

SOUTH AFRICA / JUDGMENT

# NUMSA obo Dismissed Employees Listed in Annexure "A" v M and S Corrosion Sasolburg (Pty) Ltd (J507/2022) [2025] ZALCJHB 28 (24 January 2025)

[2025] ZALCJHB 28

## COURT

Labour Court Johannesburg

## BEFORE

Mahalelo

## CASE / FILE NUMBER

J507/2022

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IN THE LABOUR COURT OF  
SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J507/2022

## In the matter between:

NUMSA OBO DISMISSED  
EMPLOYEES LISTED IN  
Applicant  
ANNEXURE "A"  
and  
M&S CORROSION  
SASOLBURG (PTY) LTD  
Respondent  
Heard: 29 Jan –  
02 Feb 2024

## Delivered:

This judgment was handed down electronically by  
circulation to the parties' legal representatives by email and  
publication on the  
Labour Court's website. The date for  
hand-down is deemed to be on 24 Jan 2025.

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**JUDGMENT**

MAHALELO, AJ

**Introduction**

- [1] NUMSA referred a dispute to this court on behalf of its members (the applicants). The applicants were dismissed on 21 May 2021 after being found guilty on several charges of misconduct, all of which had their origin in an unprotected strike that occurred on 6 March 2021. Following their dismissal, the applicants pursued on a variety of grounds against the respondent, ultimately ending up in the Labour Court. In a statement of claim filed on 6 January 2022, the applicants contended that they embarked on a protest march in terms of the Gatherings Act, 205 of 1993 on 6 March 2021 against the respondent's decision to dismiss its employees without having complied with the requirements of section 189(3) (a) to (j) of the Labour Relations Act[1]. A further issue raised by the applicants was that the respondent did not at any point give the employees and/or their trade union an ultimatum that they were embarking on an unprotected strike and that they would be dismissed should they not refrain from participating in the protest march.
- [2] The respondent opposed the claim. It contended that the section 189(3) notice clearly indicated that the employees as well as the union were invited to consult with the respondent and further to this the respondent had arranged a formal meeting with the union official to take place on 10 May 2021. The respondent further says that the shop stewards and staff were informed that any protest action will be unprotected in terms of the Labour Relations Act and that employees will be disciplined if they partake in unprotected industrial action over and above the principle of no work no pay. With regards to the issue of ultimatum, the respondent submitted that the group of protesters included a large group of people not employed by the respondent. The union was not present at the gathering and the memorandum of grievances was handed to the respondent by a representative of the Economic Freedom Fighters (EFF) Labour desk, as such the employees created a situation where the union was not involved, and the respondent gave verbal ultimatums to the recognised shop stewards to convey to the workers to refrain from the work stoppage.
- [3] When the matter came to trial, the other disputed issues as appears on the pleadings and the pre-trial minutes were disposed of by agreement between the parties as a means to further limit the issues. What thus remained for determination was whether the dismissal of the applicants was substantively fair. In particular, the court is required to determine (1) whether the dismissal was a fair sanction to impose on the individual applicants, and (2) whether the respondent issued a proper ultimatum to the striking employees.

## Background

- [4] The applicants approached the EFF Labour desk on 30 April 2021 regarding the alleged grievances they had with the respondent. The EFF Labour desk then informed the respondent that it received permission for a protest march in order to hand over their demands to the respondent.
- [5] On 5 May 2021, the respondent called its workforce stationed at the Natref site, being the applicants to discuss the issue of the protest march.
- [6] On 6 May 2021, the dismissed employees embarked on an unprotected strike, their grievances were, amongst others, the respondent's non-payment of their annual leave, the respondent's non-payment of their leave enhancement pay, the respondent's sporadic deductions of their UIF and provident fund, the respondent's implementation of short time without consultation and the respondent's then contemplated retrenchments.
- [7] On 11 May 2021, the dismissed employees were issued with charge sheets inviting them to disciplinary hearings where they were charged with three counts of misconduct namely: (1) unauthorised absence from work, (2) gross insubordination by failing to carry out an instruction given by a member of management wherein breaking the trust relationship between employer and employee and (3) participating in an unprotected strike.
- [8] On 13 May 2021, the dismissed employees attended disciplinary hearings and on 21 May 2021 they were issued with termination letters.

## The Respondent's case

- [9] The respondent adduced evidence from four witnesses in support of its case. Mrs De Villers the IR Clerk testified that she received a notice of the protest march from the EFF Labour desk on 5 May 2021 notifying her of a protest march planned for 6 May 2021. She proceeded to inform Andre Claassens, the site manager of the situation and all shop stewards were called to ascertain the legitimacy of the correspondence received from the EFF Labour desk. The shop stewards confirmed that the applicants have approached the EFF Labour desk with their grievances for assistance. She proceeded to tell the shop stewards that the applicants did not have a permit to go on strike and that if they proceeded with the march, they would take a disciplinary hearing which could lead to their dismissal since their staying away from work would constitute an illegal strike. She requested the shop stewards to take the message to the applicants and upon their return, the shop stewards informed her that the staff "would bear the consequences". After receiving a message from the shop stewards she again explained that it would be an illegal strike in accordance with the Labour

Relations Act and requested that the shop stewards again ask the applicants to reconsider their intended action and the response she received was that the applicants would continue with the protest action. The applicants participated in the march on 6 May

2021. At the time of the march, the applicants had valid written warnings for participating in an unprotected strike regarding the events of 31 October 2019. She was part of both the disciplinary hearings. The employees in the first hearing were represented by shop stewards. During the disciplinary proceedings, the applicants failed to challenge the evidence presented by the respondent in respect of the verbal ultimatum given as well as the evidence she presented that the response she received from the shop stewards was that the employees “would bear the consequences” of their participation in the unprotected march. She testified further that all the staff are annually inducted in terms of the company disciplinary code and that each is issued with a booklet that not only contains the disciplinary code but also other procedures and policies which they get to keep.
- [10] Andre Claassens testified that he received information from Ms De Villiers about the notice from the EFF Labour desk. He called a meeting with the shop stewards where he and Ms De Villiers told the shop stewards that their march was illegal and could lead to dismissal. He told the shop stewards to go and speak to the applicants and inform them of such. The shop stewards came back with the response that the workers said they would continue with the march and that they would bear the consequences. On 6 May 2021, the workers took part in the unprotected strike action.
- [11] He issued them with notices of disciplinary hearings on 11 May 2021. He was a witness in the disciplinary hearing for the applicants who were not shop stewards. The applicants did not challenge his evidence that they were given a verbal ultimatum and that they responded to the shop stewards that they would bear the consequences.
- [12] Vidian Gerber, the chairperson of the disciplinary hearing for the applicants who were not shop stewards testified that at the start of the disciplinary proceedings, he asked if any of the employees would like their hearing to be held separately or if they needed additional time to prepare. The employees responded that they would continue and that the hearing should be done as a collective hearing. After the evidence of Ms De Villiers and Mr Claassens, he was satisfied that the employees were given an ultimatum because there would have been no other reason for the shop stewards to have gone to the employees and reported back that the employees said they would bear the consequences.
- [13] The fourth witness for the respondent Mr De Fries, testified that he was the chairperson of the disciplinary hearing for the shop stewards namely Serame, Hlongwane and Simelani. They were represented by a Union official. During the hearing, they disputed that they were given an ultimatum because it was not in writing and was not clear and unambiguous. He rejected their version and found them guilty of the charges levelled against them because the totality of the evidence showed that they did not obey instructions and that the strike was illegal.

The Applicant’s case:

[14] The applicants led the evidence of two witnesses in support of their case. The first witness was Mr Boy Khoza. He testified that he was a shop steward between 2014 and 2015. He worked with his sister's son at the respondent. He had attended only one training. He was not at work on 5 May 2021 because the roads from where he resides were blocked and there was no public transport. On 5 May 2021, he received a call from his sister's son that the protest was still proceeding the following day. His sister's son would have alerted him to an ultimatum if there was any given by the respondent. On the day of the protest march, he was part of the protestors as he had been collected by a colleague who had a car. The protest march was held at the respondent's head office. On the day of the protest march, there was no ultimatum issued by the respondent. Instead, the respondent accepted the worker's memorandum of grievances. He had no permission to be absent from work on 6 May 2021. He was elected by the dismissed

employees to present evidence at these proceedings.

[15] With regard to the final written warning issued to him by the respondent in 2019, he denied knowledge thereof and stated that the workers did not embark on any industrial action then. They came to work and discovered that their access cards had been revoked because someone had phoned one of the clients of the respondent and threatened them. The respondent conducted investigations and thereafter reinstated their access.

[16] Mr Mokoena testified that he was a shop steward at the time of the protest march on 6 May 2021. They were called by Ms De Villiers on 5 May 2021 and told that the respondent had received a notice of the march from EFF. She further told them that they would be at the head office to receive the memorandum. Ms De Villiers did not issue out an ultimatum to them. Thereafter they went to the workers to tell them that the protest march would still continue the following day. On the day of the protest march, the respondent did not issue an ultimatum but instead accepted the memorandum of grievances. During the disciplinary hearing, the employees did not raise the issue of the ultimatum. He did not have any previous written warning for participating in an unprotected strike.

### Applicable Legal Principles

[17] The legal principles to be applied in a dispute such as the present are well established. The Labour Relations Act makes a distinction between protected and unprotected strike action. The consequences of a protected strike action carry an immunity against dismissal whereas unprotected strike action does not, this does not mean that unprotected strike action carries with it an automatic penalty of dismissal, any dismissal must be substantively and procedurally fair.

[18] Item 6 of the Code of Good Practice: Dismissals, provides that participation in an unprotected strike is an act of misconduct and just like any other misconduct participation in an unprotected strike does not always deserve dismissal. In determining the substantive fairness of a dismissal all relevant facts must be considered, including the seriousness of the contravention of the Labour Relations Act, attempts made to comply with the Act, and

whether or not the strike was in response to unjustified conduct by the employer. Item 6 of the Code of Good Practice further requires that the employer is to discuss the ultimatum in clear and unambiguous terms prior to dismissal and that the employees be afforded sufficient time to reflect on the ultimatum and that the employer should at the earliest prior to dismissal contact a trade union official to discuss the course of action that it intends to adopt.

- [19] The code further requires that in a determination of whether the dismissal is fair, consideration should be had whether the employees contravened a rule, whether the rule was reasonable, whether the employee was aware or could reasonably be expected to be aware of the rule, whether the rule had been consistently applied and whether the dismissal was the appropriate sanction.

## Analysis

and conclusion

- [20] I deal first with the issue of the failure of the respondent to issue out an ultimatum to the applicants. There are conflicting actual accounts in respect of this issue. I will follow the approach laid down in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and others*[2] in the resolution of competing factual accounts. Mr Khoza testified that he was not at work on 5 May 2021. His evidence regarding whether the respondent gave the employees a verbal ultimatum on the 5 May 2021 is hearsay and cannot be accepted by the court. With regards to the evidence of Mr Mokoena, he conceded during questioning by the court that there was no dispute on the part of the applicants in relation to the version presented by Ms De Villiers and Claassens in the disciplinary hearing pertaining to the ultimatum and the response from the employees.

- [21] The issue of an ultimatum is dealt with in Item 6(2) of the Code of Good Practice referred to above. Applying this provision the court in *Mndebele and Others v Xstrata South Africa (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)*[3] held as follows:

‘The code does not suggest how the ultimatum should be distributed, or require that it should be in writing. Furthermore, it states that the issuing of an ultimatum is not an invariable requirement. The purpose of an ultimatum is not to elicit any information or explanations from the employees to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not. The ultimatum must be issued with the sole purpose of enticing the employees to return to work, and should in clear terms warn the employees of the folly of their conduct and that should they not desist from their conduct they face dismissal. Because an ultimatum is akin to a final warning, the purpose of which is to provide for a cooling-off period before a final decision to dismiss is taken, the audi rule must be observed both before an ultimatum is issued and after it has expired...’

[22] The evidence presented by the respondent's two witnesses, Ms De Villiers and Mr Claassens shows that the respondent issued a verbal ultimatum to the shop stewards and requested them to convey it to the applicants which ultimatum clearly indicated that if the employees did not report for duty and participated in the illegal strike, disciplinary hearings would be held against them which may result in their dismissal. The shop stewards play an important role within the Union structures, they represent members and negotiate on their behalf. Ms De Villiers and Mr Claassens did not communicate with the shop stewards once on 5 May

2021. The verbal ultimatum was conveyed twice to the shop stewards who went to address the applicants at the lay-off area and came back with the response that the workers would bear the consequences and that they would still continue with the protest march the following day.

[23] The applicants did not report for duty the next day despite the ultimatum. They participated in the illegal strike. In all of the circumstances outlined above, it is not possible to say that the applicants did not receive a proper ultimatum. Over the period of the previous day after they were given the ultimatum, the applicants were given time to consider their position, which in my view must be more than enough time. In my view, the applicants clearly knew that the respondent viewed their conduct as unlawful and would take disciplinary action against them.

[24] Applying the ratio in *Xstrata Alloys (Rustenburg Plant)*, the court in *AMCU obo Sibiya and Others v Shanduka Coal (Pty) Ltd*[4] held:

'The Employees' contentions that the ultimatum was unclear on the basis that they were simply informed that they should desist from the strike immediately and return to work is without merit. In line with what Murphy AJA had stated in *Mndebele & Others v Xstrata South Africa (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)*, the mere fact that the ultimatum was issued, and the Employees were told on no less than three occasions that they should desist from their actions and return to work failing which consequences would follow was more than sufficient...'

[25] I align myself with these views. I am therefore satisfied that despite there being no written ultimatum, the applicants were clearly

warned that what they intended to do was illegal and that they faced disciplinary action as a result. The applicant's case of not having received an ultimatum or a proper ultimatum thus falls to be rejected.

[26] Be that as it may, the Code affirms earlier law where the illegality of the strike did not automatically result in the dismissal of unprotected strikers. See, for example, *Betha v BTR Samcol (A Division of BTR Dunlop (Ltd))*[5]. The key question therefore is whether, in this case, dismissal was justified. The applicants contended that the respondent under the circumstances of this matter, was required to apply progressive discipline. As already stated, the applicants participated in an unprotected strike action and refused to report for duty despite being instructed to do so. This is a clear misconduct. They acted in clear breach of

the LRA in striking because they were informed of the date of the meeting which was to take place between their union representatives and the respondent to resolve whatever issues that they had with the respondent. The applicants chose to run to EFF abandoning their union officials. They applicants had alternative remedies in terms of the LRA. They were given an ultimatum to return to work the following day. They had sufficient time to reflect. Despite all this they chose to proceed with the unprotected strike. As a matter of principle, they committed a misconduct which is of a kind sufficiently serious to place in the realm of a dismissible offence. Taking into account all the facts and circumstances of this case, there is no alternative sanction to dismissal that is indicated in this case.

[27] For the reasons given above, the dismissal of the applicants is found to be substantively fair. The applicants' claim therefore stands to fail.

#### Costs

[28] Regarding costs, the requirements of law and fairness dictate that there should be no order as to costs.

[29] In the result, I make the following order:

#### Order

1. The applicants' claim is dismissed.
2. No order as to costs.

B. Mahalelo

Acting Judge of the Labour Court of South Africa

#### Appearances:

For the Applicant: Mr Sello Mogare Instructed by: NUMSA For the Respondent: Mr Nico Van der Westhuizen Instructed by: SST Attorneys Inc

- [1] Act 66 of 1995, as amended.
- [2] 2003 (1) SA 11; [2002] ZASCA 98.
- [3] (2016) 37 ILJ 2610 (LAC); [2012] ZALCJHB 87 at para 27.
- [4] (2017) ZALCJH13 134 at para 61.
- [5] 2 (1998) 19 ILJ 459 (SCA)

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Prepared on 14 October 2026 · Esheria