

SOUTH AFRICA / JUDGMENT

Mlambo and Others v Choppies South Africa (Pty) Ltd (JS 168/2015) [2023]

ZALCJHB 307 (27 October 2023)

[2023] ZALCJHB 307

COURT

Labour Court Johannesburg

BEFORE

MM Baloyi

CASE / FILE NUMBER

JS 168/2015

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No. JS

168/2015

In

the matter between:

JOB

MYBOY MLAMBO & OTHERS

Applicants

and

CHOPPIES

SOUTH AFRICA (PTY) LTD

Respondent

Dates

heard: 11, 12, 13 of September 2023

Date delivered: 27

October 2023 (This judgement was handed down electronically by circulation to the party's legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down is deemed to be 12:00 on 27 October 2023)

JUDGMENT**BALOYI AJ****Introduction**

1. The strike called by the trade union, namely, Workers Association Union (WAU) is the subject matter of this dispute. The individual applicants referred a dispute about the fairness of their dismissal to this Court for adjudication after it could not be resolved through conciliation. It is common cause that the reason for dismissal is the applicants' participation in the strike that did not comply with the provisions of Chapter IV of the Labour Relations Act 66 of 1995, as amended ("LRA").
2. The respondent filed a response to the statement of case and the issues in dispute were clearly identified in the pre-trial minutes. The notable point requiring the Court's determination is, firstly, the identity and correct number of applicants and whether such applicants are properly before this Court. Secondly, the fairness of the dismissal.

Factual Background

3. The respondent operates a supermarket chain store business with outlets established in the majority of the provinces in the country. Its head office is in Botswana. The applicants were at all material times employees of the respondent. They were based at four of the respondent's stores in the Northwest province, namely Rustenburg, Swartruggens, Koster and Lichtenburg. They were members of the Workers Association Union (WAU) which has since been deregistered. Mr. Joe Motlhabane was the union official who serviced the members who worked in the said branches.
4. The respondent introduced a shift change in the Rustenburg branch for a certain number of employees regarding the starting and ending times. This change was not acceptable to the employees.
5. On 31 July 2014 the trade union referred a dispute of mutual interest to the CCMA claiming a unilateral change of its members' conditions of employment. The conciliation of the dispute was unsuccessful and a certificate of outcome referring the dispute to strike/lockout was issued on 27 August 2014. However, no notice of the commencement of strike action was issued soon after the issuing of the certificate.
6. On 23 October 2014 the Rustenburg employees were allowed to hold a meeting prior to the normal opening time of the store. That was shortly before 8h00. The meeting was addressed by a WAU shop steward, Mr Lucas Mabusela. Mr Mabusela did not conclude the meeting within the allocated time as it proceeded beyond 08h00 and he did not comply with the General Manager's instruction not to carry on with the meeting further. This led to the suspension of Mr. Mabusela for insubordination. The WAU union official, Mr Joe Motlhabane visited the store and engaged the respondent's Mr Mazwi about the respondent's

failure to follow procedures when suspending a shop steward. He thereafter issued a 48-hour strike notice.

7. The four stores listed above were affected by the strike as the employees in each store refused to tender their services. It only stopped after the granting of an interdict by this Court on 28 October 2014. The terms of the order were by agreement crafted as follows:

“IT IS ORDERED THAT:

1. THAT all employees including those who took part in violent or non violent strike action at any of the 35 branches of the Applicant, as appears from Annexure “Y” hereto, must stop such actions with immediate effect and return to commence their normal duties as from 29 October 2014 until 30 October 2014. These employees include the employees as per Annexure “X1” hereto.
2. THAT no members of the respondent will embark on any further strike actions in terms of the certificate of outcome annexed hereto as Annexure “X2”, at any of the 35 branches of the Applicant.
3. THAT the Applicant does not hereby waive its rights to institute appropriate disciplinary measures against any member of the Respondent as a result of the strike action.
4. THAT the Applicant and the Respondent will meet within 14 days of date hereof to attend to resolve the disputes between them. The CEO of the Applicant as well Mr. Ramachandran Ottapathu, and President and Secretary of the respondent must attend this meeting. That the Respondent will send an agenda for this contemplated meeting to the Applicant within 3 days before the meeting.
5. THAT each party will pay its own costs”
8. After the granting of the order, the applicants reported for duty as ordered. The respondent in the meanwhile elected to institute disciplinary hearings against the applicants on reason that it was within its right to do so in terms of the third order above. The applicants with the assistance of the union official attended the hearings but elected not to participate in the proceedings and in some instances did not appear at all. The applicants were found guilty and dismissed.

Before this Court

9. The respondent’s first witness, Levy Lebogang Thamsanqa Mazwi, was the Group HR Manager of the respondent. He was based in Rustenburg and regularly visited the Rustenburg store that was known as Choppies Superstore. It came to his attention through the General Manager of the Rustenburg store that the store was extremely busy in the afternoons than in the mornings. This led to some unbearable pressure. He then proposed a shift change for a certain number of employees who used to report for duty at 8h00 to start at 11h00 and end at 20h00. This change was only introduced in Rustenburg as it was the only store facing the challenge. This was attributed to the town’s mining activities as the store

was mainly convenient to the mine workers.

10. On 23 October 2014 during the employees' meeting which Mr Mabusela was addressing, the General Manager instructed Mr Mabusela to conclude the meeting on account of having gone beyond the allocated time as it was already past 8h00, he refused and insulted the General Manager.
11. With such a disorderly situation prevailing, he was compelled to drive to the store after receiving a call from the General Manager who asked for his assistance in restoring order. He then suspended Mr Mabusela. Mr Motlhabane, told him that the suspension of the shop steward was effected without following the procedures. As he was leaving the store, some employees followed him to the parking area and pronounced their refusal to work, unless Mr Mabusela was reinstated. Shortly after he left the store Mr Motlhabane sent a notice to strike in terms of which the strike was to start at any time from 14h20 on 25 October 2014. The notice reads as follows:

"TO: CHOPPIES SUPERSTORE

ATT: CEO MR RAMACHANDRAN/DEON

DATE: 23 OCTOBER 2014

FAX: [...] / [...]

RE: NOTICE TO GO ON A PROTECTED STRIKE

The writer is hereby informing CHOPPIES SUPERSTORE about the intention to embark a protected strike. This letter served as a 48hours notice starting on the 23 October 2014 time being 14h20 till Saturday the 25 October 2014 at 14h20 due to company fail to comply with schedule 8 of Labour relation act the HR Lebo refused to comply with schedule 8 and the chairperson of the shop steward is suspended without proper procedure and that lead to a work stoppage of all WAU members. The union tried to advise the HR of Choppies LEBO MAZWAI to let all the workers to resume to their normal duties but he chose not to allow all the workers to return to their work, that is why the union take effort to inform the chief executive officer (CEO) of Botswana and South Africa that we going to embark on a protected strike.

Please see the attached copy of certificate of strike.

The union is still available to can negotiate about the issues.

Hope you find the above in order.

Yours faithfully

Signature____

Joe Motlhabane."

12. He pointed out that the strike was unprotected because the grievance recorded in the strike notice was about the suspension of a shop steward which according to the trade union did not comply with schedule 8. The grievance in the strike notice differed from the one appearing in the certificate of outcome.
13. Nothing was mentioned in the strike notice about the shift changes. The dispute that led to the issuing of the strike notice was about the Rustenburg grievances arising out of the suspension of a shop steward. However, the employees in other stores decided not to report for duty on Monday, 27 October 2014. He physically attended to the three other sites and attempted to persuade the employees to return to work but the effort came to naught. The ultimata were issued and the employees did not adhere to same. No striking employee was suspended prior to the disciplinary hearing.
14. The strike had a huge impact on the respondent's business as the unsold perishable goods ended up being discarded as well as a loss of revenue. He conceded that the employees did return to work after the granting of the interdict and the respondent did not hold a meeting as per the fourth order of the Court. Furthermore, the number of dismissed employees was not less than 63. He concurred with the applicants' counsel that employees have a right to strike. He went further and stated that the strike must be compliant with procedures. He dismissed a proposition that employees were entitled to strike whilst awaiting the issuing of the certificate of outcome. He intimated that it was possible that some employees might have lost interest in pursuing the unfair dismissal cases. This was denoted by the absence of certain employees during conciliation. He did not say who of the employees had attended.
15. Rodney Sean Flanagan is the Chief Peoples Officer at the respondent. He only joined the respondent in 2021. The South African operations of the respondent were sold to the local company and the use of the name has been relinquished. The remaining 13 stores are now known as Hyperland. Lichtenburg and Rustenburg stores have been closed. Koster and Swartruggens stores are now taken over by OK Groceries. The respondent's business is recently operating at a loss hence there are ongoing retrenchments. He was unable to dispute that his evidence was not based on a pleaded case.
16. Mr Joe Motlhabane was a WAU union official at the time. The trade union is no longer in existence because of its deregistration. His offices were about 5 minutes away from the respondent's Rustenburg store. On 23 October 2014 he received a call from one Maggy Modikwe who told him that WAU members were instructed to leave the shop because they had a meeting the previous day. He tried to have a conversation with Mr Mazwi who said he could not talk because the employees were suspended. Mr Mazwi promised to send him a suspension letter before the close of business day and he did not.

17. There were issues in the past, specifically about the respondent's refusal to recognize the union hence COSATU was approached to intervene. Most issues were about unequal payments and making the employees perform tasks that were not part of their duties. The certificate of outcome was issued after a failed conciliation attempt. He wrote the strike notice because the employees were suspended. The Respondent's continuous changing of the employees' conditions of employment was the reason for the strike.
18. The Rustenburg employees did not go on strike because they were suspended. They reported for duty on 30 October 2014 after the granting of the Court order. The reason for the strike was the change of conditions of employment in Rustenburg, Koster, Lichtenburg and Swartruggens. As a result, the Burgersfort branch employees eventually joined the strike. The total number of dismissed employees is 135 which is made up of 31 for Rustenburg, 20 for Koster, 29 for Lichtenburg and 35 for Swartruggens. The respondent made no request for powers of attorney when the matter was referred to this Court. The union was still representing the employees at that time.
19. It came out during cross-examination that the applicants' previous attorney prepared a statement of case without having a consultation with the union or the applicants. He was only asked to refer the matter to this Court. Although the section 64 referral to conciliation is specifically about the unilateral change of conditions of employment for Rustenburg employees, according to him it covers employees in all the other branches. He conceded that it is not the applicant's pleaded case that the Rustenburg employees did not go on strike as they were suspended. He did not include a unilateral change of conditions of employment in the strike notice. A mere indication that the employees were going on protected strike mattered most according to him. He also distanced himself from a media statement issued by the union's General Secretary which also did not mention that the strike was about unilateral change to conditions of employment.
20. To his knowledge there was no ultimatum issued. Other lists in the applicants' bundle were compiled for the purpose of verification of union membership. The list used by the respondent in the urgent application is also incomplete. The union did not call the strike soon after the issuing of the certificate of outcome because they allowed time for the respondent to reconsider its position.

The arguments

21. Both parties filed comprehensive closing arguments in support of their respective cases with extensive reliance on relevant case law on the subject matter of the dispute. The respondent admits that only 63 employees with crosses next to their names below are properly before the Court whilst the rest are not. The basis for this contention is that the respondent's attorney addressed a request for a list of applicants to the applicants' previous attorney and from that list, only 63 have signed powers of attorney. The applicants argue that the respondent does not dispute dismissing the persons appearing in the revised list that was accompanied by powers of attorney. The respondent was only challenging the authority of

their attorney to act on their behalf and such challenge was settled by the filing of powers of attorney.

22. In so far as the merit of the dispute is concerned, the respondent contends that the identification of the issue in dispute is of high importance and it clearly came out that the strike was about the suspension of Mr Mabusela as recorded in the strike notice. The issue that led to the strike has no relation to the mutual interest dispute that was referred to the CCMA. The strike notice was not preceded by the issuing of a certificate of outcome flowing from a specific referral of the grievance that resulted in strike action to conciliation. The strike was therefore unprotected.
23. The applicants, on the other hand, are adamant that the strike action was fully compliant with section 64 and relied on Ceramic Industries[1] decision that the notice to strike should not be overly technical and further relied on Western Platinum Ltd v National Union of Mineworkers and Others[2]. The above authorities in so far as strike notice is concerned mainly relate to the times and or dates for the commencement of the strike not the subject matter of the strike on which the issue in dispute may be founded. Furthermore, the applicants placed reliance on Public Servants Association of South Africa v Minister of Justice & Constitutional Development and Others[3] to suggest that it is not mandatory to record a demand in the strike notice. The strike was according to the applicants by all account protected.
24. It bears mention that a number of issues not pleaded by both parties found their way into the trial of this matter. Both parties were alive to this and their arguments still followed the same route. The Labour Appeal Court in Trellicor (Pty) Ltd t/aTrellidor v National Union of Metal workers of SA (NUMSA) obo Mondli Mdwalane & Others[4] was dealing with similar situation and had this to say:

“It is a trite principle that litigants are to be restricted to the issues defined in the pleadings. Other issues that are not defined in the pleadings do not have to be decided unless they were fully canvassed without objection in the evidence”

25. Of significance in this matter is the applicants’ claim of impossibility to strike in respect of the Rustenburg employees and the respondent’s claim that the majority of the affected stores are completely closed and the remaining ones have been taken over by other companies. In this regard, the Court heavily leans towards exercising its discretion and accordingly finds it to be in the interest of justice to consider the issues that were not pleaded in the determination of this matter.

Analysis

26. The issue regarding the number of applicants in the matter was challenged on various fronts by the respondent. As a means to satisfy the respondent’s objection, specifically regarding their attorneys’ authority to act on their behalf, a total of 115 powers of attorney were filed. With the respondent’s reliance on Candy and Others v Coca Cola Fortune (Pty) Ltd,[5] there

are still some controversies raised about the powers of attorney in that the statement of case does not have necessary information as required in terms of Rule 6(1) of the Rules of conduct of proceedings in this Court, most particularly with regard to names description and addresses of the parties.

27. The respondent raised a point about the identity of the applicants and called upon them to prove their attorney's mandate through powers of attorney. The applicants acted accordingly by filing such powers of attorney in respect of the following employees:

NUMBER NAME & SURNAME NUMBER NAME & SURNAME 1. Balebeso Caroline Madikwane X 59. Julia Kefiloe Leena 2. Neo Milda Moabi X 60. Onicca Palesa Nape 3. Lucky Seun Itlhabangeng X 61. Goldrich Gabaiphiwe Pule 4. Magdeline Metsiatsile Modiko X 62. Lucas Itumeleng Mabusela 5. Bojosi Wilheminah Mekgobo X 63. Katlego Motsielwa 6. Baba Timothy Pudumo 64. Motshabi Florah Bogatsu 7. Rina Mmapula Motswadi 65. Itumeleng Abbram Tlholwe 8. Andrius Moyo X 66. Setoki Edith Mashogo 9. Kgomotso O. Modisane 67. Christina Kelebogile Itlhabanyeng X 10. John Molatola 68. Mogale Maria Cher-ji X 11. Goodwin Oageng Mahupa 69. Phatsimo Sara Kgosi X 12. Pranuna Tshepiso Sebunasi 70. Obakeng Pule 13. Pontsho Aletta Morake 71. Kgosietsile J Matsogo 14. Regnah Radebe 72. Simon Boikie Kokwani X 15. Rockney Thobe 73. Reuben Mpho Sasa 16. Stephina Motlhale 74. Sibongile Esther Segale 17. Martha Dikalenawo Mokgadi 75. Maila Rebecca Nontutuzela 18. Berned Gopolang Mokgadi 76. Ivy Johannah Cloete X 19. Thapelo Melato 77. Moloi Pauline Tshidi X 20. Godfrey Pitso 78. Maria Gabaikangwe Shabele X 21. Virginia Kelebogile Kabudi 79. Molly Modise X 22. Moshe Molatlhoa George 80. William Mothakgodhi 23. Dineo Rose Ngwako X 81. Sophia Kelebogile Dielele X 24. Pinki Maria Selo X 82. Emily mmami Mokonyane X 25. Popisi Leah Ramasita X 83. Puseletso Lidia Gaven X 26. Petrus Boitumelo Mofokeng 84. Sehoke Annanius Sello X 27. Boiki Johannes Phale 85. Lettie Letsapa X 28. Gloria Kgothatso Mafoko X 86. Dipuo Rosina Kati X 29. Kebareng Maria Molokwane X 87. Issac Segone X 30. Setshego Annah Marumo X 88. Ida Letsholonyane X 31. Jacob Molete 89. Pudi Edward Letsholonyane 32. Gobenneone Elsie Lekgari 90. Tshepo Guilty Leshomo 33. Kedibone Emally 91. Semakaleng Malape 34. Lenwajang Cecilia Motlagomang 92. Abram Mogotsi Muane X 35. Mpho Charity Kgakatsi 93. Phakale Dorah Gadifele 36. Lerato Yvonne Mosadi X 94. Gabanaope Herminah Lethoko 37. Mmapaseka Annah Makgale 95. Dorah Kedibone Itlhabanyeng 38. Motlalepule Dorah Kgotleng (Mogale) 96. Ikakanyeng Modise 39. Kesebelwang Charmaine Diale 97. Annette Anelize 40. Gaipone Hilda Marumo (Wati) 98. Tshepo Holly Sidibo 41. Lekgetho Tshepiso Maichel 99. Tebogo Lettia Kgengwe 42. Ronny Matheolwane X 100. Khasiane Jerminah Khalanyane 43. Rainy Valencia Isaacs X 101. Solomon Mosinki X 44. Kealeboga Victor Mokgaotsi X 102. Kefilwe Elizabeth Teu X 45. Cornelius Tumelo Phege X 103. Kgakamatso Rebecca Chipoka X 46. Montshonyane Pelonomi Christina 104. Kuka Anna Motshab X 47. Moima Kgomotso Johanna 105. Margaret Ntshoteng Rakuba 48. Lucas Maotwane 106. Motladile Amos Serache 49. Moseki Annah Itumeleng X 107. Setlhabetsi Ethel Thembekele 50. Mogosi Solomon Thabang 108. Nthinya Bertha Kedibone X 51. Modisane Maria Kelebogile 109. Metswamere Dimakatso Gladness X 52. Lesly Mogale 110. Ndhovu Magaiza Thoma 53. Motshabi Ofentse David 111. Molokwane Lebogang Cathrine 54. Sarah Sefakonyane 112. Pauline Morake Mmamaima 55. Tebogo Moleme 113. Dithate Puseletso Victoria 56. Morakabe Stefaans X 114. Moaludi Eric 57. Lydia Moelang

Mafojane X 115. Mohumi Kelebogile Aphaphia 58. Aletta Motlalepula Mogoshane

28. It bears mention that the respondent knows fully well who it has dismissed. The disciplinary chairperson's various outcomes neither contain lists of dismissed employees nor refer to any annexed list. He recommended a dismissal for all employees without identifying them by name. The applicant's positive response to the respondent's call for powers of attorney effectively resolves its self-created preliminary point. The respondent does not dispute dismissing them. Mr Mazwi clearly testified that the respondent dismissed more than 63 employees. It should not surprise the respondent that the very dismissed employees approached this Court to challenge their dismissal. I am under the circumstances compelled to find that all the individual applicants who personally signed the powers of attorney are properly before this Court.
29. It was brought to the attention of this Court that, certain employees have passed on. The powers of attorney were signed on behalf of the deceased employees without letters of executorship or authority. Both parties' representatives did not clearly list these deceased employees but are in any event identifiable. Despite the applicants being represented throughout the prosecution of this matter, no application was made to have them substituted by their respective estates. Accordingly, their claims should be dismissed.
30. I now turn to the merit of the dispute. As revealed through the above facts, it is common cause that a strike action took place at the respondent's four outlets. The main question requiring the Court's determination is whether the said strike action was protected or not. The fairness of the dismissal is, inter alia, determinable based on this issue. The applicants' contention is that the strike was compliant with the procedures set out in section 64(1)(a) and (b)[6]. The respondent disagrees on the basis that the certificate of outcome on which the applicants are relying is about a unilateral change of conditions of employment, whilst the notice to strike raised a grievance of suspension of a shop steward. To be precise, there is no certificate of outcome issued with respect to the issues that led the union to call a strike. Secondly, the Rustenburg store was the only site that had issues with shift changes and the suspension of a shop steward. The grievances contained in the strike notice had no bearing on the other branches.
31. In terms of section 213 of the LRA, a strike is defined 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".

32. The respondent contends that the change in shift patterns was effected only in Rustenburg. The employees in Koster, Lichtenburg and Swartruggens were not entitled to join the strike as the issues in question did not concern them. This contention is clearly wrong in light of the long-held principle set out in *Early Bird Farms v FAWU*[7] that the employees are fully entitled to participate in a strike called by their fellow employees who are directly affected. This

position was restated by the Constitutional Court with approval in *SA Transport & Allied Workers Union v Moloto NO & Another*[8] where the following was said at paragraph 88:

“The argument that it is crucial for the employer to glean from the strike notice how many employees may be involved in the strike is discounted by the decision in CWIU, where the Labour Appeal Court held that a single strike notice by a union, in respect of a dispute that affected only certain of its members, was nevertheless sufficient to allow other members of the union, not so affected, to join the strike. The Labour Appeal Court again confirmed this in Early Bird Farm. We agree with these decisions”.

33. It deserves to be emphasized that this entitlement does not exist without a qualifying question, that is, whether the strike in question is protected. As pointed out above, the fairness of the dismissal in this matter specifically rests, inter alia, on whether the strike called by WAU was protected. The answer to this question appears herein below.
34. What is of great importance for the determination of this matter, is the identification of the underlying issue in dispute which in terms of section 213 of the LRA is defined as follows:

“‘issue in dispute’, in relation to a strike or lock-out, means the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out.”

35. It is therefore of paramount importance in any strike-related matter that the issue in dispute be clearly identified[9] as it is a critical point for the determination of the dispute. In *Dunlop South Africa v Metal & Allied Workers Union*[10], the Court formulated an important question to be answered to establish what the issue in dispute is. The Court had the following

to say at page 169:

“It seems to me, having regard to the definition of ‘strike’, that the words in s 65(1) ‘the matter giving occasion for the strike’ refer to the refusal or failure of an employer to agree to or to comply with demands or proposals of the employees or these representing them. In order to determine what the matter is in respect of which application was made for the establishment of a conciliation board, one has to determine what demands or proposals had been refused or not agreed to and which refusal or failure formed the subject-matter of the application.

36. In *Ceramic Industries Ltd v t/a as Betta Sanitaryware v National Construction Building & Allied Workers Union (2)*[11] the Court had this to say at 703:

“Even if the issue in dispute is not articulated as a substantive complaint coupled with a specific demand, but rather in the form of a complaint about the refusal of a specific demand itself, the position would not change. The refusal of a demand, or the failure to remedy a grievance, always needs to be examined in order to ascertain the real dispute underlying the demand or remedy. The demand or remedy will always be sought to rectify the real, underlying, dispute. It is the nature of that dispute that determines whether a strike in relation to it is permissible or not.”

37. In this instant matter, nothing came out in evidence to suggest that the changes that led to a re-arrangement of working hours were in violation of the employees’ contractual terms specifically governing shift scheduling. In *SA Police Union v National Commissioner of SA Police*[12] the Court held that in the absence of a contractual term entitling employees to a specific shift pattern, the re-arrangement of shifts cannot be regarded as a unilateral change to the terms and conditions of employment but a work practice. The Court at paragraph 84 had this to say:

[84] ...In short, it was not a term of the contract of employment that employees working 12-hour shifts would always be entitled to do so. Without express, implied or tacit contractual rights to such effect, the employees do not have a vested right to preserve their working times unchanged for all time. The alteration of shifts does not result in the employees being required to perform a different job thereby entitling them to claim a material breach or alteration in the supposition of the contract. The change in timing does not amount to a change in the nature of the job. The shift system was accordingly merely a work practice not a term of employment.

38. In *Johannesburg Metropolitan Bus Services (Pty) v SAMWU*[13] the Court did not find any unilateral change of terms and conditions of employment upon the employer implementing the changes in the scheduling of shifts. This particular changes were about the starting and ending times of shifts with no change to the number of hours to be worked per shift. The Court concluded in paragraphs 40 and 41 as follows:

40. “In the case before me, SAMWU has not been able to point to any term contained in a collective agreement or in the bus drivers’

contracts of employment that accords them a vested right to a specific shift schedule. They have vested rights with regard to maximum working hours; and the right to pick shifts according to seniority. These rights have not been changed or infringed.

41. The changes implemented by Metrobus comprise no more than a change in work practice. It does not amount to a unilateral change in the bus drivers’ terms and conditions of employment. Therefore, the trade unions representing the drivers do not have the right to strike over a unilateral change to terms and conditions of employment in terms of section 64 (4) of the LRA.”

39. The applicant's reliance on a referral of a dispute in terms of section 64(1) followed by the issuing of the certificate of outcome and a 48-hour notice cannot in all circumstances be the sole determinative measure on whether the strike is protected or otherwise. Unilateral change to the terms and conditions of employment gives rise to a dispute of mutual interest which is a strikable issue. Having considered the substance of the dispute rather than its form, the change of shift patterns that are not governed by contractual terms does not create a unilateral change of terms of conditions of employment. The strike embarked upon by the applicants cannot under the circumstances enjoy protection, it is thus unprotected.
40. It does not end here. Even if the dispute referred to conciliation was genuinely of mutual interest, the facts of the matter clearly revealed that the dispute that led to the issuing of the certificate of outcome is different from the dispute articulated in the strike notice. What appears in the strike notice is nothing, but a spontaneous issue triggered by the suspension of a single employee who was a shop steward.
41. The factual enquiry to establish what the issue in dispute is, is articulated in Dunlop decision referred to above. This leaves the Court with one option, that is, to prefer the version of Mr Mazwi over that of Mr Motlhabane. Mr Motlhabane's evidence is littered with inconsistencies and improbabilities on this point. According to his strike notice, the reason for the strike was the suspension of Mr Mabusela. In a swift turn of things, he came up with a version that it was impossible for the Rustenburg employees to go on strike because they were all suspended. This is certainly crucial for the determination of the issue in dispute. The suspension of an employee or employee(s) does not give rise to a dispute of mutual interest but a dispute of right. This on its own, renders the strike unprotected as the grievance arising out of this issue was not referred to conciliation, and obviously no certificate of outcome was issued.
42. In *SMCWU v Brano Industries (Pty) Ltd*[14] the Court found that:
- ".....The mere fact the employer took legitimate disciplinary steps against the shop steward precipitated the strike. The employer's conduct cannot be banded as unjustified".*
43. As pointed out above such a grievance cannot by any account lead to a grievance giving rise to an interest dispute. It is certainly a dispute of right that employees may assert through arbitration or referral to this Court in terms of the Labour Relations Act or any other law[15].
44. On this note, the strike embarked upon by the employees of the respondent in Rustenburg, Koster, Lichtenburg and Swartruggens branches is without doubt unprotected. The employees' participation in such a strike is in no doubt misconduct. However, it does not automatically follow that dismissals consequent to participation in an unprotected strike when adjudicated upon will result in a decision pronouncing such dismissals fair. It is upon this Court to make a determination on whether the dismissal of the applicants by the respondent is fair based on the merits of this case.

45. In *Nkutha v Fuel Gas Installations (Pty) Ltd*[16], the Court took note of item 6(1) of schedule 8 and held as follows:

“Item 6(1) of schedule 8 to the Act states that participation in a strike that does not comply with the provisions of Chapter IV of the Act, that is, an unprotected or unlawful strike (such as the strike in casu) is misconduct. However, such misconduct does not always deserve or justify the dismissal of the strikers concerned. The substantive fairness of such dismissal is to be determined in the light of the facts of the case, including factors such as the seriousness of the contravention of the Act, attempts made to comply with the Act and whether or not the strike was in response to unjustified conduct by the employer”.

46. The Labour Appeal Court restated this position in *NUM obo Employees v CCMA*[17] at paragraph 22 as follows:

- [21] However, the unprotected nature of this strike is not a license to dismiss without a careful consideration of the surrounding circumstances. In determining whether those workers who participated in an unprotected strike should be dismissed, a number of considerations must be part of the decision. Item 6(1) of the Code of Good Practice provides as follows:

“(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissals 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.”

47. The Applicants’ case, both on pleadings and oral evidence reveals an attempt to comply with relevant strike procedures in light of the referral of the dispute of unilateral change to terms and conditions of employment, followed by the issuing of the certificate, and the issuing of a 48 hours’ strike notice. It is not in dispute that the strike took place in four branches identified above. The applicants believed that the strike was protected.

48. It appears that there was an attempt to settle the dispute prior to and during the unprotected strike[18]. The union did not call the strike soon after the issuing of the certificate of outcome because they allowed time for the respondent

to reconsider its position. Furthermore, in its strike notice of 23 October 2014 the union indicated to the respondent that it was still available to negotiate about the issues, but to no avail. The parties reached an agreement about further engagement on the matter and it was made a Court order on 28 October 2023.

49. Without exploring such measures of resolving the dispute, the respondent elected to disregard the fourth order of the court order. The Respondent did not meet the applicants' union to attempt to resolve the issues between them, despite having agreed to do so. Instead, within the space of two days of the granting of the Court order, the respondent instituted mass disciplinary hearings. With such a situation prevailing, I strongly align myself with what was held in NUM v Marievale Consolidated Mines^[19] where the following was said:

“On evaluating the company's actions the following emerges:

The company appeared to be solely concerned with the lawfulness of its actions and paid little or no heed to the fairness thereof.

The failure to direct its concerns to the fairness of its actions was consequently in the circumstances of this case not conducive to generating conciliatory or sound industrial relations”

50. The unprotected strike was of short duration. In Rustenburg it commenced on 25 October 2014 and ended on 30th October 2014 when the Rustenburg striking employees returned to work in compliance with the Court order of 28 October 2014. The employees in three other outlets commenced striking on 27 October 2014 and ended on 30 October 2014 when they also returned to work in compliance with the very court order.
51. There is no evidence that the unprotected strike was not peaceful. The respondent did not dismiss the applicants for a reason related to their conduct during the unprotected strike, such as acts of violence, damage to property, etc. It dismissed them for a reason related to an act of having participated in the unprotected strike.
52. The cumulative facts of the matter raise exceptional circumstances which the Court should consider on whether the employees who are dismissed for participation in the unprotected strike deserve the Court's sympathy. This can however not extend to all employees. The circumstances of the employees in Rustenburg are distinguishable from those in Koster, Lichtenburg and Swartruggens. The evidence of Mr Mazwi that they started the strike action and declared that they were not going to take up their posts until Mr Mabusela was reinstated remained undisputed. This happened before the strike notice was issued. I do not find a reason why the dismissal of the Rustenburg employees should be found to be unfair. This does not include Mr Mabusela whose assessment of his case is separately discussed hereunder.
53. With regard to three other stores, the evidence of Mr Mazwi was also clear to the effect that they only started the strike on 27 October 2014. That was after the issuing of the strike notice and after the expiry of the 48-hour period. Furthermore, the strike was of extremely short duration in their case. In this regard, I find the dismissal of applicants from Koster, Lichtenburg and Swartruggens to be substantively unfair. They are therefore entitled to relief.

54. Mr Flanagan's evidence that the operational difficulties in which the respondent finds itself could not be disputed by the applicants. This certainly renders reinstatement impractical. The only relief to consider is compensation. I have to seriously take into account that the applicants did not come to this Court with clean hands. They cannot in all fairness get substantial relief for the unfair dismissal which they have partly contributed to. Compensation equivalent to three months' remuneration will under these circumstances be appropriate.
55. In so far as the procedures are concerned, it deserves mention that the applicants were summoned to a disciplinary hearing, with the assistance of the union official, Mr Motlhabane, they undermined the disciplinary processes by not participating in the disciplinary proceedings. They did not put their side of the story to the disciplinary hearing chairperson, thus waiving their right to be heard. While it is open to the employee to attend or to refuse to attend the enquiry, the consequence of refusal to attend is that the enquiry will proceed in his/her absence and any subsequent decision, such as dismissal, cannot be said to be procedurally unfair on this ground alone. I therefore find the dismissal of all the applicants, save the shop steward (Mr. Mabusela) to be procedurally fair.
56. There is one other issue that the Court is faced with. It is a proven fact that the strike was precipitated by the suspension of a single employee, Mr Mabusela in the Rustenburg branch. Mr Motlhabane tried so hard to suggest that the entire workforce in Rustenburg was suspended, as a result, they could not be viewed as having gone on strike. It is already established that this version does not stick as the only employee who was suspended is the shop steward, Mr Mabusela. The respondent has not adduced evidence suggesting that Mr Mabusela's suspension was lifted prior to the commencement of strike action on 25 October 2014 or at any other time. The defence raised during Mr Motlhabane's testimony regarding suspension only applies to Mr Mabusela.
57. The respondent went on to charge Mr Mabusela with the misconduct of participation in the unprotected strike together with the entire workforce of the Rustenburg branch. The heading of the matter as recorded in the disciplinary hearing chairperson's outcome is captured as 'Mabusela, Lucas and 55 Others'. There were no separate charges preferred against Mr Mabusela in respect of the misconduct he allegedly committed prior to his suspension. The disciplinary chairperson's verdict was followed by a recommendation of dismissal which read as follows:
- "based on the above, I find all employees guilty as charged."* (my emphasis)
58. In *Ramotsepane & Others v Barmont Truck Hire (Pty) Ltd*[20] the Labour Appeal Court in a case bearing similar facts as this matter overturned the decision of the Industrial Court. The Court

effectively found the dismissal of three shop stewards for participating in an unprotected strike that took place after their suspension to be unfair labour practice. The underlying demands of the strike included the lifting of their suspension. The Court

ultimately awarded them a relief of reinstatement. To be precise, the Court had this to say at paragraph 85:

“As the three appellants were still on suspension, they cannot be said to have been on strike. This is so because a strike means collective refusal to perform work in circumstances where the employees are obliged to work. This matter is governed by the old Act. Accordingly the definition of “strike” contained in the Labour Relations Act, 1995, does not apply. The three appellants cannot be said to have been under an obligation to work during their suspension. That they were on suspension means that for the duration of the suspension, the respondent had released them from their contractual obligation to perform their work. The only time that these three appellants did not work was when they and other employees went to Mr Bubb on the 17th January. That was a very short time. The strike which the workers embarked upon at about 13h00 on the 17 January occurred after they had been suspended.

59. The facts in Ramotsepane are exactly the same as those of this matter in so far as Mr Mabusela is concerned. In the absence of evidence suggesting that Mr Mabusela committed the misconduct he was dismissed for, there is no reason why this Court should not arrive at the same finding made in Ramotsepane. Clearly, Mr Mabusela’s services were not required since he was suspended on allegations not related to the strike misconduct. He was found guilty and dismissed for the strike related misconduct which he did not commit. The Court cannot under these circumstances find any form of fairness to the dismissal of the applicant. The dismissal of Mr Mabusela is accordingly found to be substantively unfair.
60. In so far as the procedural fairness of his dismissal is concerned, Mr Mazwi clearly stated that he did stress a point to Mr Motlhabane that he was not obliged to consult with the union prior to suspending a shop steward. Item 4 of Schedule 8 was only applicable where the disciplinary hearing was to be instituted against a shop steward. It never came out from his evidence that he eventually consulted with the union at the time or prior to the commencement of the disciplinary hearing which resulted in Mr Mabusela’s dismissal. This is indicative of the respondent’s failure to follow procedures that were always within its knowledge and elected to ignore them. Mr Mabusela’s dismissal should in this regard be found to be procedurally unfair. In summary, the dismissal of Mr Mabusela is found to be substantively and procedurally unfair.
61. What flows from the above finding is Mr Mabusela’s entitlement to relief. In *Equity Aviation Services (Pty) Ltd v CCMA & Others*[21] gave a plain interpretation of section 193(2) of the Labour Relations Act and had this to say at paragraph 36:

“The ordinary meaning of the word “reinstate” is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions.⁴² Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers’ employment by

restoring the employment contract. Differently put, if employees are reinstated they resume balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.” 40 [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC); 2000 (2) SACR 349 (CC). 41 Id at para 24. 42 Consolidated Frame above n 38 at 798B-D. NKABINDE J 20 employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal.43 The ordinary meaning of the word “reinstatement” means that the reinstatement will not run a date from after the arbitration award. Ordinarily then, if a Commissioner of the CCMA order the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the Commissioner decides to render the reinstatement retrospective. The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee’s having been without income for that period was a direct result of the employer’s conduct in dismissing him or her unfairly”.

62. In *SACCAWU v Woolworths (Pty) Ltd*, the Constitutional Court emphasized that the exceptions to reinstatement are not just given; ‘the employer must lead evidence as to why reinstatement is not reasonable and the onus is on that employer to demonstrate to the court that reinstatement is not reasonably possible’[22].
63. There is no evidence tendered to suggest that the reinstatement of Mr Mabusela, in particular, is practically impossible. The lapse of a significant period between the date of dismissal and the date of the is no bar to making a reinstatement order[23]. That the Rustenburg store at which Mr Mabusela was based is now closed is a mere operational issue that the respondent should deal with in terms of the law. That he should not have been dismissed for participation in the unprotected strike far outweighs any suggestion of impossibility to reinstate him. There is no doubt that the purpose of reinstatement is to place a dismissed employee in a state of restoration of his contract of employment as if he was not dismissed. The operational issues which the respondent is faced with should be dealt with in terms of the law in respect of Mr Mabusela’s case. There is no reason why such primary relief should not be awarded to Mr Mabusela.
64. The last issue for determination is about costs. It is now a settled position that the rule that costs follow the order is not applicable in labour matters. I accordingly exercise my discretion and make no order as to costs.

Order

65. In the premises, the following order is made:
 1. The dismissal of Itumeleng Lucas Mabusela is found to be substantively and procedurally unfair.

2. The respondent is ordered to reinstate Itumeleng Lucas Mabusela with full retrospective to the date of dismissal and to pay his full back pay within 14 days of this order.
3. The dismissal of the Rustenburg applicants is found to be substantively and procedurally fair.
4. The dismissal of Koster, Lichtenburg and Swartruggens applicants is substantively unfair
5. The respondent is ordered to pay Koster, Lichtenburg and Swartruggens applicants compensation equivalent to three months' remuneration within 14 days of this order.
6. The claims of deceased employees who were not substituted by the representatives of their estates are dismissed.
7. There is no order as to costs.

MM BALOYI AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Adv. ZQ Majenge

Instructed by

D Tsoenyane Attorneys

For the first respondent:

Mr D Pretorius of Fluxmans Attorneys

[1] See footnote 6

[2]

(2000) 21 ILJ 2502 (LC)

[3]

[2001] 12 BLLR 1385 (LC)

[4]

(2022) ILJ 1331 (LAC) at para 38

[5]

(2015) 36 ILJ 677 (LC)

[6] Every employee has the right to strike and every employer has recourse to lock-out if- the issue in dispute has been referred to a council or to the Commission as required by this Act, and-

a certificate stating that the dispute remains unresolved has been issued; or ii. a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that- in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless-

the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or

the employer is a member of an employers' organisation .

[6] Every employee has the right to strike and every employer has recourse to lock-out if-

the issue in dispute has been referred to a council or to the Commission as required by this Act, and-

a certificate stating that the dispute remains unresolved has been issued; or

ii. a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that-

in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless-

the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or

the employer is a member of an employers' organisation

.

[7]

[2004] 25 ILJ 2135 (LAC) at para 37 and 44.

[8]

[2012] 12 BLLR 1193 CC

[9] See Platinum Mile Investments (Pty) Ltd v SATAWU [2010] 10 BLLR 1038 (LAC) at para 37

[10] [1985 6 ILJ 167 (D).

[11]

[1997] 6 BLLR 697 (LAC).

[12]

[2005] 26 ILJ 2403 (LC).

[13]

[2011] 3 BLLR 231 (LC).

[14]

[1999] 12 BLLR 1359 (LC) at para 47.

[15] See section 65(1)(c) of the LRA: No person may take part in a strike or loc-out or any conduct in furtherance of strike or lock-out if: (a).....
(b)..... (c) the issue in dispute is one that a party may refer to arbitration or to the Labour Court in terms of the Act or any other law.

[15] See section 65(1)(c) of the LRA: No person may take part in a strike or loc-out or any conduct in furtherance of strike or lock-out if:

(a).....

(b).....

(c) the issue in dispute is one that a party may refer to arbitration or to the Labour Court in terms of the Act or any other law.

[16]

[2002] 2 BLLR 178 (LC) at para 94

[17]

[2012] 1 BLLR 22 (LAC)

[18] NUMSA &Others v Elm Street Plastics t/a ADV Plastics (1989) 10 ILJ 328 (IC) at 335B

[19]

(1986) 7 ILJ 123 (IC) at 150 E-F

[20]

[2002] 6 BLLR 525 (LAC)

[21]

[2008] 12 BLLR 1129 (CC)

[22]

[2019] 4 BLLR 323 CC at para 50

[23] See SACCAWU v Woolworths at para 47

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