IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA36/16

In the matter between:

SACCAWU OBO BONOLO MOKEBE & 71 OTHERS **Appellant**

and

PICK 'N PAY RETAILERS **Respondent**

Heard: **14 March 2016**

Delivered: **26 September 2017**

Coram: Waglay JP, Kathree-Setiloane and Phatshoane AJJA

JUDGMENT

KATHREE-SETILOANE AJA

Introduction

[1] This is an appeal against the judgment of the Labour Court (Basson J), in which it found the dismissal of 61 employees ("the employees") for engaging in an unprotected strike, of about an hour's duration on 24 September 2010, substantively and procedurally fair. The employees were all employed as so-called variable time employees (VTEs) at Pick 'n Pay's ("the company") Woodmead store at the time of their dismissal. They were all members of the South African Commercial Catering and Allied Workers Union (SACCAWU) ("the union"), which acts on their behalf in this appeal.

[2] The appeal is in essence about penalty. The union contends that because the employees were only on strike for about an hour, the penalty of dismissal was disproportionate and thus unfair. The company contends, to the contrary, that the penalty of dismissal was appropriate when viewed in the context that the employees:

(a) while already on a final written warning for the same misconduct;

(b) deliberately engaged in an unlawful strike, in the last and busiest hour of trading on a public holiday (Heritage Day), which was calculated to cause the company damage and did, in fact, do so when approximately 100 customers abandoned their trolleys;

(c) deliberately defied numerous instructions and warnings by management not to strike at 15:00 hours;

(d) deliberately tried to mislead the Labour Court with a defence that there was a miscommunication with the union and that they thought they were entitled to strike at 15:00 hours; and

(e) showed no remorse for their misconduct, thereby rendering a continued relationship intolerable.

Background

[3] The company and the union were engaged in wage negotiations at a national level. On 10 June 2010, for reasons unrelated to the wage negotiations, the employees engaged in industrial action (by marching from the company canteen to the other side of the Woodmead store where the manager's office was situated and back to the canteen again) pursuant to which the employees were issued final written warnings. On 12 June 2010, the union referred a dispute of mutual interest to the Commission for Conciliation, Mediation and Arbitration ("CCMA"). An attempt at conciliation was unsuccessful, and the union obtained a certificate of outcome from the CCMA in relation to the non-resolution of the wage dispute forming the subject of the negotiations.

[4] On 22 September 2010, the company and the union were engaged in a

mediation process in relation to that wage dispute. There was an impasse by 15h00 on that day. At 17h29 that afternoon, the union issued the company with a strike notice in relation to a national strike which would commence on 24 September 2010 at 19h00 ("the strike notice"). The strike notice read:

> 'The intended industrial action will take the form of a complete withdrawal of labour by all SACCAWU members and those who stand to benefit from the proceedings negotiated by the Union in the collective bargaining process from which the current dispute arose, throughout all the establishments / operating units of Pick 'n Pay across the Republic of South Africa. Such withdrawal of labour will be effective from 24 September 2010 at 19h00 up to 24h00 on the 27th of September 2010…'

[5] On 24 September 2010, the employees (who were scheduled to work until the closure of the store at 16h00, and in some cases until 16h30 to service remaining customers post-closure) embarked on the strike at the company's Woodmead store at times earlier than their scheduled ending times. Their times of joining the strike ranged from 14h59 to 15h44.

[6] Mr Frans Nkosi ("Nkosi") (Regional Chairperson of the union and a member of the National Negotiation Committee (NNC); Mr Mbulisani Ngomane (a regional office bearer of the union, Ms Joyce Letsoalo (Co-ordinator of the shop stewards' committee at the Woodmead store) ("Letsoalo"); and Mr Sibongile Mzizi ("Mzizi") (one of the dismissed employees) testified on behalf of the employees.

[7] Mr David Green ("Green") (receiving security coordinator); Mr Jacques van Rooyen ("Van Rooyen" (store manager); Mr Joseph Goba ("Goba") (head of department: foods), Mr Willem van der Berg ("Van der Berg") (head of department: general merchandise); Mr Sabelo Mngomezulu ("Mngomezulu) (regional manager); and Ms Valerie Olga Petrus("Petrus") (fruit and vegetable manager) testified on behalf of the company.

[8] Nkosi testified that during the regional council meetings held with the shop stewards (including two from the Woodmead store) on Tuesdays, it was reported to them that the strike was to commence at 15h00; this being the

decision of the National Negotiating Committee (NNC). Strike pamphlets were distributed to all stores indicating that the strike will commence at 16h00. However, on Monday, 20 September 2010, the union discovered that the commencement time of the strike was incorrectly recorded in the pamphlet as 16h00 instead of 15h00. It, nevertheless, decided to distribute the pamphlet to the employees since it would have been too costly to print new ones.

[9] On Tuesday, 21 September 2010, there was a scheduled regional council meeting which was attended by Busisiwe and Ndlovu, both shop stewards at the Woodmead store. The shop stewards were given copies of the strike pamphlet at the meeting and asked to distribute them as soon as possible.

[10] On Wednesday, 22 September 2010, in a last ditch attempt to avert a strike, the parties met at the CCMA. Amongst the members of the NNC who attended were Nkosi and Mr Sam Mashaba (a member of the NNC). At around 15h00 hours on the day, the union decided to delay issuing the strike notice as there was a possibility of settling the dispute. The dispute did not settle, so the union issued the strike notice later that day. It resolved to change the commencement time of the strike from 15h00 to 19h00 in order to comply with the 48 hour notice requirement.

[11] The amended notice was sent to the company by e-mail and was received by it at 17h29. Two regional office bearers, namely Ngomane and Ms Brenda Nkosi were then assigned to communicate the change in the commencement time of the strike, from 15h00 to 19h00 to the stores, in the Wits region. However, according to Ngomane's testimony, they were unable to phone the shop stewards to advise them of this, as the shop stewards office at the Woodmead store was not operational.

[12] Van Rooyen, the store manager, testified that on arriving at the store on the morning of Thursday, 23 September 2010 at about 06h00, he read the strike notice which he had received by e-mail. It had been sent to the general managers of the various stores in order for them to communicate the impending strike to management and staff. At about 07h00 that day, Van Rooyen held a meeting with his heads of department including Goba and

Green at which he advised them of the strike notice. At about 08h00, he instructed a human resources officer to place the strike notice on the notice boards, at the staff entrance to the store, and the entrance to the staff canteen, which they duly did. This was corroborated by Green and Goba.

[13] Letsoalo and Mzizi (Mzizi was dismissed for participating in the unprotected strike), to the contrary, denied that there was a notice board outside the canteen, and that the strike notice was displayed on the notice boards at the staff entrance. Mzizi testified that he had no knowledge of the decision-making process at union level which led to the decision to strike at 15h00 on 24 September 2010. He said that he was notified by Busisiwe (a shop steward), at the Thursday shop stewards' feedback meeting, that the strike would commence at 15h00 on 24 September 2010. He said that he believed what he was told and understood the strike to be legal.

[14] Mzizi, furthermore, testified that at no stage before the commencement of the strike at 15h00 on the 24th, was he or his fellow employees informed by either the shop stewards or management that the starting time of the strike had changed from 15h00 to 19h00. He also said that he was not aware of any steps that the company might have taken to inform the employees that the strike was illegal. He was adamant that he had not seen the strike notice and nor was it placed on the company notice boards. In conclusion, he said that he did not play a role in the planning of the strike and was remorseful for going out on strike early on 24 September 2010. He said that had he known that the commencement time had changed, he would not have joined the strike at 15h00.

[15] Van Rooyen testified that he had met with the shop stewards including Letsoalo and Ndlovu, in his office, at about 10h30 on the morning of 23 September 2010. He handed them copies of the strike notice, conveyed its contents to them, and requested that they do likewise at the union feedback meeting scheduled for 11h30 that morning. Green, who was present at the meeting with Van Rooyen and the shop stewards, testified that the shop stewards were told that the strike notice had been placed on the notice boards. Letsoalo denied that the meeting took place and that she had ever

seen the strike notice. She, however, testified that a union feedback meeting was held between the shop stewards and employees on the day, at which they were told that the strike would start at 15h00. She said that the shop stewards (Dorcas Ndlovu and Busisiwe) who briefed them had just returned from the shop stewards' council.

[16] Letsoalo said that she was on leave on 24 September 2010, when the strike took place. She testified, under cross-examination, that she had not had sight of the strike notice, and denied that it was placed on the staff notice boards outside the staff canteen, where the shop stewards' feedback meetings were held. She also denied attending a meeting with management where copies of the strike notice were handed to the shop stewards, including herself. Lastly, she asserted that neither herself nor the staff were aware that the strike was to begin at 19h00, as they were informed that it would begin at 15h00 on 24 September 2010.

[17] Friday, 24 September 2010 was a public holiday. The senior managers on duty were Goba (acting store manager in Van Rooyen's absence), Green and Buthelezi. None of the shop stewards were at work. On the understanding that the strike would begin at 19h00, Petrus enquired from the staff in her department, at about 07h30 that morning, whether they planned to work a full day. When Petrus was told that they intended to work until 16h00, she warned them that they were on a final written warning. They responded by saying that "Joyce [Letsoalo] will fight for them". Letsoalo was the *de facto* representative of the VTEs (or union activist).

[18] At about 09h00, Green saw Letsoalo, Ndlovu and Mashaba handing out the strike pamphlets both inside and outside the store. They were wearing union T-shirts. Goba also saw Letsoalo and Ndlovu handing out the strike pamphlets to both staff and customers in the store. He did not personally see Mashaba doing this. Mzizi, on the other hand, testified that he had not seen the strike pamphlet and nor did he see Letsoalo, Ndlovu and Mashaba handing them out.

[19] Round about the same time, Paula and Thembi Weyi (the two frontline

supervisors) handed Green a strike pamphlet, and advised him that the employees were planning to clock out at 16h00 since they had been given an assurance, from the shop stewards, that "nothing will happen to them" if they did so. Green and Goba quickly arranged, through a temporary employment service ("TES"), for 30 relief workers (cashiers and packers) to start working at 16h00.

[20] At about 10h00 on 24 September 2010, Van Rooyen, who had the day off, arrived at the store with his wife to do some shopping. Green and Goba advised him that Letsoalo, Ndlovu and Mashaba were handing out strike pamphlets to staff and customers. Van Rooyen saw numerous pamphlets on the floor, which he and his fellow managers picked up. The pamphlet stated that more than 27 000 SACCAWU members employed by "Pick 'n Pay throughout the country would embark on strike action on 24 September 2010, starting at 16h00". Van Rooyen, Goba and Green tried to find Letsoalo and Ndlovu in order to question them about the new (16h00) starting time of the strike, but they were nowhere to be found. Van Rooyen also telephoned Mr Maduma (chairperson of the national office bearers of the union) but could not get hold of him either. Van Rooyen left the store at about 12h00.

[21] At about 12h30 on 24 September 2010, Green was advised by Paula and Thembi Weyi that the commencement time of the strike had been brought forward from 16h00 to 15h00. As Green put it:

> 'They told me that they are going off at 15:00 hours as they were instructed by the shop stewards and were told if they [go] off at 15:00 hours nothing will happen to them.'

Upon learning of the change of commencement time of the strike, Goba immediately informed Van Rooyen of this telephonically. Van Rooyen thereupon instructed management to caution staff against leaving work early because the commencement time of the strike, as per the strike notice, was 19h00 and not 15h00. Van Rooyen corroborated Goba's testimony on this aspect. At about 13h00 and pursuant to Van Rooyen's instructions, Goba instructed the department managers to warn the staff against striking at

15h00. He personally saw them carrying out his instruction.

[22] At about the same time, a meeting of supervisors was convened in Buthelezi's office. According to Green, he appealed to the supervisors present to ignore the call to strike at 15:00.They, however, informed him that they were instructed by the union and the shop stewards to go out on strike at 15h00 and that "nothing will happen to them". Soon thereafter, Green observed Buthelezi trying to persuade all frontline employees not to go on strike early. Green also tried to dissuade the employees from striking at 15h00. Mzizi, however, testified that he did not, during the course of that day, see anyone warning employees against striking at 15h00.

[23] At about 14h55, Green saw the cashier's cashing up. They thereafter walked with the packers to the cash office. He opened the cash office for them. After doing so, he saw a sizable number of employees in the process of clocking out at the scanner next to the cash office. Green warned them that their conduct was illegal, and that they would lose their jobs as they had already been given final written warnings in June 2010. They responded by telling Green that they had nothing to worry about as the "shop stewards had told them that nothing will happen to them". Green understood this to refer to the three shop stewards who had been at the store that morning, namely Letsoalo, Ndlovu and Mashaba. The strikers ignored Green's plea, clocked out and left.

[24] Goba was also in the vicinity of the cash office at 15h00. He attempted, in the presence of Petrus and Buthelezi, to persuade the strikers to return to work. They responded by stating that they would not take instructions from management vis à vis the strike as the union and Letsoalo, in particular, "will stand up for them". At about 15h00, Green saw Mr David Mbele (Mbele) trying to persuade the employees in the fruit and vegetable department (next to the cash office) to return to work. He said that Mbele instructed them to return to work on the basis that "their strike was illegal". Goba corroborated Green's testimony on this aspect.

[25] At around 15h00, the TES workers were brought in. This enabled

management to keep 15 of the 45 tills operating. According to Van Rooyen, approximately 100 trolleys were abandoned by customers during the strike from 15h00 hours onwards, as a result of which the company suffered a loss of R190,000.00. He said that the peak trading hour on the day (a public holiday) was from 15h00 to 16h00.

Judgment of the Labour Court

[26] The Labour Court identified the key factual dispute as being whether the employees had deliberately planned to go on strike at 15h00 hours or whether this was an innocent error. In finding against the dismissed employees on this issue, the Labour Court reasoned as follows:

> 'The overwhelming evidence was that clear instructions were given by Van Rooyen and his managers to the employees warning them against commencing with the strike at 15h00. These instructions also clearly conveyed to the employees that should they go on strike at 15h00, the strike would be illegal. Having also accepted that the strike notice must have come to the knowledge of the employees, the action of the employees to embark on strike action at 15h00 was in deliberate defiance of management.
>
> On the evidence therefore I do not accept that the 60 odd employees went on strike at 15h00 not knowing that the strike was to commence only at 19h00. It is clear from an overall conspectus of the evidence that the strike was planned to commence at 15h00 and that it was in fact orchestrated by the shop stewards and more in particular Letsoalo and the employees knew that the strike would be illegal not only because the strike notice was displayed on the noticeboard, but also in the light of the fact that they were repeatedly warned by management. Embarking on the strike action at 15h00 hours was in deliberate defiance of management.'

[27] In arriving at this finding, the Labour Court rejected every aspect of the union's evidence including that: (a) the strike had originally been planned to commence at 15h00 hours and not at 19h00 hours as reflected in the strike notice; (b) the strike notice was not placed on the notice boards and the employees had not seen it; (c) management did not hold a meeting with the shop stewards on 23 September 2010 and inform them of the strike notice; (d)

the strike notice was not discussed at the union report back meeting held at 11h30 that day; and (e) Letsoalo, Ndlovu and Mashaba had not handed out the strike notice at the store on the morning of 24 September 2010.

[28] The Labour Court also held that the union and the employees “were not truthful in their pleaded defence” because they “had deliberately tried to mislead the court with a defence that was… devoid of any truth”. In this regard, it found, *inter alia*, Nkosi’s evidence “convoluted” and “contradictory”, and Letsoalo’s evidence “not truthful". It was, furthermore, critical of the union's failure to call as witnesses Mahlome, Legodi, Mashaba and any of the dismissed employees apart from Mzizi.

[29] In relation to the penalty of dismissal, the Labour Court found the following factors to be aggravating:

(i) By striking when they knew that they should not, "the [appellants] had deliberately set themselves on a conflict path with the employer" (described by the court as "a deliberate collision course with management").

(ii) The employees “commenced with the strike at the time when they knew that the employer was vulnerable", and "what made matters worse is the fact that this was a public holiday and that the store was full of shoppers". The fact that the strike took place during the last hour of trade "is indicative of the fact that the [appellants] tried to maximise the harm imposed upon the employer".

(iii) The "overwhelming evidence was that the [appellants] were repeatedly warned not only to desist from their conduct but of the consequences of the conduct should they persist with embarking on an unprotected strike action".

(iv) The Court went on to find that it could "also not ignore the fact that the [appellants] had deliberately tried to mislead the court with a defence that was found to be devoid of all truth".

(v) furthermore, only one of the [appellants] gave evidence and attempted to show remorse. Not one of the other [appellants] came forward to explain the conduct and to show remorse".

[30] Having taken into account the short duration of the strike, the Labour Court held that it did not mitigate the seriousness of the unprotected strike and that the aggravating factors simply outweighed the mitigating factors. The Labour Court accordingly found the dismissal of the employees to be both substantively and procedurally fair. The appeal against the judgment and order of the Labour Court is with its leave.

Unprotected Strike

[31] The evidence reveals overwhelmingly that the strike was unprotected because, in terms of the protected strike notice which is common cause, the strike should have commenced as 19h00 on 24 September 2010, but the employees went on strike at 15h00 in circumstances where the end of their shift time was either 16h00 or 16h30. Of the 61 dismissed employees, the end of shift of 44 of them was at 16h00, and that of the remaining 17 was at 16h30. It follows from this that the 17 employees whose shifts would have ended at 16h30 were on strike for between and an hour and an hour and a half, and the 44 employees whose shifts would have ended at 16h00 were on strike for between 40 minutes to an hour. This means that the majority of the employees participated in the strike for under an hour. This was clarified in the following exchange between Green and counsel for the union during cross-examination:

> 'When you say employees embarked on a strike. We accept that this is the time when employees joined the strike action, the out punched times [recorded in the schedule on pp 463 - 471 of the record]? Yes.
>
> So if the strike commenced at 15:00, the duration of the unprotected strike could only be a maximum of one and a half hours, only for those employees who embarked at 15:00 and were scheduled to work until 16:30, do you accept that?---- I accept that yes.
>
> And of course, if an employee joined the strike later than 15:00, it would be a

shorter time than this? ---- It can be.

For employees scheduled to work only until 16:00, who embarked on the strike later than 15:00, they would have been on an unprotected strike for less than one hour given the end of their shift times. ---- It can be.'

[32] The Company's employees at two other stores, namely Carlton Centre and Rosebank had also commenced striking at 15h00 on 24 September 2010. The Company instituted disciplinary action against the employees (at the Woodmead store) for participating in the strike earlier than the time indicated in the strike notice. Those employees, who were on final written warnings for the events of 10 June 2010 were dismissed for participating in the unprotected strike on 24 September 2010, whereas other employees at the same store (i.e. the Woodmead store) who were not on final written warnings, were only issued written warnings for participating in the unprotected strike on the same day. Other employees at the company's Carlton Centre and Rosebank stores, who were already on written warnings for prior industrial action, were issued written warnings for participating in the unprotected strike on 24 September 2010.

[33] The question that remains for determination is that even though the strike was unprotected, is dismissal the appropriate sanction? In contending that it is not, the union relies for support on the judgment of this Court in *Hendor Steel Supplies v National Union of Metalworkers of SA and Others (Hendor),*[1] where in spite of the employees having embarked on an unprotected strike for seven weeks, the court found the sanction of dismissal to be disproportionate to their misconduct, and unfair. In light of the unions' reliance on *Hendor,* a detailed recitation of the facts is warranted. These are the facts in *Hendor*:

(a) A group of employees raised complaints regarding their alleged victimisation and race discrimination at the hands of a foreman. As a result, on 3 October 2002, there was a work stoppage on the night shift (this being an incident of unprotected industrial action) following which the foreman was suspended pending a disciplinary hearing. The

[1] (2009) 30 ILJ 2376 (LAC).

foreman was issued a final written warning pursuant to the disciplinary hearing. The shop stewards, angered by the decision of the employer not to dismiss the foreman, embarked upon an unprotected strike at the employer's factory (this being the second incident of unprotected industrial action). Following the issue of an ultimatum by the employer, on 15 October 2002, the striking employees were dismissed.

(b) Pursuant to certain engagements between the employer and the employees' trade union representatives, it was agreed that the dismissed employees be reinstated and issued a final written warning valid for 12 months, for participation in the second incident of unprotected industrial action. During February 2003 and after a further demand, by the employees, that the employer dismissed or removed the foreman, which the employer refused to accede to, the trade union referred a "mutual interest dispute" to the CCMA. The latter issued a certificate of non-resolution of the dispute and on 20 June 2003 a strike notice was issued. On 25 June 2003, the employees commenced their unprotected strike. It endured for seven weeks.

(c) The employer issued an ultimatum to all employees advising them that their strike was illegal and that unless they reported for duty at the commencement of the day shift on Friday, 4 July 2003, they would be dismissed. They were invited to make representations to the employer prior to 4 July in relation to why they should not be dismissed. On the evening of 3 July 2003, the day before the ultimatum was to expire, the union launched an urgent application, in the Labour Court, in which it sought an order interdicting the employer from carrying out its dismissals.

(d) The Labour Court made an order by consent in terms of which the employer would not dismiss the striking employees pending the hearing of the matter on 1 August 2003. The application was heard on 1 August 2003 and on 13 August 2003 the application to interdict the employer from dismissing the employees was dismissed. On the same day, the union wrote to the employer indicating that a decision had

been taken to call off the strike action with immediate effect. The employer responded by stating that it was entitled to terminate the employment of the employees, but that it intended to give them a further opportunity to make representations on why they should not be dismissed on 18 August 2003 at 9 am. On 18 August 2003, representations were made by the employees. After considering the representations, the employer dismissed those employees who participated in the strike.

(e) The Labour Court found that the employees' dismissals were substantively unfair on the basis that: (a) the employees were understandably aggrieved by the continued presence of the foreman who had used derogatory/racist language; (b) the employees held a *bona fide* belief that their strike was protected; (c) the employees had returned to work immediately after the employer had succeeded in interdicting the strike; and (d) the strike would have been substantially shorter if the employer had not agreed to the postponement of its application for an interdict by a month.

[34] The Court in *Hendor* held as follows in relation to the principle of proportionality:

> 'Dismissal is manifestly the sanction of the last resort (*WG Doney (Pty) Ltd v National Union of Mineworkers of SA* (1999) 20 ILJ 2017 (SCA) at paragraph 18). Hence there is a need to examine the arguments of both parties as to the matter and conduct of the strike to test whether dismissal was proportional to the misconduct.'

It went on to hold that:

> 'In summary, the use of the most extreme sanction, dismissal in this case was manifestly disproportionate to the "misconduct" of the second and further respondents.'

[35] The principle that was established in *Hendor* is not that the dismissal of employees because they were on a short duration strike will inevitably be found to be disproportionate and thus substantively unfair. Rather, the

principle established there is that when determining whether the dismissal of striking employees is proportional to the misconduct, a court must examine the conduct of both the employer and employees "as to the matter and conduct of the strike".

[36] This Court has, in the past, confirmed the sanction of dismissal in relation to employees who had participated in a short duration strike. *National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables*, (*CBI*)[2] is one such case where it was found that the dismissal of employees, who had engaged in a two-hour strike (while on a final written warning) in response to the employer short paying them their wages, was substantively fair because the employee's decision to strike was:[3]

> '[D]eliberate and calculated. It undermined the process of collective bargaining as a tool to resolve industrial disputes. When [the employees] reported for their shift they were appraised of the nature of the problem regarding short payment of their wages and were told that it was being attended to by the respondent's management. They were told to report for their shift and warned that if they failed to do so they faced the risk of dismissal. They were given an ultimatum which they ignored. They decided to walk off at 22h00 to show solidarity with the day shift. Their collective decision to walk off at 22h00 was taken before they filed any grievance. There was no attempt at all on their part to comply with the provisions of the Act regarding the handling of grievances. The employee's contention that they were justified in leaving their shift early because of the [employer's] failure to pay them correctly, is accordingly rejected.'

[37] The Court in *CBI*, however, found the dismissal of the employees to be procedurally unfair because the employer had "made no attempt to bring the ultimatum to the attention of the Union when it was clear that a union official dealing directly with the matter was not immediately available and could not be contacted". The Court accordingly found that the "strike would have been avoided had the respondent engaged with a union official before issuing an ultimatum. The court accordingly awarded the dismissed employees 12

[2] [2014] 1 BLLR 31 (LAC).
[3] *CBI* at para 39.

month's compensation, which it found to be just and equitable in the circumstances.

[38] Not unlike in *CBI*, the Labour Court found, in this dispute, that the decision of the employees to strike was in deliberate defiance of the company. It, in fact, characterised the key factual dispute as being "whether the employees had deliberately planned to go on strike at 15:00 hours or whether this was an innocent error". It accordingly found as follows:

> 'On the evidence therefore I do not accept that the 60 odd employees went on strike at 15h00 not knowing that the strike was to commence only at 19h00. It is clear from an overall conspectus of the evidence that the strike was planned to commence at 15h00 and that it was in fact orchestrated by the shop stewards and more in particular Letsoalo and the employees knew that the strike would be illegal not only because the strike notice was displayed on the noticeboard, but also in the light of the fact that they were repeatedly warned by management. Embarking on the strike action at 15h00 hours was in deliberate defiance of management.'

[39] The Labour Court then went on to find that the employees had set themselves on a collision course with management, by knowingly being party to a scheme aimed at exacting damage on the company by embarking on the strike at 15h00 on 24 September 2010. This finding is not sustainable on the evidence. On the probabilities, the employees would have been aware that the strike was originally called for 7pm, as the strike notice was brought to their attention when it was placed on the notice boards, and they were reminded of this by the employer's representatives. However, it is clear, on the company's own version, that the employees believed that they were allowed to strike at 15h00 on the basis of certain assurances that they had received from the union representatives.

[40] The testimony of both Green and Van Rooyen also puts paid to the contention that there was something sinister at play in that the union had induced the employees to commence the strike early, despite being cautioned by the company's representatives that this was not the appropriate course of action. I

consider the following concessions which Green made, under cross-examination, to be dispositive of this issue:

> 'Employees being members of SACCAWU would of course rely on things that their trade union tells them, correct? --- Correct yes.
>
> They would be entitled to accept in good faith what the – what is communicated to them by their trade union, correct? --- Yes.
>
> If something – if they receive a conflicting message from another [indistinct], it is understandable that there would be confusion on the part of the employees? --- Yes.'

As is apparent from the following exchange between counsel for the union and Van Rooyen, Van Rooyen also felt constrained to make a similar concession:

> 'Assuming for a moment that it [i.e. the Notice mentioning the strike commencement time of 19h00, which was allegedly communicated to the Employees by the Company] did come to their attention for purposes of my questions, the employees of course are SACCAWU members and are guided by SACCAWU in relation to matters such as embarking on an unprotected strike, I think you must accept that at the very least? --- Yes.
>
> Sorry? --- Yes.'

[41] The Labour Court found correctly so, in this regard, that the employees had received an instruction from the union to embark on the strike at 15h00. I, however, disagree with its finding that the employees set themselves on a collision course with management by knowingly being party to a scheme aimed at exacting damage to the company. The strike called for 15h00, by the union, was a national strike and not a store specific one. This calls into question the contention that the employees (at the Woodmead Store) were knowingly party to a scheme aimed at exacting damage to the company.

[42] Moreover, the evidence reveals that the strike was originally meant to commence at 15h00 on 24 September 2010. The starting time then changed to 19h00 in order for the union to meet the 48 hour notice requirement. Union

representatives were then instructed to communicate this to the stores in the Wits region, including the Woodmead store. The shop stewards at the Woodmead store could not be reached because the phone in their office was not operational. This resulted in the Woodmead store not being notified of the change in the commencement time of the strike. It turned out that a few other stores, including those at Rosebank and Carlton Centre, were not notified of this. This indicates that if the employees in the Woodmead store acted in deliberate defiance of the company, then the employees in these other stores must have done so as well. But this is not what the evidence demonstrates. I accordingly consider the Labour Court to have erred in finding that the employees acted in deliberate defiance of the company's instructions.

Ultimatum

[43] The company's representatives attempted to dissuade the employees at the Woodmead store from striking before 19h00, but were unsuccessful in doing. However, what they did not do was to issue the employees with an ultimatum once it became clear to them that the strike was to begin at either 15h00 or 16h00. Item 6(2) of the Code provides that:

> '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.' [4]

[44] It was contended on behalf of the company that it could not reasonably have been expected to issue an ultimatum to the staff as it was given short notice that the strike would begin at 3pm. There is no merit in this contention as the company had strike guidelines in place for handling unprotected industrial action. These guidelines have, as annexure B, a *pro forma* ultimatum which is

[4] Own Emphasis.

to be issued to employees in a strike situation, where it was "not possible to engage the shop stewards and/or address the employees personally". The *pro forma* contains the body of the ultimatum in it, and only requires the time, date and store name to be inserted in the spaces provided.

[45] The company was aware from 12h30 on 24 September 2010 that the strike may commence at 15h00. In anticipation of this, it took steps to arrange for replacement labour but did not deem it necessary to issue an ultimatum to the employees. As such, no ultimatum was issued to the employees either before or after the strike commenced; in circumstances where a number of the employees only "punched out" much later than 15h00 including, in some cases, approximately an hour later. There was nothing, in my view, which prevented the company from issuing a written ultimatum to the strikers, which it was obliged to do in the circumstances.

[46] The contention, advanced on behalf of the company, that there was no obligation to issue an ultimatum in circumstances where the employees were informed that the strike was unprotected, loses sight of the objective of an ultimatum, which was expressed by this Court in *Modise v Steve's Spar Blackheath*[5] as follows:

> 'The purpose of an ultimatum is… to give the workers an 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.'

This is precisely why an ultimatum in writing is so important – the employee concerned has a document in hand setting out what is required (and the consequences of non-compliance), and can reflect on the matter in those circumstances.

[47] The unique circumstances of the current dispute warranted the issue of a written ultimatum because the employees were seemingly of the belief that the strike was a protected one. It is unlikely, on the probabilities, that they would have proceeded to participate in the unprotected strike had they been

[5] [2000] 5 BLLR 496 (LAC) at para 73.

furnished with a written ultimatum which expressly spelt out the consequences of doing so, such as no payment for the duration of the strike and disciplinary action that could result in the termination of their services.

[48] As previously held by this Court[6] "an ultimatum is as much a means of avoiding a dismissal as a prerequisite to affecting one". It has a bearing not only on the procedural fairness of a dismissal, but crucially also on the substantive fairness because it is aimed at avoiding a dismissal.

Failure to provide a hearing

[49] The company failed to give the employees an opportunity to be heard before dismissing them, despite undertaking to provide each of them with an opportunity to submit a written representation, in the event that it was not persuaded by the union that the sanction of dismissal was inappropriate. Importantly, in this regard, the company issued a disciplinary notice to the employees which read:

> '1. You participated again in unprotected industrial action on 24 September 2010, which took the form of leaving your work station collectively without authorisation at 15h00.
>
> 2. Disciplinary enquiry proceedings will be initialised.
>
> 3. Because of the difficulties of holding a disciplinary enquiry with all employees involved in the unprotected industrial action, which could result in your dismissal, we have decided to hold a hearing as per the following:
>
> 3.1. The union through its office bearers and shop stewards at the store to be given the opportunity to inform us why you should not be dismissed. We have scheduled the hearing for date to follow. Please advise your shop steward of any representation that should be made.
>
> 3.2 Each employee involved to be given the opportunity to submit

[6] *Mveltrans (Pty) Ltd t/a Bojanala Bus Services v Pule and Others* (JA 72/13) (2014) ZALAC 63 (23 October 2014) at para 55.

a written representation thereafter if the union cannot persuade us that dismissal is inappropriate.

4. The outcome of the hearing with the office bearers and shop stewards will be communicated to you.'

[50] The company held a disciplinary hearing and an appeal hearing in which only the union officials and shop stewards were permitted to participate. Contrary to the undertaking in the notice, the company failed to provide the individual employees with an opportunity to submit written representations to persuade it otherwise once the decision to dismiss them was taken. While I accept that in the context of a strike dismissal, a collective hearing may be utilised where appropriate,[7] this does not give an employer *carte blanche* to use collective enquiries irrespective of the exigencies of a particular case. While in some cases collective hearings may be warranted, in others they may not.[8] Van Rooyen's testimony in the Labour Court was that in cases of collective misconduct, the company always holds disciplinary hearings on a collective basis. This implies that the company does not tailor the process to meet the dictates of fairness based on the prevailing circumstances of a specific case.

[51] As contended for by the appellants, this was a case where individual hearings (or at least, collective hearings in which individuals could participate) were warranted because the employees appeared to be of the mistaken view that they were entitled to go out on strike at 3 pm, on the day in question, as the strike was a protected one. In *Modise and Others v Steve's Spar Blackheath,*[9] where the dismissed employees were of the similar belief because the union had taken steps to make the strike legal, this Court held that:

'The last observation relates to the conclusion that it would have been a pointless and an unnecessary exercise for the employer in G.M. Vincent to afford the strikers a hearing. My difficulty with this conclusion is that this was

[7] *National Union of Metalworkers of SA v Vetsak Co-operative Limited and Others* (1996) 17 *ILJ* 455 (A).

[8] *Modise and Others v Steve's Spar Blackheath* [2000] 5 BLLR 496 (LAC) at para 96.

[9] At para 64.

> a case where the union had taken various steps prescribed by the old Act for making a strike legal... Indeed, it appears from the judgement of the industrial court in the same matter that, when the matter was argued in the industrial court, it was the union's case that it (and, a fortiori, the strikers) believed that the strike was legal (see *NUMSA V G.M. Vincent Metal Sections (Pty) Ltd* (1993) 14 ILJ 1318 (IC) at 1320J-1321A)... In those circumstances I cannot, with respect, see how it could be said that a hearing would have been a pointless and an unnecessary exercise in such a case.'

The Court went on to hold that:[10]

> 'The need for the respondent to hear the appellants was arguably even stronger in this case because this was a case where, to the knowledge of the respondent, certain steps had been taken by the union which were obviously aimed at making the strike a legal strike. The respondent should have realised that, because such attempts had been made, the strikers could well have been under the impression that the strike was legal and, that, for that reason, they might have believed that they were entitled to go on strike and even to ignore any calls by the respondent that they return to work. Although the appellant's strike was illegal, they should not, in my judgement, be treated in the same way as strikers who simply flouted the Act and made no attempts whatsoever to comply with it. They deserve some sympathy. Workers must be encouraged to comply with the law. To treat them as if they fall into the same category as strikers who go on a strike without any attempt at all to make their strike legal would not be right. It would not encourage unions and workers to make whatever attempts they can to ensure that their strikes are legal.'

[52] The union, in the current matter, had obtained a certificate of outcome in terms of s64(1)(a) of the LRA and it had issued a strike notice in terms of s64(1)(b) thereof. This, in my view, rendered it fair and appropriate for the company to hold a disciplinary hearing where individual participation was allowed for primarily two reasons. The first was to ascertain each employee's understanding of what the correct time of the commencement of the strike was. And the second was to establish whether he or she was knowingly

[10] At para 99.

complicit in the purported scheme to cause damage to the company. As it turns out, the company failed to adhere to the process that it specifically undertook to follow in the disciplinary notice which it issued to employees. This rendered each of the employees' dismissals procedurally unfair.

Inconsistency

[53] On 10 June 2010, during the course of a weekly shop steward meeting with employees in the company's canteen at the Woodmead store (between 11h30 and 12h00), a group of employees marched from the canteen to the other side of the store, where the manager's office was situated, and back to the canteen. It is common cause that weekly shop steward meetings, such as this one, ran from 11h30 to 12h00. The employees were authorised to be away from work during this period.[11] After the meeting, those employees scheduled to go for lunch would have done so. They remained on authorised absence from work during their lunch break.

[54] The company issued final written warnings to the employees for participating in the march on 10 June 2010. By all accounts, this infraction differed materially from that for which the employees were dismissed on the current charges. According to Goba, who observed the events of 10 June 2010, the "entire process took about 20 minutes or thereabout". Green conceded, as did Van Rooyen, that the 10 June 2010 misconduct for which the employees were issued with final written warnings, differed materially from the conduct for which they were dismissed.

[55] In addition, Van Rooyen conceded that where an employee, on a final written warning, commits misconduct which differs from misconduct previously committed, it would be unfair to impose the next level of discipline. In terms of the company's "Guidelines for Handling Unprotected Industrial Action" ("the guidelines"), progressive disciplinary action starting with a written warning generally applies to industrial action off the shop floor and a final written

[11] Section 213 of the LRA defines a strike as "the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory."

warning applies to industrial action on the shop floor. This guideline as well as the concessions made by the company's representatives, demonstrate that the final written warnings, which the employees received for their 10 June 2010 misconduct, were not a license to dismiss them for striking (in most cases for less than an hour) on 24 September 2010, as those warnings related to "on the floor" industrial action that was distinguishable from the strike action on 24 September 2010.

[56] The employees' participation in an unprotected strike for less than an hour on 24 September 2010 was not sufficiently serious to warrant what is, in the words of this Court in *Hendor* "*the use of the most extreme sanction*". In terms of its guidelines, the company should have issued the employees with a written warning (and not a final written warning) for engaging in the unprotected strike action on 24 September 2010 – which was, by all accounts, the first time that the employees embarked upon such industrial action.

[57] The evidence reveals that not all the workers who participated in the unprotected strike at the Woodmead store, on 24 September 2010, at 3 pm were dismissed. Notably, the workers who were not on a final written warning, for the 10 June 2010 incident, were not dismissed for participating in the 24 September 2010 unprotected strike. They received written warnings. Similarly, the employees at the Carlton Centre and Rosebank stores, who also participated in the strike that commenced at 3 pm on 24 September 2010, only received written warnings. This, in spite of the fact that they were already on a written warning for participating in strike action in June 2010.

[58] Clause 3(6) of the Code of Good Practice: Dismissal ("the Code")[12] provides:

> 'The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.'

The Code envisages a consideration of the employer's historical and contemporaneous treatment of employees. In so far as the company's

[12] Schedule 8 to the LRA.

historical treatment of employees is concerned, it issued (ordinary) written warnings to employees at its Carlton Centre and Rosebank stores for participation in unprotected industrial action (off the floor) in May and June 2010. As concerning its contemporaneous treatment of employees, we know that the company dismissed those employees to whom it had previously issued final written warnings, but did not dismiss employees at the Rosebank and Carlton Centre stores who were already on written warnings, and who committed the same misconduct in embarking on the strike at 15h00 on 24 September 2010. It instead issued the employees at the Rosebank and Carlton Centre stores with further (ordinary) written warnings.

[59] The company, furthermore, dismissed the employees, but did not dismiss other employees in the same store (i.e. the Woodmead Store) who committed the same misconduct in embarking on the strike at 15h00, and who were also only issued (ordinary) written warnings. This, to my mind, is a clear case of inconsistency, rendering the employees' dismissals substantively unfair.

[60] The inconsistency calls into question the contention that the employees, had committed serious misconduct deserving of dismissal and, were part of the alleged sinister scheme in deliberate defiance of the company's instruction not to go out on strike at 3 pm as opposed to 7 pm. To reiterate, the 24 September 2010 strike was a national strike and not confined to the Woodmead store. On an assessment of the probabilities, the employees at the Woodmead store could not have been involved in a sinister scheme in deliberate defiance of the company. As indicated, they were seemingly of the belief that they would be participating in a protected strike at 3 pm on the day in question. In fact, Mzizi who testified on behalf of the employees, stated that he was not involved in the planning of the strike and had he been aware that the "legal" starting time of the strike was 7 pm as opposed to 3 pm, he would not have gone out on strike.

[61] Importantly, on this aspect, Green's testimony that at about 13h00 and after the shop steward feedback meeting on 23 September 2010, two shop stewards – Ms Letta Mhlomi and Ms Salome Legodi – informed him that the 19h00 commencement time of the strike was discussed at the shop stewards'

feedback meeting and that they had received copies of the strike notice advertising the commencement time as 19h00 on 24 September 2010, was hearsay as neither Legodi nor Mhlomi were called by the company to testify at the trial.

The Trust Relationship

[62] Van Rooyen made two further significant concessions under cross-examination. In relation to the first, he conceded that after the events on 24 September 2010, the employees were not suspended and continued working until their dismissal. In relation to the second, he conceded that he could trust the employees sufficiently to continue working during this period. This concession, in my view, belies the company's defence that "the employees acted in deliberate defiance of management by knowingly being part of a scheme aimed at exacting damage to the company".

[63] As relating to the harm caused, Van Rooyen testified that even though the company had employed replacement labour to operate 15 of the 45 tills, approximately 100 customers abandoned their trolley during the strike, as a result of which the company suffered a loss of R190 000,00. Notwithstanding the significance of this issue (the harm caused by the striking employees) to the substantive fairness of the dismissals, except for the say so of Van Rooyen the company led no evidence in support of it. It is also significant that despite the participation of other employees in the strike at 15h00 on 24 September 2010 (at the Woodmead, Rosebank and Carlton Centre stores), they were not dismissed.

[64] The argument that the trust relationship with the other employees remained intact, but it did not in relation to the dismissed employees (who committed the same misconduct) is absurd. It also contradicts the company's contention that the dismissed employees were knowingly part of the sinister scheme that the union had constructed to exact damage to the company. If there were any merit in this contention, then the other employees (at the Woodmead, Carlton Centre and Rosebank stores), who embarked on the strike at 15h00, should have also been dismissed – and not merely warned. Accordingly, I consider

the employees' misconduct not to be such as to render their continued employment intolerable.

[65] For these reasons, I consider the dismissal of the employees by the company to be both procedurally and substantively unfair. The company has advanced no reasons for why I should not grant the employees the primary relief of reinstatement with back pay retrospective to the date of their dismissal. In the circumstances, I see no reason not to grant the employees that relief. The appeal accordingly succeeds.

Costs

[66] As concerns the question of costs, I consider it fair and just that costs follow the result.

Order

[67] In the result, I order that:

1 The appeal is upheld with costs.

2 The order of the Labour Court dismissing the action is set aside and replaced with the following order:

'1. The dismissal of the employees is procedurally and substantively unfair.

2 The respondent is ordered to reinstate the employees retrospectively to the date of dismissal.

3 The respondent is ordered to pay the employees back pay retrospective to the date of dismissal.

4 The respondent is ordered to pay the costs of the action.'

F Kathree-Setiloane AJA

LABOUR APPEAL COURT

Waglay JP and Phatshoane AJA concur in the judgment of Kathree-Setiloane AJA

APPEARANCES:

FOR THE APPELLANT:	R Itzkin
	Instructed by Dockrat Inc Attorneys
FOR THE RESPONDENT:	A Myburgh SC
	Instructed by Bowman Gilfillan Inc