

SOUTH AFRICA / JUDGMENT

Marapula and Others v Consteen (Pty) Limited (J1086/98) [1999]

ZALC 63 (23 April 1999)

[1999] ZALC 63

COURT

Labour Court

BEFORE

M Jajbhay

CASE / FILE NUMBER

J1086/98

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IN THE

LABOUR COURT OF SOUTH AFRICA

HELD AT

JOHANNESBURG CASE NO : J1086/98

In the

matter between :

JACKSON,
MARAPULA AND OTHERS Applicants
and
CONSTEEN
(PTY) LIMITED Respondent

JUDGMENT

JAJBHAY, A.J.

- [1] Strikes and lock-outs are regulated by Chapter IV (Sections 64-77) of the Labour Relations Act No. 66 of 1995 as amended ("the LRA"). Section 64(1) provides in general terms that "Every employee has the right to strike and every employer has the recourse to lock-out", subject to certain conditions. These conditions are set out in paragraphs (a) to (d), read with sub-sections (ii) and (iii). They comprise an attempt at conciliation in regard to "the issue in dispute".

[2] In terms of Section 65 of the LRA, "No person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or lock-out" if a collective agreement prohibits it, the issue in dispute is arbitrable or justiciable, or (subject to certain exceptions) the person is engaged in an essential or maintenance service.

[3] Section 68(5) of the LRA provides :

"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. In terms of Item 6 of Schedule 8, the Code of Good Practice : Dismissals it is stated :

(i) 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 suspensive 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 this Act;

(b) attempts made to comply with this Act; and

(c) whether or not the strike was in response to unjustified conduct by the employer.

(ii) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the cause 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] In recent decisions, the Labour Appeal Court has outlined the basic principles that inform its approach to the task of interpreting the provisions of the LRA. The Act requires that the LRA be interpreted to give effect to its primary objects, and in conformity with the Constitution (Constitution of the Republic of South Africa Act 108 of

1996) and South Africa's public law obligations. The purpose of the Act is set out as follows :

"The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the work place by fulfilling the primary objects of this Act, which are -

(a) to give effect to and regulate the fundamental rights conferred by Section 27 of the Constitution;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

- (c) to provide a framework within which employees and their trade unions, employers and employers organisations can -
- (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
- (ii) formulate industrial policy."

[5] Cameron, J.A. in *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Limited* (1999) 20 ILJ 321 (LAC) at 326 states :

"Conformity with the Constitution entails inter alia that the provisions of the LRA must be considered against the background of the Constitution which is the supreme law of the land and which itself requires that this Court when interpreting the LRA promote the spirit, purport, and objects of the Bill of Rights."

Cameron, J.A. in the *Chemical Workers Industrial Union* case supra goes on to state in paragraph 21 :

"It is plain that the right to strike, conferred without express limitation in the Constitution, is subjected to a number of

significant, expressly stated, limitations in the LRA. The statute not only sets formal pre-conditions for the exercise of the right to strike, but imposes material limitations on who may strike. Strikers or those acting in contemplation or furtherance of a strike whose conduct falls outside the statute's limitations are deprived of the protection Section 67 provides, and are accordingly vulnerable (if employees) to dismissal and (in any event) to sue for delict or breach of contract."

[6] Conformity with the Constitution includes the fact that the provisions of the LRA must be considered against the background of the Constitution, which is the supreme law of the land and which itself requires that this Court when interpreting the LRA promote the spirit, purport and objects of the Bill of Rights.

(See : *Business South Africa v Congress of South African Trade Unions and Others* (1997) 18 ILJ 474 (LAC) at 476F-478I;

Ceramic Industries t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union (1997) 18 ILJ 671 (LAC) at 675E-I;

Carephone (Pty) Limited v Marcus N.O. and Others (1998) 19 ILJ 1425 (LAC) paragraph (8);

Chemical Workers Industrial Union supra at 326G-I.)

- [7] The right to strike is enshrined in the Constitution. Section 23(2)(c), provides that every worker has the right to "strike". That right, though it is expressed in an unlimited form, is subject to curtailment provided the restriction complies with Section 36, which permits limitation "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors", see *Chemical Workers Industrial Union supra* at 327.
- [8] The present action stems from the dismissal of Jackson Marapula and others (Applicants), consequent to their participation in a strike that did not comply with the provisions of Chapter IV. The Applicants were employed at all material times by Consteen (Pty) Limited (Employer). The Employer operates a brick factory, producing clay and paving bricks for the building industry and employs approximately 230 employees. The evidence on behalf of the employer was tendered by Mr Frederick Kok, Mr Michael Wright, and Mr Jaco Kok.
- [9] On the 2nd of December 1997, approximately 120 employees were engaged in a strike at the premises of the employer that was not in compliance of the LRA. During their employment, with the employer, the Applicants were accommodated in a hostel on the premises within the confines of the employer's place of business. It was stated that when access is afforded to the hostel, the admitted person will then also have access to the remainder of the company's premises. As a result thereof, certain security measures had to apply. The employer's security guards were tasked with the security functions and in addition thereto, they also attended to certain domestic problems between employees and their family members.
- [10] On the 2nd of December 1997, and at approximately 07h00, the Applicants together with other people who were also within the employ of the employer, did not commence with their daily duties. These individuals who amounted to approximately 120 people, were standing in front of the main administration offices of the employer. It was stated that these workers had commenced with industrial action, although, at that stage, the employer had not been informed about their demand or grievance. Mr Wright, the labour advisor to the employer, was immediately summoned who attended at the premises of the employer immediately thereafter. It was emphasised that no attempt had been made to formulate any demand, or hand a memorandum to the employer.
- [11] All the persons who had testified on behalf of the employer were certain that the proceedings were peaceful at all material times. Mr Wright testified that he invited the workers to sit as gentlemen and discuss their problems. Mr Wright further testified that on this particular day, he had to attend at the offices of the Commission for Conciliation, Mediation and Arbitration (CCMA) at 09h00. The reason for this meeting, at the CCMA was not related to the action at the workplace at all.

[12] Mr Wright invited the employees to inform him the reasons for the employees not having assumed their normal daily functions. It was at this stage that one of the employees handed a memorandum to Mr Wright. This memorandum is in a handwritten form, and it is rather simplistic in its content. The memorandum is written out on a page of a diary. At the top is written :

"Sorry for adres" (sic).

Dear management first of all I would like to say "Hello" how is the life according to your side. To our side is moving "tip top".

We've got a problems about your security. We don't realise as we can, because of your security you don't say nothing about it. We as workers we must know that which people make a production of bricks. Security or workers. All people care about it. What can we do about security we take action, before security go, and we go to react, we want them out immediately, in this premises, we want answer first if we don't get it we can't work; before it. Somebody get injury, but you don't say nothing. This is your land as we know. We must know the work of your security is. Looking for your lorry, office, not for the people or room. Yesterday we get another people of your security they take gun and wys that woman they say this is not your land, is the land of Frik Kok. We give you a 2 hours. After 2 hours we want answer?

By member of Consteen"

[13] In response to this memorandum, Mr Wright testified that he spoke to the workers and informed them that their actions were improper. He further invited them to talk to their representative Mr Sam Moyo. Mr Wright was adamant that the employees refused and insisted that they would not return to work until the security persons were all dismissed.

[14] During the discussions, it was intimated to the workers by the employer, to separate amongst themselves and indicate those who are in favour of continuing with their employment, and those that did not want to work any longer. The overwhelming majority of people at this stage intimated that they would prefer to continue with the employment at the employer.

[15] Mr F Kok testified that in his opinion some progress was being made during these discussions.

[16] Mr Wright had attended the offices of the CCMA, when he was called at approximately 11h00 and informed that the employees had not reverted to their work stations. Mr Wright had discussed this issue with Mr Sam Moyo who purported to represent the workers at the employer's premises. Mr Wright returned to the employer's premises at approximately 13h00 on that day. At this time, Mr Wright observed that there were a few workers standing outside, who were "polite" and they had informed him that they were not willing to discuss this matter at all with him. They were referring regularly to a Beni. Mr Wright testified that he understood the workers to state that they demanded that Beni be dismissed immediately. Beni was one of the four security guards employed by the employer at the premises.

[17] Mr F Kok was adamant at this point in time that all the workers return to their work stations. An attempt was made to contact Mr Moyo, however this attempt proved to be futile. Thereafter Mr J Kok and Mr Wright, debated the issues, and after some time settled an ultimatum to be distributed to the employees. The ultimatum is set out on a letterhead of the employer, and is dated the 2nd of December 1997. The time reflected is 15h30 (3:00) :

"General Ultimatum issued by management of Consteen (Pty) Limited to all employees engaged in the unprotected strike action which commenced at 07h00 this morning.

Issuing of Ultimatum :

This ultimatum is being issued, where possible, to all employees engaged in the unprotected strike, which started at approximately 07h00 this morning. Management will make every effort to issue a copy of this ultimatum to each employee participating in the unprotected strike and further with the use of an interpreter, to read this ultimatum and explain it to the striking employees. Copies of this ultimatum will be affixed, in as many languages as possible, to walls in the areas where striking workers are congregating and will be generally circulated in the living quarters on the premises. Each employee is entitled to a copy of this ultimatum.

Purpose of this ultimatum :

1. To encourage employees who are participating in the illegal/unprotected strike to desist and resume their normal duties as soon as possible.
2. To ensure that this industrial action does not occur in future. It should be noted that this is the second time certain employees have embarked on an unprotected strike. The first time was Friday November the 14th, 1997 - some two weeks ago.
3. To categorically state to employees that the illegal go slow that has been operation for some four months now will not be tolerated in the future.
4. To advise striking employees that their action is a very serious breach of their contracts of employment and that management after considering the facts and circumstances reserve their right to dismiss employees participating in go slow and this second

unprotected strike.

Warning :

1. If employees participating in the unprotected strike today and those who have participated in the lengthy go slow do not desist in their actions, management will dismiss them.
2. Any future illegal strikes or go slows (either this year or next year) cannot and will not be tolerated and the sternest action, including dismissal, will be considered.
3. This general ultimatum is the final ultimatum to be issued. Should any such illegal actions happen in the next 12 (twelve) months,

management will take the strongest steps necessary, including dismissal.

General :

It must be clearly understood that should an employee or group of employees have grievance relating to the work environment, this should be handled in the correct manner e.g following the grievance procedure and not via illegal industrial action such as unprotected strikes or go slows.

Finally :

All employees are requested to return to work and perform their duties as required by no later than 07h00 tomorrow, 3 December 1997, and to not again participate in strikes, go slows etc. Failing which management reserves the right to take whatever action it considers necessary in order to protect the business.

J C L KOK"

- [18] The services of two interpreters were secured, and the memorandum was interpreted in several languages according to Mr Wright. A memorandum was handed to all persons who were present, and a question and answer session pursued, however Mr Wright did not understand the questions that were being asked, and he in fact believed that the workers were satisfied. The atmosphere was "peaceful and polite". The meeting ended at 16h30, when everybody went away.
- [19] Mr Wright testified that he honestly believed that once the employees had conducted their discussions with Mr Moyo, they would all revert to work. All of Mr Wright's attempts to contact Mr Moyo proved to be in vain. On the 3rd of December 1997, when the Applicants had not reported for duty, they were dismissed.
- [20] It was further testified that the Applicants did not at any time intend to moderate their demand. They had assembled in a group, and had no intention of returning to work as the majority of the workforce had done. The Applicants did not take up the offer of the employer to convey constructive proposals via a duly elected or appointed committee. The employer believed that no purpose would be served in negotiating any further and the employees were informed that they were to vacate the premises on the 12th of December 1997 when the Respondent closed down for the annual holiday.
- [21] It was further testified that the employer had its levels of production deteriorating to such an extent that the viable existence of the employer was in jeopardy. The Respondent's pricing and financial management depended on certain levels of production of bricks. If these levels are not maintained, the employer's business would not operate profitably.

- [22] The parties had approached the CCMA on the 14th of November 1997, with regard to a dispute that revolved around the unilateral change to the terms and conditions of the employment. This matter was amicably resolved at the CCMA. In terms of the agreement entered into at the CCMA, the union (the SAEUB who acted on behalf of employees at the employer) agreed to approach "the company in writing to set up a meeting to discuss other work related issues". The evidence of the employer was that this was never done.
- [23] Mr Wright testified that he did not meet Mr Moyo (who purportedly represented the employees) on the premises. Whilst they had worked together as adversaries, and respected each other in a professional capacity, the relationship was within the framework of the law. Mr Wright stated that he had no intention of inviting Mr Moyo to the premises of the employer. It must be noted that Mr Moyo at the time of the trial had passed away.
- [24] Mr Jackson Marapula, Ms M.S. Kwatsia Chavalala and Ms Yimeka Rikhotso, testified on behalf of the Applicants. Mr Marapula stated that he was authorised to testify on behalf of all of the Applicants whose names were appended to Annexure "A" attached to the Applicants' statement of case. The testimony was that in the overwhelming majority of instances, the employees are labourers, who have been working for "a long time" for the employer. The employees were assaulted indiscriminately by the security guards at the work premises. Each one of these three individuals were according to their evidence, assaulted by the security guard who was known as Beni.
- [25] They believed that their complaints were not taken seriously by Mr Kok and other members of management. Beni boasted that no action will be taken against him and he is free to act as he willed. The complaints lodged by the workers, in terms of the evidence, was treated with contempt. Their response to the complaint, would invariably be if you are not happy to work here, then you must find yourself alternative employment.
- [26] Mr Sam Moyo was a community leader, and he tried to represent the workers from time to time at the workplace.
- [27] Mr F Kok, had vehemently dissuaded union activity at the workplace. According to the evidence, he was not in favour of allowing workers to participate in union activities. Mr Moyo was not allowed on to the premises of the employer.
- [28] On the 2nd of December, according to Mr Marapula, the employees were "tired of the treatment that was meted to them" by the security guards. They had decided to confront management with this problem. Mr F Kok was informed about the assaults, and he was further told that if these assaults were not stopped immediately, then the workers will engage in a work stoppage.
- [29] On the 2nd of December 1997, according to Mr Marapula, almost all of the employees were engaged in the work stoppage. When the memorandum was handed to Mr Wright, Mr F Kok retorted that if anyone is not interested in working, he/she should leave the premises. Mr Marapula protested that they had confronted management with the intention of establishing

how the issue revolving around the unlawful assaults being carried out by the security guards would be resolved. He believed that the members of the management team were not prepared to address this particular issue with them. There were joint meetings between employees on the night of the 30th November 1997 as well as the 1st of December 1997, where an appropriate cause of action was debated and discussed. It was pursuant to these meetings that a memorandum was submitted to the management team.

- [30] Mr Marapula testified that the persons acting on behalf of the management team as interpreters were in fact police officers from the Muldersdrift Police Station. They were not clothed in the normal police uniform at the time. These "interpreters" had informed the workers that if the workers had not returned to work, the police will come in with dogs and attack the workers.
- [31] Mr Marapula as well as the two ladies who testified were adamant that their demand was for management to reprimand the security guards. The abusive tactics of the security guards according to these individuals had to be put to an end.
- [32] Mr Marapula was cross-examined in great detail, and many contradictions emanated during this time. However the same could not be said about the two ladies. In addition to the contradictions, Mr Marapula was also not clear on many aspects of his evidence, and at certain occasions I had to advise him to listen to the questions and answer them to the best of his ability. There were many inconsistencies in his testimony.
- [33] Insofar as the evidence is concerned, the upshot is that I am faced with two conflicting versions, only one of which can be correct. The onus is on the employer to prove that the dismissal was fair (Section 192 of the LRA) on a preponderance of probability. In my opinion, the onus is discharged if the employer can show by credible evidence that its version is the more probable and acceptable version. The credibility of witnesses and the probability or improbability of what they say should not be regarded as separate inquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the employer's version, an investigation where questions of demeanour and impression are measured against the content of the witnesses' evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety. It is on the basis of this test that I have set out, that I accept the version of the employer as the more probable one, and accordingly should be accepted.
- [34] Mr Marapula and Ms Chavalala proved to be in error where their evidence was contradicted by the facts set out in the statement of case. Ms Chavalala testified that she was assaulted by the security guard during the day of the 1st of December 1997. The statement of case alleges that the guards had threatened her. I was not afforded a reasonable explanation setting out the variances. I realise that at least one version may have been alluded to erroneously: and

error by itself does not establish a lie. However, there was no attempt on the part of either the witness or the legal representative to explain these contradictions. Ms Rikhotso's allegations were serious. They were not pleaded.

- [35] Pleadings should not be read pedantically, however, they must be carefully drawn and properly turned out. The rules of this court does not envisage that pleadings be drawn up in perfect language. However, the allegations of the parties should be clearly cognizable, so that each one, as well as the court, may know what case is to be made out and what case has to be met.
- [36] In the premises, the question I am asked to determine is whether the employees who had participated in a strike that did not comply with the provisions of Chapter IV deserved to be dismissed in the circumstances of this particular case.
- [37] The meaning of the right to strike guaranteed in the Constitution should be determined by an analysis of the purpose of such a right. In my view, when conducting this analysis, and in interpreting Section 68(5) of the LRA, a generous rather than a legalistic interpretation should be afforded, which is aimed at fulfilling the purpose of a guarantee and securing for all individuals the full benefit of the rights protection. The right to strike, that is enshrined in the Constitution, is in my opinion a breach from a culture of authority, which rested on a doctrine of management's prerogative, to a culture of justification. In terms of this culture of justification, the new order in industrial relations must be a community that is built on persuasion and not coercion. It is precisely for this reason, that in my opinion, Section 68(5) treats the participation in a strike not complying with the provisions of Chapter IV, as a misconduct.
- [38] When employees engage in a strike that does not comply with the provisions of Chapter IV, this conduct in appropriate circumstances can be seen to interfere with the normal cause of conciliation, set out in the LRA.
- [39] The intention of the LRA is to promote innovative partnerships in collective bargaining and establish an array of employee involvement programmes that will operate in the workplace. This has to be built on positive experiences with productive and co-operative employer/employee relations.
- [40] The LRA endorses and encourages the development and promotion of fair, speedy and efficient resolution of disputes at the workplace. Problems arising in labour matters frequently involve more than legal questions. Political, social, and economic questions frequently dominate labour disputes. The nature of labour disputes and grievances and other problems arising in labour matters dictate that

special procedures outside the legalistic system must be initially employed in their resolution. The legislative creation of the CCMA and conciliation boards is primarily focussed on the fostering of industrial peace and stability.

- [41] If these sections are not heeded, the operation and indeed the whole concept of protected industrial action may be thrown in disarray. Before engaging in protected industrial action, the issue in dispute must be referred to conciliation because the CCMA and bargaining councils have been set up to operate in areas where specific expertise, experience and sensitivity to the particular problems involved are essential to their resolution.
- [42] The administrative bodies such as the CCMA, are designed to function expeditiously, inexpensively and there is little doubt either of the need for these bodies or the very important role that they fulfil in industrial relations society. Through their constant work in this sensitive area, such bodies develop the special experience, skills and understanding needed to resolve the complex problems of labour relations.
- [43] In the present matter, it was common cause that the Applicants had utilised the services of the CCMA in relation to a dispute approximately three weeks prior to them engaging in the unprotected industrial action. This was on the 14th of November 1997. At this intervention, the employees had largely achieved the desired outcome. The matter revolved around the unilateral variation to the terms and conditions in the employment contract. In terms of the agreement entered into, the employer had agreed to revert to the original employment contract. The witnesses who testified on behalf of the Applicants, were all aware of this particular intervention at the doors of the CCMA, as well as another dispute that was resolved at the CCMA that was between the same parties. In my opinion, the Applicants were aware of the dispute resolution mechanisms in existence at the time. There are very sound reasons for referring a dispute for conciliation prior to engaging in industrial action. The parties to a dispute, should quite simply exercise deferential caution in their assessment to engage in unprotected industrial action. The LRA adopts a legislative policy of postponing the exercise of the right to strike until all attempts at conciliation have failed. The conscious decision in the participation in a strike that does not comply with the provisions of Chapter IV, in the present matter, constituted a misconduct.
- [44] In my opinion, there is no doubt as to the seriousness of the contravention, in addition thereto, there were simply no attempts

made by the Applicants to comply with the Act. On the Applicants' own version, they were dissuaded from engaging in any conduct in contemplation of a work stoppage by Mr Moyo. The Applicants heeded to this advice during the evening of the 30th of December

1997. The Applicants engaged in the unprotected activity on the 2nd of December

1997. It is important to note for the purposes of the present matter that the operations of the employer were to have stopped for that particular year on the 12th of December

1997. Merely ten days after the action entered into by the Applicants.

[45] There may well have been difficulties with the general conduct of the security guards at the workplace. Unfortunately no evidence was placed before me to convince me that attempts were made to comply with the Act, more particularly there was simply no credible evidence that anything was in fact done in order to bring the grievance of the Applicants to the attention of management at the employer.

[46] In attempting to build a new order on persuasion and not coercion, our Courts must be careful to avoid constitutionalising any qualities of power in the workplace.

"The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Constitution and the ultimate standard against which a limit on a right of freedom must be shown, despite its effect, to be reasonable and demonstratively justified." (See : R v Oaks

(1986) 1 SCR at 136.)

[47] In labour relations we are dealing essentially with people who, because of their mutual involvement in the work situation, have been placed in a specific relationship with one another. The relationship formed is a human one, and as such will contain elements common to all other relationships such as friendship, marriage, business partnerships, social, religious and political liaisons. What makes these relationships work should also promote a sound labour relationship. Consequently, it could be postulated that, like all other relationships, the labour relationship will be nurtured by mutuality of interests, the verbosity of support, understanding, trust, facilitative communication, shared goals and shared values; and that it will falter should one or more of these qualities be absent. Also as in the case of all other relationships, the labour relationship is a dynamic and ever-changing one, such change being dependant on the evolving status, needs, attitudes and perceptions of the parties concerned. In my opinion, it is important to emphasise the institutionalisation of relationships, structures and procedures in the sphere of industrial relations. With this in mind, it is noteworthy in the present matter, the Applicants chose not to accede to the requests of the employer to delegate a committee that would appraise the employer of the concerns regarding the Applicants. As I understood the evidence, the attitude of the Applicants was simply in a form of a demand to dismiss the security guards forthwith. This demand was unreasonable in the circumstances.

[48] Human communication is ethical to the degree that it reflects and fosters participant attitudes of geniuses, accurate empathetic understanding, unconditional positive regard, mutual equality and understanding. Within the context of their relationship the parties to the employment relationship would do well to demonstrate an affinity for dialogue prior to engaging in industrial action. This is contemplated by the provisions of Chapter IV of the LRA. The promotion of effective resolution of labour disputes should commence at the workplace. On the evidence before me, I find that the Applicants had contemplated industrial action as early as Sunday the 30th of November 1997. It was envisaged at this

meeting that there will be a "work stoppage".

- [49] I am not satisfied that the strike in the present matter was in response to unjustified conduct by the employer. There were allegations about the alleged assaults committed by the security guards. Unfortunately for the Applicants, the evidence does not establish this particular concern. The attorney who acted on behalf of the Applicants omitted to provide this particular version to the witnesses who had tendered evidence on behalf of the employer. In addition thereto, despite allegations of certain individuals being admitted to hospitals, not a single record to this effect was placed before me. A finding of this nature can only be made on the basis of credible evidence. In this matter there was none. There were vague allegations that complaints had been lodged with the South African Police Services and that these individuals were being bribed by the employer. However I am not able to place any weight to this evidence. Save for these bald allegations I have not been furnished with any corroborative evidence to establish the veracity of these allegations.
- [50] In the present matter, I believe that the impasse was reached as a product of the inflexible conduct on the part of the Applicants. The deadlock would have been averted if the employees had heeded to the advice of Mr Wright. This gentleman requested the Applicants to furnish him with facts so that he could investigate the grievances. This was simply not presented. The dictates of the moment which predicated an invitation to set up a "committee" and to further discuss the grievances were not adhered to. Mr Marapula had taken up the cudgels on behalf of the aggrieved workers. In truth Mr Moyo was requested to furnish in writing to the employer any work related issues in respect whereof the Applicants had grievances. He did not take up the invitation. This invitation was extended as early as the 14th of November 1997.
- [51] In terms of the ultimatum that was submitted to the Applicants, an opportunity was afforded to the Applicants in clear and unambiguous terms to desist from the "illegal/unprotected strike and resume their normal duties as soon as possible". An important fact set out in the ultimatum was that the Applicants were advised in no uncertain manner once again that "Should an employee or group of employees have grievance relating to the work environment, they should be handled in the correct manner e.g. following the grievance procedure and not via illegal industrial action such as unprotected strikes or go slows". The Applicants were again afforded the opportunity to "return to work and perform their duties as required by no later than 07h00 tomorrow, 3 December 1997". A clear warning in relation to the implications of the Applicants not returning to work was then set out as follows "Failing which management reserves the right to take whatever action it considers necessary in order to protect the business". In other words, the employer issued an ultimatum in clear and unambiguous terms and further the employer stated what sanction will be imposed if the workers did not comply with the ultimatum.

- [52] The Applicants discussed the contents of this ultimatum at a meeting on the evening of the 2nd of December 1997, and persisted in their attitude. Clearly they were allowed sufficient time to reflect on the ultimatum and respond to it. The conduct of the Applicants in the present matter was subversive to conducive negotiations and consequently detrimental.
- [53] Despite its collective nature, the dismissal of striking workers is a dismissal nonetheless; just as all other dismissals, it operates to terminate the services of the individual. The code of good practice in my opinion does not contemplate a separate inquiry.
- [54] The employer had indicated that it was indeed open to negotiation on the issue. However the Applicants did not modify their initial demand as set out in their memorandum. An important factor in this regard, is that the majority of the workers heeded the ultimatum and returned to work the next day. It appears that despite realising that there was progress in developments, the Applicants lost sight of the real implications of their memorandum. In my view, this was done to their own detriment in the circumstances. The circumstances did not justify their position. There were ways in which the dispute could have been settled, and in the present matter, the Applicants chose not to adopt alternate methods to amicably resolve their dispute.
- [55] The employer appreciated the need for a process to be established in the circumstances, and suggested this in the ultimatum. The Applicants did not take up this invitation.
- [56] In the circumstances, the dismissal of the strikers was both substantively and procedurally fair. In my opinion, the Applicants disobeyed the provisions of the LRA and committed a misconduct. This misconduct was in flagrant breach of the purpose of the Act. It is important for employees to understand that such flagrant disregard of the provisions of the LRA, will have devastating consequences.
- [57] The representatives of both the parties in this matter agreed that costs must follow the cause.
- [58] In the premises, I make the following order :
1. That the application of Jackson Marapula and Others is dismissed with costs.

M JAJBHAY

Acting Judge of the Labour Court

SIGNED and DATED on this the 23rd day of APRIL 1999

DATE OF HEARING : 12, 13, 14 and 15th of April 1999

DATE OF JUDGMENT : 23rd day of April 1999

FOR THE APPLICANT : Mr W.A. Van der Walt of Truter Crous and Wiggill Inc.

FOR THE RESPONDENT : Mr R.P. Maddern of Wright Rose-Innes Inc.

MJ0002

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