-employment.

Bennet Motaung

[29] He is not an applicant and was a shop steward at the time of the strike. He initially said in evidence in chief that they did not require permission for the meeting since it was a normal monthly meeting of the workforce of which management was aware and confirmed that there had been no promise from management to address the workforce. His evidence was that “no meeting took place, it changed into something else”, but he stopped short of admitting that their conduct constituted unprotected strike action. He testified that although he was a shop steward, the employees refused to tell him what their complaints were and insisted on meeting with management themselves.

He had been instructed to hand over the list of demands to the fourth respondent and to summon him to a meeting, which he did. He confirmed that the fourth respondent had agreed to a meeting with the shop stewards but was not prepared to meet the entire workforce. The shop stewards met with the fourth respondent later that day and he undertook to address the list of grievances but requested that the applicants be told to resume their duties. However when they reported back the workers refused to listen to them and "wanted their demands to be met and rectified at that very time". They had tried to meet with Madolo, but he was not available and sent two other officials to meet with management at 15:00 that day. Because he did not know these officials he decided not to attend the meeting.

[30] He admitted that meetings could not simply be convened *ad hoc* and that a regular monthly schedule of shop steward and management meetings existed, prior to which the agenda would be agreed. In addition, report back meetings to the workforce could be held without permission provided they ended by 7:00 when the workday began. He admitted that the 6 November meeting had not been scheduled, and that the next meeting with management had been scheduled for 24 November. In cross examination he finally conceded that they did not have permission to meet on the day of the alleged strike and that he and another shop steward, Nkabinde, had approached the fourth respondent that morning to seek permission for the meeting.

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[31] Motaung explained that the demands made on the day were legitimate, and mainly concerned underpayment of wages. His evidence was that management had refused to address employee concerns over a long period of time. He said that matters would be solved and then after a week they would re-surface again. Underpayment, which was the main concern, had been an issue for over a year. Whenever workers complained they would be told to return to work and that the problem would be addressed but this never happened. Although he had heard of the Bargaining Council audit and had been present at the meeting with Matsepe at which they would receive full pay for a while but afterwards would again be underpaid and the Bargaining Council was not aware of this. His reason for not bringing this to the attention of the Bargaining

Council was that he was always busy. He was unable to explain why the issue of underpayment was not placed on the agenda of 26 October prepared for the forthcoming meeting on 30 October – and tried to extricate himself from being caught up in his own contradictions by saying the agenda had been prepared by management without consultation.

[32] His evidence was that the ultimatums were placed on the ground in the area where the workforce was gathered and each of them took a copy, but no one complied. He confirmed that not all the first respondent's employees participated in the conduct that day –some were off sick and others had gone to Botswana, and this meant that not all the applicants had associated themselves with the demands. He was not offered re-employment or reinstatement but made no effort to seek this because he had been informed by some of the applicants that he was "categorically not to come back". He still does not know the reason why he was dismissed.

[33] On 7 November they were prevented by security guards with dogs from entering the premises and they had a list containing names of employees who were not allowed to enter the premises. However, he did not make any attempt to ascertain if his name was on the list because he had already received a notice of dismissal, which he confirmed had been distributed at 8:30 on 7 November. This contradicted both Masilela and Futshane's evidence that the dismissals had been effected on the day of the strike. Although he was adamant that they were not on strike, he confirmed that the applicants "*could not have gone back to work until he came to address us. We wanted our demands to be met".*

[34] He conceded there had never been any violence on the day and there was no reason for police or security guards to be present. In re-examination he conceded that the security guards did not prevent anyone from physically entering the premises but they had dogs, and this was a deterrent. Thus, only subcontractors could enter and drive the delivery trucks. They had all been ordered to remove their belongings from the trucks and leave the premises on the day of the strike and had to access to their trucks.

Evidence presented by the first respondent

[35] The first respondent led the evidence of the second and fourth respondents (referred to as Enslin and Axer herein). Their testimony was consistent with the first respondent's statement of defence and their evidence was not materially challenged in cross examination.

[36] Enslin was responsible for Human Resources at the time and testified that the strike of 6 November was the fourth wildcat strike at the first respondent since 31 October 2005, and it occurred in contravention of an agreement between the parties that unprotected strikes would not be repeated. All problems were addressed at monthly meetings with the union and shop stewards and the list of demands presented on 6 November had, save for three new demands, been dealt with. He confirmed that no meeting had been agreed to or arranged for 6 November and the events came as a complete surprise. He confirmed that the first respondent had complied with the Main Agreement and that apart from regular audits being conducted, Matsepe had attended a meeting with the union at which he was asked to explain various issues. The minutes of this meeting are not in dispute. At the meeting with the union and shop stewards at 15:00 on 6 November the shop stewards distanced themselves from the defiant conduct of the applicants in refusing to heed the advice of the union that they should return to work. In addition, a meeting was held with Madolo on 7 November in which he confirmed that "everyone who is part of the company is part of the strike". He testified that the first respondent risked losing substantial contracts as a result of the strike. Its critical customers (including Sasol and Consol) were reliant on continuous transport of raw materials and contracts with them were on "*thin ice"* as a result of the erratic delivery schedules caused by the series of unprotected strikes. The first respondent was accordingly completely dependent on the drivers and had no intention of dismissing them.

[37] Enslin testified that when he arrived at the premises at 8:15 on the day of the strike, Axer informed him that he had telephoned Madolo and that the shop stewards

had spoken with Madolo. Madolo said he was not available that day and a meeting was arranged for the following morning. Axer then asked the shop stewards to convey this to employees and to urge them to return to work. No one returned to work and Enslin sent a fax to Madolo later that morning which stated: *"We have tried our best to convince drivers and workshop employees to resume their duties in the mean time and allow the meeting to proceed tomorrow morning in an orderly way, however to no avail. We are on thin ice with some of our main contracts and we stand to loose (sic) work for approximately 70 of our trucks. It is recorded that should we suffer any damage as a result of the strike we reserve our rights to institute whatever action may be available to us. An ultimatum will be issued forthwith for employees to resume their duties by 13:00 today or face dismissal."* At 12:20 he telephoned Madolo again in an effort to secure an urgent meeting and Madolo agreed to send two union officials to meet with management at 15:00 that day.

[38] The first ultimatum was issued at 11:45 and stated that a meeting had been arranged to address the list of demands, and instructed employees to resume work by 13:00. A final ultimatum was issued at 13:30 instructing them to resume work by 16:00 and stating that management would be available to hear representations as to why dismissals should not ensue. At 15:00 a meeting was held with the union officials and shop stewards following which they addressed the strikers. The meeting resumed at 16:24 when they confirmed that the strikers would not return to work until their demands were met. The union officials, Nkadimeng and Phala, as well as the shop stewards distanced themselves from the conduct of their members.

[39] Although Enslin then prepared the dismissal notices, he decided to wait until the following day to see if they would come to their senses. He testified that the ultimatums were issued in a genuine attempt to get the applicants to return to work and efforts were made to ensure that all the striking employees received these as well as the offer of re-employment. The first respondent was not in a position to simply replace, at short notice, approximately 146 drivers (who possessed the necessary licenses and qualifications and who knew the clients, loads and routes). He denied that the offers to

re-employ the dismissed employees was conditional or that it was on condition that they agree to be subcontracted. They were given overnight to consider their attitude and the dismissal notices were only issued on 7 November when they persisted in their conduct and the shop stewards confirmed that they would not abandon their demands. Following the meeting with Madolo on 7 November, he addressed the employees, following which he confirmed that their attitude was that they would not resume work until all their demands were met. He further informed them that *all* employees would continue the strike and drivers would abandon their trucks wherever if they were on the road.

[40] On 8 November Enslin and Axer addressed the dismissed employees and offered them re-employment on the dual wage system, which was not in conflict with the Main Agreement. He explained the rationale for the dual wage system, which meant that employees were paid either for hours worked plus allowances or 7% of the total income earned from their deliveries, whichever was the greater. The offers of re-employment on the dual wage basis were displayed on all office windows which were visible from the street. Offers were also placed at the security gate. This was followed by further notices on 10 November indicating that the offer was closed. The police were not called by management because the conduct of the strikers was at all times peaceful, but it was possible that they drove past the premises and stopped because they saw the gathering outside. A correctional services facility existed near the first respondent's premises and the police were constantly seen driving back and forth from the facility. He denied that offers of re-employment were conditional on employees agreeing to subcontract and also testified that he had ensured that the ultimatums were circulated to everyone on strike and that the open offer was displayed in a place where it was clearly visible to the strikers.

[41] Enslin testified as follows in relation to the list of demands submitted on 6 November:

1. WE WANT OUR JOB BACK – he did not understand the demand.

2. MACLABOUR AND MAMMA MUST BE REGISTERED – the brokers were complying with the Main Agreement and were registered with the Bargaining Council.
3. PAY THE HOURS ACCORDING TO LABOUR RELATION ACT – the first respondent complied with the Labour Relations Act and Main Agreement.
4. HENNIE MUST LEAVE HAVE BAD ATTITUDE TO THE DRIVERS –this demand had never been made previously and the minutes of the meeting of 25 November 2005 confirms that the issue of communication was raised and employees reminded to use the grievance procedure.
5. EXPLAIN TO THE DRIVER ABOUT THE TARPAULIN (SAIL) – this had been resolved.
6. THE MONEY FOR THE CROSS BORDER – this was a new demand.
7. SHOP STEWARDS OFFICE – this had been addressed and the training room had been made available for meetings, as reflected in the signed minutes of the meeting of 25 August 2006 with the shop stewards.
8. MEDICATION FOR CROSS BORDER – this was a new demand[1].

[52] Axer testified that he had not given permission for the meeting on 6 November but had nevertheless been willing to meet with shop stewards. He was not prepared to meet with the entire workforce. He confirmed that 83 employees did not participate in the strike and were not dismissed, and 63 were re-employed after the strike. Insofar as the applicants disputed the minutes of the meeting of 26 October on the grounds that they were unsigned, he explained that the minutes of every meeting would be signed at the following meeting in terms of the prevailing practice. The next meeting was scheduled for 24 November (Motaung had conceded this). He testified as to the damage suffered as a result of the strike and that tenders for renewed contracts with major clients including Consol were not forthcoming, in his view as a result of the precipitous action embarked upon by the applicants. It was in the first respondent's interests that the drivers returned to work, and they did not intend to dismiss but were

[1] Masilela's evidence appeared to be that these demands had been raised informally with Axer on previous occasions. This was denied by Axer.

forced to do so. Drivers employed by the first respondent were not affected by the subcontracted drivers, the use of which they kept to a minimum. He confirmed that the police were not called by management. He confirmed that employees had to have been aware of the offer of re-employment as a number of them had taken up the offer. He denied that the offers of re-employment were conditional on subcontracting through the labour brokers Manna or McLabour.

The applicable legal provisions

[53] The LRA guarantees the right to procedural and substantive fairness to employees engaging in unprotected strike action. Section 68(5) of the LRA provides as follows:

> *" 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".*

[44] The Code of Good Practice provides as follows in Item 6:

> *(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including -*
>
> *(a) the seriousness of the contravention of the Act;*
>
> *(b) attempts made to comply with the Act; and*
>
> *(c) whether or not the strike was in response to unjustified conduct by the employer.*
>
> *(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be*

imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them."

The Code must be considered in the context of section 188 of the LRA which provides :

(1)A dismissal that is not automatically unfair, is unfair if the employer fails to prove –

(a)that the reason for dismissal is a fair reason-

(i)related to the employee's conduct or capacity;

(ii)based on the employer's operational requirements; and

(b)that the dismissal was effected in accordance with a fair procedure.

(2)Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act."

Analysis and evaluation of evidence and submissions

[45] Mr. Munyai, appearing for the applicants, submitted that the conduct of the applicants did not constitute a strike in contravention of sections 64 and 65 of the LRA for the following reasons:

(a) The employees denied that they were on strike;

(b) They wanted to work on the day in question provided certain conditions were met by management;

(c) They were prevented from working because management had taken the keys to their trucks and they had been ordered to remove their goods from the trucks;

[46] Mr. Munyai submitted that there were materially conflicting versions presented and the court should accept the applicants' version in that the balance of convenience favoured them. Furthermore, Enslin, in denying that management took the keys to the trucks, could not explain why the first respondent was not concerned that the strikers might disappear with the trucks and/or abandon or damage them. He was in addition unable to confirm that all the applicants had received the ultimatums, and his evidence should accordingly be rejected. The first respondent was clearly attempting to force employees to accede to the demand to change the method of payment from hourly based pay to the dual system, and had failed to comply with the procedures applicable to a fair dismissal in the circumstances. Moreover, the first respondent failed to identify each and every individual involved in the strike, and notices of dismissal were thus selectively issued : *Mondi Paper v PPWAWU and others* (1997) 18 ILJ 84 (D). The dismissals were accordingly unfair, but given the breakdown of the trust relationship the applicants did not seek reinstatement.

[47] Mr. Oosthuizen submitted on behalf of the first respondent that the action of the applicants on 6 November did not constitute a meeting but a strike as envisaged in section 213 of the LRA. He relied on *TSI Holdings (Pty) Ltd & others v National Union of Metalworkers of SA & others* (2006) 27 ILJ 1483 (LAC)[2] where the Court held as follows: *"A concerted refusal to work or a concerted retardation or obstruction of work which is resorted to for the purpose of resolving a dispute is one where the union or employees have made a demand on the employer and the employer has either rejected such demand or has neglected to comply with it".* The court confirmed that a demand fell within the definition of an "*issue in dispute*" as envisaged in section 213.

[48] In *casu* Mr. Oosthuizen submitted, there had been a concerted refusal to work in support of the list of demands submitted by the applicants. Except for three new demands, the others were non-existent as they had been dealt with. The first respondent was entitled to an opportunity to reflect on the demands and to accept or reject same: *City of Johannesburg Metropolitan University v SAMWU* (2008) ILJ (29)

[2] At [27].

651 (LC). Moreover, there was no urgency in the demands and no legitimate basis for a strike, particularly in the context of the history of repeated unprotected strikes: *NUM and others v Billard Contractors CC and another* (2006) ILJ 27 1686 (LC). I am in agreement with these submissions. On their own version the applicants would not return to work unless their demands, as included in the list presented to management, as well as for the MD to meet with them, were met. Their conduct fell within the definition of a strike and given that it was common cause that the requirements for a protected strike had not been complied with, their strike was unprotected. However it still remains to be considered whether the dismissals for unprotected strike action were procedurally and substantively unfair.

[49] In deciding whether a strike dismissal is fair or not Grogan[3] points out that two questions must be answered i.e. was the ultimatum fair, and were the dismissals pursuant to the ultimatum fair. See also *Plaschem (Pty) Ltd* v *Chemical Workers Industrial Union* (1993) 14 ILJ 1000 (LAC) and *Paper Printing Wood & Allied Workers Union & Others* v *Tongaat Paper Co (Pty) Ltd* (1992) 13 ILJ 393 (LC). The Labour Court has dealt exhaustively with the purpose of an ultimatum in the strike context. In *Professional Transport Workers' Union and others v Fidelity Security Services* (2009) 30 ILJ (LC)[4] the court held as follows:*"[T]he purpose of an ultimatum is to afford the striking employees an opportunity to consider their position before action which may have dire consequences is taken against them."* Because of its intended purpose *"such an ultimatum is required to give the strikers a sufficient opportunity to consider the matter and consequences of non-compliance with the ultimatum as well as to seek advice before taking the decision to comply or not to comply with the ultimatum".* See *Karras t/a Floraline v SASTAWU and others* [2001] 1 BLLR (LAC).[5] Thus *w*hat the law requires is that the ultimatum should be communicated to the striking employees, in clear and unambiguous terms and should set out what is required of them, including the time-

[3] Grogan : Collective Labour Law, Juta, 2007, page 227. See also *NUMSA* v *GM Vincent Metal Section (Pty) Ltd* 1999 (4) SA 304 (SCA) para 21

[4] At [41].

[5] At [36].

frames within which they are expected to comply, and should indicate the possible consequences of a failure to comply: *NUMSA v G M Vincent Metal Sections (Pty) Ltd* 1999 (4) SA 304 at para [21].

[50] Grogan points out the factors to be considered in assessing the fairness of an ultimatum to include the developments that led to the decision to issue it, the terms of the ultimatum and the time allowed for compliance.[6] This is a question of fact dependant upon a range of issues, and can only be determined once an analysis of the evidence led in regard to the circumstances leading up to the issue of the ultimatum is undertaken.

[51] It cannot be contended that the ultimatums *in casu* did not set out in clear and unambiguous terms what was expected of the applicants and what possible consequences would follow a failure to comply. Except for Masilela, the other two witnesses for the applicants could not deny that ultimatums had been issued and had been understood. Nor can it be contended, in the light of the evidence, that insufficient time was given to comply. The applicants were afforded an opportunity to change their minds overnight but made it quite clear that they would persist in their demands and continued their refusal to work the following day. They had clearly decided to persist in these demands until they were met, in direct contravention of the advice from their union, and they had no intention of returning to work on 7 November but instead persisted in their demands.

[52] Although it was common cause that the conduct of the strikers was not violent or aggressive, it cannot in the same vein be said that they embarked on the strike in respect of a legitimate concern, or that the conduct was justified by intransigence on the part of the employer. Nor can it be contended that they acted in the reasonable but erroneous belief that their conduct was legal. At all times the applicants witnesses denied that they had been on strike notwithstanding the protracted period of their refusal to work in support of their list of demands as well as the demand for a meeting with the

[6] Supra.

MD. The strike was therefore protracted and in no respect could it be said to have been functional to collective bargaining: *National Union of Metal workers of SA and others v SA Truck Bodies (Pty) Ltd* (2008) 29 ILJ 1944 (LC).

[53] Motaung's evidence was consistent with that of the first respondent on the material aspects, i.e. that the list of demands was presented; that there was a decision not to return to work until the demands were met; that the ultimatums were issued and received and understood and that the dismissals were only effected on 7 November; that there had been no permission granted for the "meeting" of 6 November and that management had nevertheless been willing to and had in fact met with the union and the shop stewards; that the first respondent complied with the provisions of the Main Agreement and that they had met with and questioned the Bargaining Council representative about their concerns relating to payment; that most of the demands on the list had in fact been addressed at the monthly meetings; that no specific evidence existed as to which of the applicants were alleged not to have been participants in the strike. As indicated above, Futshane and Masilela gave contradictory evidence and their versions must be rejected on the probabilities, and the version of the first respondent accepted, as corroborated by Motaung. In the premises, the dismissals cannot be said to have been substantively unfair.

[54] In regard to procedural fairness, the applicants did not deal with this in their closing submissions, but it is common cause that no formal disciplinary hearings preceded the dismissals. In the circumstances however, in my view, formal hearings were not required. The union and shop stewards were involved throughout the dispute; the first respondent was in touch with Madolo and conducted meetings throughout the day with shop stewards and union officials; it invited representations pursuant to issue of the ultimatums as to why dismissals should not follow. It was only when the conduct was persisted with the following day that the notices of dismissal were issued. This was still followed by an open offer of re-employment which remained available to the employees until it was formally withdrawn on 10 November. In these circumstances it

cannot be contended that the respondent acted unfairly or precipitously in dismissing the applicants.

[55] In *Modise & Others v Steve's Spar Blackheath* [2000] 5 BLLR 496 (LAC)[7] at para [73], Zondo JP dealt at length with the law relating to a fair ultimatum and hearings before dismissal in the context of a strike and said the following:

> *"A hearing and an ultimatum are two different things. They serve separate and distinct purposes. They occur, or, at least ought to occur, at different times in the course of a dispute. The purpose of a hearing is to hear what explanation the other side has for its conduct and to hear such representations as it may make about what action, if any, can or should be taken against it. The purpose of an ultimatum is not to elicit any information or explanations from the workers but to give the workers the opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not. The consequence of a failure to make use of the opportunity of a hearing need not be dismissal whereas the consequence of a failure to comply with an ultimatum is usually, and, is meant to be, a dismissal. In the case of a hearing the employee is expected to use the opportunity to seek to persuade the employer that he/she is not guilty and why he/she should not be dismissed. In the case of an ultimatum the employee is expected to pursue the opportunity provided by an ultimatum to reflect on the situation, before deciding whether or not he will comply with the ultimatum. In the light of all these differences between the audi rule and the rule requiring the giving of an ultimatum, there can be no proper basis, in my judgment, for the proposition that the giving of a fair ultimatum is or an ever be a substitute for the observance of the audi rule."*

[56] The above *dictum* does not mean that the employer is required to convene a formal disciplinary enquiry, or that some form of representations have to actually be made. All that is required is that the employees be afforded the opportunity of

[7] At [73].

persuading the employer that they ought not to be dismissed. Hearings are most certainly not necessary in circumstances where the opportunity for representations has been extended and rejected. It is apparent from the following *dicta* in *Modise* that the opportunity of making written representations on its own may suffice:

> *"[53] The only situation which I am able to envisage where it can be said that an employer's failure to give a hearing may be justified on the basis that a hearing would have been pointless or utterly useless is where either the workers have expressly rejected an invitation to be heard or where it can, objectively, be said that by their conduct they have said to the employer: We are not interested in making representations on why we should not be dismissed. The latter is not a conclusion that a court should arrive at lightly unless it is very clear that that is, indeed, the case. However, in my view the latter scenario falls within the ambit of a waiver. Accordingly, the normal requirements of a waiver must be present".*

[57] The Labour Appeal Court therefore clearly contemplated that circumstances may even be such that the combination of ultimata (depending upon how they are phrased), meetings and other attempts to bringing striking employees to their senses could adequately serve the purpose of providing a fair opportunity to make representations as to why employees should not be dismissed. In my view the first respondent adequately complied with the requirement of affording the individual applicants an opportunity to make representations prior to a final decision to dismiss being taken. Not only were the applicants invited to make representations, they were also given overnight to contemplate their conduct and change their minds.

Costs

[57] At the end of Masilela's testimony the court cautioned that applicants to reconsider their claim and to pursue settlement failing which they were at risk of an adverse costs order. Notwithstanding this and a further caution issued to their attorney, they instructed him to proceed with their claim. Having been warned of the consequences of persisting with their spurious claim they persisted, and it is in the

interests of law and fairness that they be ordered to pay the first respondent's costs. Although it is unfortunate that the matter has taken 4 years to be heard and applicants cannot be faulted for loss of memory on certain issues, it is beyond the scope of reason to place every material fact in dispute, as Masilela (and to some extent, Futshane) did. In any event it would appear that on at least two occasions postponements were sought by the applicants themselves, and in one instance a tender of wasted costs was even made. A further delay appeared to have been occasioned by an application for joinder of additional applicants.

Order

[57] In the premises, I make the following order:

(a) The applicants' claim is dismissed.

(b) The applicants are to pay the first respondent's costs jointly and severally, the one paying, the others to be absolved.

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Bhoola J

Judge of the Labour Court of South Africa

Date of hearing : 10,11,12,14 May 2010

Date of order : 14 May 2010

Date of reasons: 19 May 2010

Appearance:

For the applicants: Mr. Munyai, HR Munyai Attorneys

For the respondent: Mr. Oosthuizen, Viljoen & Meek