REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 26/11

In the matter between:

VECTOR LOGISTICS **Appellant**

and

MICHAEL LENCOANE AND 75 OTHERS **Respondent**

Heard: **21 February 2013**

Delivered: **04 October 2013**

CORAM: WAGLAY, JP et TLALETSI, ADJP et COPPIN, AJA

JUDGMENT

TLALETSI JA

Introduction

[1] This is an appeal directed at the judgment of the Labour Court (Nyman AJ) in which it dismissed the appellant's special plea on 15 September 2010 as well as its judgment and order which was handed down on 20 October 2010. The judgment concerned an alleged unfair dismissal of the respondents by their erstwhile employer, the appellant. The respondents had approached the court in that regard.

[2] The Labour Court ruled in favour of the respondents by dismissing the special

plea raised by the appellant challenging its jurisdiction to deal with the dispute regarding ten (10) of the respondents. In respect of the merits, the Labour Court held that the dismissal of all the respondents was both substantively and procedurally unfair and made orders in the following terms:

> '(a) The applicants' dismissal by the respondent is hereby declared to have been unfair as contemplated by section 188(1) of the Labour Relations Act 66 of 1995.
>
> (b) The respondent is ordered to reinstate the 61 applicants to the positions they held in its employment immediately before their dismissal on 21 April 2005.
>
> (c) The order in (b) above is to operate with retrospective effect to 7 May 2010.
>
> (d) The respondent is ordered to reinstate the additional 9 applicants numbered 65, 66, 67, 69, 70, 71, 72, 73, and 74 to the positions they held in its employment immediately before their dismissal on 20 April 2005.
>
> (e) The order in (d) above is to operate with retrospective effect to 8 May 2010.
>
> (f) The respondent is ordered to pay to the substituted applicants numbered 4, 70, 68, 55, 48 and 6 an amount of compensation equivalent to 12 months' pay.
>
> (g) No order as to costs.'

[3] The appellant was granted leave to appeal to this Court on petition after leave to appeal was refused by the Labour Court.

Background

[4] The issues presented in this appeal fall to be determined in the context of the following background which is, unless otherwise indicated, common cause. The appellant transports frozen and fresh food to retail outlets, restaurants

and fast-food outlets. It has four branches.[1] The present matter concerns only its Roodepoort branch. The respondents were all employed by the appellant either as drivers, or van assistants. Their engagement dates varied from the late 1960's to about 2003.[2]

[5] During 2003 and the subsequent year, the appellant sought to engage its employees through their trade unions on its operational need to change the morning starting time from 06h45 to 05h45. It is important to note that some of the employees had their starting times stipulated in their contracts of employment. Due to disputes about the representation of the trade unions, the process was stalled for long periods, but came to a head in 2005.[3]

[6] On 25 January 2005, Rin de Wet ("de Wet"), who was at the time employed by the appellant as its General Manager –Inland Operations, issued an internal memorandum to all staff stating, *inter alia*, that the appellant would like to move forward with the consultation process regarding the changes that were required by business in the delivery services trade. The memorandum stated that the appellant needed to communicate with recognised employee' representatives so that it could engage in effective communication and not with individuals "who are not recognised as a result of disciplinary outcomes".[4]

[7] On 14 February 2005, a further memorandum was issued to the staff regarding representation. It recorded that a balloting process that was to take place to elect employee representatives to facilitate effective communication process between management and the employees did not take place, resulting in there being no formal communication links with the employees. The memorandum concluded that "[m]anagement is therefore forced to

[1] Central collective bargaining took place at the Inland Bargaining Unit made up of representatives from the Nelspruit, Polokwane, Klerksdorp and Roodepoort branched. The Wage Agreement that was in place at the time of dismissal of the respondent was concluded on 14 October 2004 and was in operation for the period 1 July 2004 to 30 June 2005.

[2] Appellant acquired the business of Irvin and Johnson through a section 197 transfer.

[3] The reasons provided by the respondents for the change in the starting times were, *inter alia*, to reduce returns, Provincial legislation and to enhance better customer service. The employee representatives at the time made proposals to address the returns to management.

[4] It transpired during the trial that the appellant did not approve of some of the employees representing the employees.

implement any business changes without consultation."[5]

[8] On 17 February 2005, the appellant issued another memorandum stating that attempts to have employee representatives elected had failed and that it was obliged to change the starting time of the respondents from 06h45 to 05h45 with effect from 7 March 2005 due to challenges it faced in the industry.[6] The memorandum stated further that the employees who had difficulties with coming to work earlier should discuss their problems with their union officials. The union officials were in turn requested to assist the employees by collating reported problems and to report them to management within 10 days of the notice. Management would thereafter consult with affected employees/union officials and jointly explore the possibility of overcoming any serious problem that existed.

[9] On 4 March 2005, a meeting was held between appellant and union representatives. The minutes of this meeting were recorded by Mr Franklin Oosthuizen ("Oosthuizen") who was the appellant's Human Resources Manager at the time. Among the issues discussed at this meeting was the new starting time. The minutes reflect *inter alia*, that the following was stated by Mr Percy Maphumulo ("Maphumulo") and Rin De Wet:

> 'PM: As we indicated to you guys, time is against us and we need to implement this new starting time as soon as possible. What we propose is that we meet next week Friday 11th March 2005 to sort out whatever issues are still outstanding with the starting times. We will also discuss the implementation of the new starting times. You as the Union will have seven days from today to come up with any outstanding issues with regard to the starting times. You can send your concerns to us during the week and we will investigate, and it can then be addressed at our meeting on the 11th March

[5]The respondents claim that the employees held a meeting to elect representatives that could negotiate with management. However the meeting was disrupted by management. The appellant also suggested that a ballot be conducted so that employees could identify representatives that would consult with management.

[6] The challenges that the appellant faced were inter alia that it was operating in a fiercely competitive business environment and had to "stay ahead of the pack" to ensure survival; customers were no longer prepared to accept late deliveries; its failure to respond to the need for early deliveries was adding an estimated R1 million per year to its running costs; it could not continue to carry on absorbing these costs or upsetting its customers without losing customers and endangering employees' job security.

2005.

MP: With whom can we communicate to raise our concerns?

RD: All your concerns can be directed to me personally.'[7]

It is common cause that the trade unions had concerns regarding the change in starting time. They also presented suggestions for consideration rather than changing starting times. They indicated *inter alia*, that it would not help for the trucks to arrive early when the retail stores, which were to receive the goods, opened late; that the introduction of appointment deliveries be considered and that "routing" was a problem in itself.

[10] On 11 March 2005, a further follow-up meeting was held where the employee representatives tabled five points for discussion which impacted on the new starting time. The issues raised were that one of the competitors had provided more van assistants; that an incentive be given to drivers who took out a second delivery; that they wanted to know what would happen in the event of a truck not being ready to depart at the new starting time due to loading problems; concerning the effectiveness of the Manual for Road Show procedures and that the employees encountered problems in getting transport to work early in the morning. Management responded to each item raised by the employees. On the issue of change of starting time, the minutes reflect the following:

'Regarding communication of the new starting times, it was agreed that the shop stewards would brief their members verbally on Monday 14 March 2005. If any individuals had specific problems, the shop stewards were to report to Mr de Wet. Management would confirm the starting time change in an official communiqué that would be placed on all the notice boards on Tuesday 15 March 2005.

Implementation of the new 05:45 starting time system was confirmed as Thursday 31 March 2005.

The meeting then closed.'

[7] PM stands for Percy Maphumulo, MP for Moloko Phakedi and RD for Rin de Wet.

It must be stated that there is some disagreement about the accuracy of the above recording. Mmesi, who was one of the employee representatives at the meeting and who testified on behalf of the respondents, disputed that the minutes were a correct reflection of the meeting, because there was never an agreement reached on the new starting times. De Wet testified that agreement on the new starting time was reached on 4 March 2005. However, Oosthuizen, on the other hand, testified that an agreement on the new starting time was only reached at the meeting of 11 March and not at the previous meeting of 4 March 2005.

[11] On 8 April 2005, the appellant addressed a letter to all drivers and van assistants stating *inter alia* that:

> 'We confirm that it was agreed that Drivers and Van assistants' contracts of employment would change as from 31 March 2005, to accommodate the required new starting time of 05:45.
>
> The original date for implementation of the change was 7 March 2005, however at the meeting on 4 March 2005 between the union officials, management and workplace representatives, agreement was reached to postpone the starting time until 31 March 2005.
>
> On 31 March 2005 the drivers and Van assistants failed to report for work at the agreed 05:45 start time. Employees are advised that should the changed starting time not be effected from Wednesday 13 April 2004, disciplinary action will be taken which could result in termination of employees' contracts of employment.
>
> The union officials are requested to confirm by close of business of Tuesday 12 April 2005, that all affected employees will in fact be working in accordance with changed terms and conditions of employment. Should the necessary written undertaking not be received, we will take alternative measures to ensure that deliveries are made to our customers timeously.'

Copies of this letter were also sent to the unions.

[12] It appears that, shortly thereafter, or on the same day, the South African Food and Allied Trade Union (SAFATU), which was one of the recognised trade

unions at the appellant, replied to the above letter of 8 April 2005. The letter stated, *inter alia,* that,

> 'Meetings between the parties did take place and proposals and inputs were sought from labour to resolve the issues at hand. The new starting time was one of the items in the meetings. Labour responded with constructive proposals in writing to the employer, but has not received any feed back from same, as this would have culminated in an all inclusive agreement.
>
> We believe that the employer is disregarding the labour inputs and hereby distance ourselves from the contents of your facsimile as there has never been an agreement between the parties.
>
> However we believe that the matter can only be resolved by the parties and hereby propose an urgent meeting for the 14 April 2005 at 05:30 in the company premises.'

It is not disputed that the appellant did not respond to this letter.

[13] On 13 April 2005, the respondents again failed to comply with the ultimatum and 65 of them were issued with identical final written warnings. The notice, "Disciplinary Action Form" recorded the misconduct as "on-going refusal to obey lawful instructions to comply with the operational need for transport staff to start work at 05:45, in order to meet our customers' demands for timeous delivery of their orders". The respondents were directed to leave the workplace and to either report the next day at 05:45 or face dismissal.

[14] The 65 employees responded by lodging an appeal to the appellant against their "convictions" on misconduct and the final written warning against them. They also complained that they were denied access to the premises by the appellant. The grounds of appeal against their alleged misconduct conviction were, *inter alia*, that they were not served with any notification for the disciplinary hearings against them; that there was no agreement regarding the new starting time; that the actual disciplinary inquiries against them were not held; and that they were not given an opportunity to present their cases.

[15] On 13 April 2005, appellant's attorneys wrote to the trade unions (SAFATU

and FAWU) calling upon them to intervene and to provide them with a written undertaking by 16h00 that day to the effect that their members would, with effect from 14 April 2005, commence work "as agreed at 05h45" failing which an urgent order would be sought from the Labour Court to direct their members to commence work "at the agreed starting time of 05h45" and, further, that a punitive costs order would be sought against the unions and its members. The letter concluded by stating that disciplinary action would also be instituted and the policy of "no work, no pay" would also be applied.

[16] On 13 April 2005, the two unions replied to the appellant's attorneys' letters. They informed them that they were unable to respond to the issues raised in the letter as they still had to consult their members first, which they were unable to do under the circumstances. They mentioned further that they had submitted proposals to the appellant at the two meetings that they had with its representatives (concerning the starting time) and had not received any response. The letter set out a detailed response with reasons to the instruction that they start work at 05h45. They further accused the appellant of instituting a lockout by turning the employees away from their workplace.[8] They further complained that the appellant had unilaterally changed the working conditions of the employees. The unions demanded that the lockout be discontinued and that negotiations with the employee representatives be resumed. They further denied agreeing to the new starting time.

[17] On 15 April 2005, the appellant served its application for urgent relief on the respondents. The application was heard on 18 April 2005. The Labour Court (per Revelas J) issued a *rule nisi* returnable on 5 May 2005. It is common cause that 10 of the respondents were not cited as the respondents in the said application. On 18 April 2005, the appellant's attorneys sent a letter to the unions and the employees referring to the court order calling on them to commence work at 05h45 with immediate effect by 19 April 2005 failing which they would face dismissal.

[8]They reiterated that there was no agreement on the new starting time and as such have not refused to "obey instructions". That the starting time was not an operational need but a calculated strategy by the appellant to strengthen its excuse to dismiss permanent employees. They repeated problems they encountered with the proposed starting time.

[18] On 19 April 2005, the respondents (65 in number) were issued with notices to attend disciplinary enquiries to be held on 20 April 2005. The respondents were charged with the following misconduct allegations:

(1) Contempt of Court Order;

(2) Breach of individual contract of employment;

(3) Contravention of the Labour Relations Act; and

(4) Breach of various collective agreements.

The respondents were advised to elect five representatives who were to show cause at the collective disciplinary enquiry why their individual contracts of employment should not be summarily terminated. They were further informed that they were all on a final written warning for not starting work at 05h45.[9]

[19] Indeed, a joint disciplinary enquiry was held on 20 April 2005 for the 65 respondents as scheduled. The employees were represented by Mmesi, S Masengeni, R Selowa, S Thinawe and V Mnisi. Mmesi denied all the charges preferred against the employees and raised the following as their defences.

19.1 that an improper application was made to the Labour Court; there was no breach of employment contracts; the [appellant] has to prove the allegation that the LRA has been contravened; that the agreement was null and void as it could not bind members who had already resigned their membership of the two unions. They further challenged the process as being unfair and submitted that the individual employees should have been consulted pending the finalisation of a recognition agreement with SAIWU (South African Intellectual Workers Union). Mmesi concluded by asking why the appellant did not follow the provisions of section 24 of the LRA if it had problems recognising the two unions.

19.2 After Mmesi's address, the chairperson of the inquiry (Hosken) had the

[9] The final written warnings referred to here are the one issued on 13 April 2005 which were contested by the respondents and against which they lodged appeals.

following to say:

'Chairperson: Okay, thank you. I suggest Mr De Wet and I caucus, guys are welcome to hang on here, or whatever. Just give us 15 minutes if that's okay. The time is now quarter past. We say we meet again at half past.'(emphasis added)

19.3 After the adjournment the chairperson thanked the employee representatives "for the opportunity to caucus". The chairperson went on to state: "We would just like to respond. I don't know if Mr De Wet would like to respond or shall I". De Wet responded by saying "very well". Thereafter the chairperson addressed the employee representatives by responding to the defences they raised against the charges. He mentioned that three points have been addressed by the Labour Court itself by declaring that the employees have breached the LRA. On the issue relating to the validity of the agreement, the chairperson mentioned that "we have agreements that until they are cancelled remain valid." On the issue relating to recognising the union, he stated that "we currently don't have problems with the unions." On the issue relating to consulting the individual employees, the chairperson responded by stating that the matter has been decided by the Labour Court and they made attempts in good faith to consult with the employees and the union without success.

De Wet, upon enquiry by the chairperson if he had missed anything, added that an opportunity to appoint representatives through a ballot process had also failed.

19.4 The chairperson concluded thus:

'We have taken this, we've taken advice of course, not just legal advice. We've taken advice from the Labour Court, and we are going to abide by their terms and conditions. We do have a Court order which you people are in breach of, and accordingly we are going to now impose the sanction of dismissal, and we will write onto forms for each and every individual who is affected. They will be handed to them, as well offered to them, that is also within their rights. So if you will you're going to have to excuse us while we

get this sorted out, and we will revert to you this morning. It's still – ja, we can do it this morning still. Thank you.

The meeting is closing, the time is 08:40.'

19.5 On 20 April 2005, letters of dismissal were handed to all the affected employees. The letters set out the defences raised by the employees and the responses made by the chairperson and De Wet and concluded thus:

'In the circumstances, we confirm that it has been found that employees are:-

1. In breach of their individual contracts of employment in that employees refuse to commence work at 05:45;
2. Are participating in unprotected industrial action in that they are refusing to commence work at 05:45 and are demanding that they be retrenched and paid a severance package;
3. In breach of the Recognition Agreement and other collective agreements requiring employees to work flexible working hours;
4. In contempt of the Court Order obtained in the Labour Court on 18 April 2005.

Employees are, in the circumstances, advised that their contracts of employment are summarily terminated. All monies due to employees from the company will be paid to them by the end of this current month, April 2005. The company will assist where possible in expediting any provident / retirement payments due from NBC.

As repeatedly stated to employees, the Company can no longer tolerate employees' refusal to work in terms of the Company's operational requirements and the demands of its customers. Unprotected industrial action cannot be tolerated.

Dismissal is the last resort.'

[20] On 21 April 2005, the remaining ten (10) respondents were issued with final written warnings requiring them to comply by 22 April 2005 or face dismissal. A disciplinary inquiry was convened on 21 April 2005 at 10h30 and was

chaired by De Wet who represented the appellant at the previous inquiry of the other respondents on 20 April 2005. De Wet recorded that the 10 employees wanted to have their inquiry held that day as they were aware of everything that had been happening at the appellant. The charges were read by De Wet and he asked the employees to provide reasons why they should not be dismissed. Their response was that they had no reasons why they should not be dismissed and wanted to be part of the other respondents who had been dismissed. They were then dismissed. It is significant to note that the charges preferred against these employees were the same as those against their colleagues except that the ten (10 were not charged for breach of a Court Order.

[21] On 5 May 2005, the rule *nisi* that was issued by Revelas J was discharged. On 26 April 2005, 66 respondents referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA") and were given the case number: GAJB 13488/05. After various delays, the parties agreed at a pre-trial conference held in July 2009, that the CCMA does not have jurisdiction to determine the dispute.

[22] On 17 September 2009, the respondents initiated proceedings in the Labour Court. The matter was heard in September 2010, the judgment was handed down on 20 October 2010.

[23] The appellant's special plea, which was the subject of the ruling by the Court below, was raised in the Reply to the Respondents' Statement of Case. The contention was that ten (10) of the employees listed in annexure A2 to the statement of case, were not part of the referral of the dispute for conciliation to the CCMA. Their dispute, it was contended, was therefore not referred either timeously or at all for conciliation as is requested in terms of s 191(1) (a) of the Labour Relations Act ("the Act") and as such their dispute has not been conciliated. The Labour Court, therefore, did not have jurisdiction to adjudicate their alleged unfair dismissal dispute for lack of referral to the CCMA for conciliation.

[24] In amplification of the point *in limine,* the appellant contended that it only

received the referral under CCMA case number GAJB13488/05. This referral only listed 66 employees to the exclusion of the disputed ten (10). It was further denied that the appellant received a referral under CCMA case number GAJB12528/05 in respect of the thirteen (13) employees that included the disputed ten (10) respondents. The appellant further disputed the respondents' contention that case number GAJB13488/05 was "joined" with case number GAJB12528/05 in that no application for joinder was brought by the respondents. The appellant further relied on a letter sent by its former attorneys of record dated 23 August 2005 to the SAIWU confirming that at the conciliation meeting of 22 August 2005 the union's representative had indicated that case number GAJB12528/05 had been incorrectly allocated to the matter by the CCMA as a duplicate case number.

[25] The respondents' version of the events was simply that there was a referral of the dispute to the CCMA by the identified 13 employees and that their contention is supported by the CCMA's electronic records, which show that there were two separate unfair dismissals disputes lodged against the same appellant under the two case referral numbers referred to above. The one referral cited the referring party as SAIWU on behalf of Selowa R and sixty-five(65) others and the other as Mesi and seventy-eight(78) others. "Mesi" is one of the thirteen (13) disputed respondents. The two referrals were subsequently combined under one case number. However, before the two were combined two separate conciliation proceedings were held and two certificates of non-resolution of the dispute were issued by a commissioner of the CCMA.

[26] Ruling on the special plea, the Labour Court found that the respondents had proved on a balance of probabilities that the Court had jurisdiction in respect of the disputed employees. The Labour Court accepted the respondents' argument that the certificate of non-resolution constituted evidence that it had jurisdiction in respect of the disputed employees; that the two computer print-outs verified information shown on the certificate of non-resolution; that there were two separate referrals with two separate case numbers and that in both computer print-outs the appellant is cited as the employer in respect of both

cases.

[27] The court *a quo* held that the letter from the attorneys referred to above confirmed the respondents' version that there was a duplication of the two referrals as opposed to casting any doubt on the validity of the certificate of outcome. That it was common cause that the appellant received the certificate of non-resolution of the dispute on 28 June 2005 (and was represented at the conciliation meeting). Furthermore, SAIWU instituted a review application as evidenced by a letter dated 14 August 2006 prepared by the appellant's attorneys of record. The Labour Court held further that the certificate of non-resolution should unequivocally state that the two referrals had been combined; that the CCMA directive dated 23 August 2005 described the respondents as "SAIWU obo 75 members"; and finally, that the appellant failed to institute proceedings to review the certificate of outcome and elected to only raise its objection to the jurisdiction of the Labour Court five years later. Consequently, the Labour Court ruled that it had jurisdiction in respect of the disputed employees and dismissed the special plea with no order as to costs.

[28] The Labour Court analysed the evidence regarding each and every misconduct charge preferred against the employees and made the following findings with regard to the unfairness or otherwise of the dismissal of the employees which are relevant to this appeal:

28.1 that the documentary and oral evidence point towards the fact that the dismissal of the respondents was final and was not effected to compel them to agree to the starting time of 05h45. The dismissal of the respondent employees does not fall within the ambit of section 187(1)(c) of the Act and therefore does not constitute an automatically unfair dismissal.

28.1.1 that the appellant bore the *onus* to show that the reason for the dismissal of the respondent employees was for a fair reason related to their conduct or incapacity or based on the appellant's operational requirements and that the dismissal was effected in

accordance with a fair procedure.

28.2 the reasons for the dismissal of the respondent employees as described in the notices of dismissal are that they were:

28.2.1 in breach of their individual contracts of employment in that they refused to commence work at 05h45;

28.2.2 participating in unprotected industrial action in that they were refusing to commence work at 05h45 and are demanding that they be retrenched and paid severance packages; and

28.2.3 in breach of the Recognition Agreement and other collective agreements requiring employees to work flexible working hours.

28.3 the starting time *in casu* did not constitute a flexible working pattern but a permanent change to a term of a condition of employment, since among others, the starting time is stipulated as a specific term in the contract of employment.

28.4 the said term of a condition of employment could only be changed through collective bargaining with the trade unions since a term of employment contract constitutes a dispute of interest and not a dispute of right and would be the subject matter for collective bargaining.

28.5 there is no acceptable evidence to show that the employees demanded to be paid severance packages. They also did not participate in unprotected industrial action. They reported for duty at 06h45 until their dismissal. It is rather the appellant who had engaged in an unprotected lock-out before the final dismissal, in contravention of Section 64 of the Act.

28.6 the employees were not in breach of any recognition agreement.

28.7 by failing to report for work at 05h45 the employees were indeed in breach of the Court order. However, contempt of court constitutes conduct in relation to the Court and as such it is the Court and not the

employer who may impose a sanction for the breach:

28.8 the reason for the dismissal of the respondent employees was because of the appellant's operational requirements and that save for the incomplete consultations that took place, the requirements of s198A have not been met.

28.9 the dismissal of the respondent employees was substantively unfair.

28.10 the dismissal of the sixty-five(65) employees was procedurally unfair because Hosken (the chairperson of the enquiry) and de Wet, (the respondent's witness) had a caucus after the evidence was led at the disciplinary enquiry to consider the verdict.

28.11 the dismissal of the ten(10) remaining respondents was procedurally unfair because their dismissal was a forgone conclusion and the appellant was only going through the motions of conducting a disciplinary enquiry.

28.12 that none of the circumstances set out in s193(2) of the Act that would disentitle the respondent employees to their reinstatement were present. The evidence that other employees had been employed in the positions of the applicants does not constitute acceptable evidence that reinstatement is not reasonably practicable.

28.13 that in order to ameliorate the burden of retrospective reinstatement on the appellant, it would be fair and equitable to limit the retrospective period of the order to a period of 6 months from the date of judgment.

The Appeal

[29] The notice of appeal filed by the appellant does set out the grounds of appeal upon which the ruling and judgment of the Court below are challenged. However, in the petition for leave to appeal, the following are what the appellant regards as essential grounds, which were also pursued in argument in this Court. These are that the Court below erred in finding that:

29.1. The hours of work were stipulated as a specific term in the individual contracts of employment. It is contended that the Labour Court should have found that a change in work times was a change in work practice (which falls within the prerogative of the employer) and not a change in the essential nature of the job. The new starting time was not a material term or condition of employment;

29.2. The starting time was not changed by agreement;

29.3. The appellant was entitled to rely on the court order as the basis for its instruction since the respondents were obliged to comply with a court order stating the starting time in the interim;

29.4. The respondents had discharged the *onus* to prove that the Labour Court had jurisdiction over the thirteen (13) disputed respondent employees;

29.5 The reinstatement of the employees was appropriate where there had been a delay which cannot be attributed to the appellant: and that the, respondents who were in breach of the order approached that court with "unclean hands".

[30] Mr Watt-Pringle SC, who appeared on behalf of the appellant, made the following submissions:

30.1 The respondents were in fact dismissed for their repeated failure to heed a lawful instruction by management to commence work an hour earlier than had previously been the case for operational reasons;

30.2 At the time of their dismissal, the respondents were on final written warnings for this transgression and all but ten 10 of them had been ordered by the Labour Court to comply with these instructions which they nevertheless persisted to ignore.

[31] Counsel contended further that the respondents agreed through their representative to the change in work practice; that it in any event lay within the prerogative of management to alter a work practice of commencement of

working hours. It was contended further that the interim court order in any event determined the legal position between the employer and employees and for as long as the order stood the respondents, who were subject to the order, were obliged to comply with the court order.

[32] With regard to procedural fairness, counsel for the appellant contended that the undisputed evidence relating to the disciplinary inquiry of sixty-five (65) of the respondents was that the chairperson and the witness enjoyed a "smoke break" together and not for purpose of discussing the merits of the case. As regards the second disciplinary inquiry, it was contended that the respondents failed to mount any form of defence and invited management to dismiss them just as the other respondents had been dismissed.

[33] As to sanction, counsel contended that reinstatement was impracticable and inappropriate because of the breakdown in the trust relationship between the parties, the lengthy delay between the date of dismissal and the date of the reinstatement order, and the wanton disregard by the majority of the respondents for the court order with the result that they approached the Court with "unclean hands."

The point *in limine*.

[34] Section 191(1) of the Act prescribes that a dispute of an alleged unfair dismissal be referred to the CCMA or the relevant council, as the case may be, for conciliation. The dispute can only be referred to arbitration or the Labour Court, as the case may be, after the commissioner or the council has certified that the dispute remains unresolved, or a period of 30 days has expired since the CCMA or the council received the referral of the dispute. Therefore, in the absence of a referral to conciliation, or of a certificate to the effect that conciliation has failed, or the expiry of a period of 30 days since the matter had been referred to conciliation, the Labour court has no jurisdiction to adjudicate the dispute.[10]

[35] In my view, the court below cannot be faulted for concluding that the

[10] See *NUMSA v Driveline Technologies (Pty) Ltd and Another* [2000] 1 BLLR 20 (LAC) at para 74. S191(5) of the Act.

respondents had successfully discharged the *onus* of showing that the court had jurisdiction. The court *a quo* did the best it could under the circumstances. It considered both the documentary as well as the oral evidence placed before it, as shown above, and provided detailed reasons for its conclusion which require no repetition. It is evident that there were indeed two referrals of the dispute against the appellant on the same set of facts and incident. Both referrals were conciliated at the CCMA and certificates to the effect that the disputes that were referred could not be conciliated were issued. It is the very dispute that the court *a quo* dealt with in this matter. The appellant contended that although there was evidence of a second CCMA referral, there was no evidence, or proof that it related to a referral on behalf of the disputed respondents. It is surprising that the appellant accepts the fact that there were two case referrals, but still contends that it does not have any record of receiving the other referral. There was no evidence presented to suggest that there was another dispute different from the one adjudicated by the court below that existed between the parties. In the absence of evidence to the contrary, it is, in my view, not unreasonable to conclude, in the circumstances, that it was the same dispute that was referred. Furthermore, the two referrals cover the number of the respondents and Mmesi, who testified on behalf of the respondents, appears in the list of the disputed respondents. The appeal on the point *in limine* should therefore, in my view, not succeed. I now proceed to consider the appeal on the merits of the dispute.

[36] The common law position with regard to change in terms and conditions of employment is that an employer may not unilaterally change the terms and conditions of an employee. Such unilateral change is unlawful and the affected employee has an election to either resile from the contract or to sue for damages in terms of the contract. The Act treats unilateral variations of the terms and conditions of employment as a subject for collective bargaining. However, the employees are not deprived of any remedy other than strike action where the employer has unilaterally changed the employment contract.[11]

[11] See:Grogan: "Workplace Law" Tenth Edition at 88;*Monyela and Others v Bruce Jacobs T/A LV Construction* (1998)19 ILJ 75 (LC); *MITUSA and Others v Transnet Ltd and Others*(2002)23 ILJ 2213

[37] There are decisions that dealt with the question whether a change in shift patterns and shift systems amounted to a change in the terms and conditions of employment or whether that merely amounted to a change in work practice. In *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA and Others,*[12] the decision heavily relied upon by the appellant, the predecessor to this Court, had to consider a situation where employees were instructed to operate two machines instead of one machine as has been the case all the time. The then LAC held as follows:

> 'The second question which must be decided is the broad one whether the instruction to operate two machines was lawful. If that instruction constituted a unilateral amendment to the terms of employment of the applicant, the instruction would have been unlawful. The narrower inquiry, consequently, is whether the instruction did constitute a unilateral amendment to the terms of employment of the applicants.
>
> The evidence of what constitute the terms of employment of the applicants was very vague. Most of the applicants did not sign letters of appointment. They were employed as operators in terms of oral contracts and were trained on machines upon the commencement of their employment. The more recently employed applicants signed letters of appointment in which it was specified that they were appointed as operators and required to perform any task that might reasonably be expected of them.
>
> On those facts it was not a term of the contracts of employment that the applicants would operate only one machine. A description of the work to be performed as that of 'operator' should not, in my view, 'be construed inflexibly provided that the fundamental nature of the work to be performed is not altered'(Wallis *Labour and Emploment Law* para 45 at 7-19). I agree with the view expressed by the learned author at 7-23 n9 that employees do not have a vested right to preserve their working obligations completely unchanged as from the moment when they first begin work. It is only [if the changes] are so dramatic as to amount to a requirement that the employee undertakes an entirely different job that there is a right to refuse to do the job in the required

(LAC) at para 107 -the LAC held that where unilateral amendment of terms and conditions of employment also constitutes conduct falling under the definition of unfair labour practice, and that the affected employees may choose between strike action and referring the matter to arbitration.

[12] (1995)16 ILJ 349 (LAC).

manner…'[13]

[38] A similar approach was adopted by the Labour Court in *SA Police Union v National Commissioner of SA Police Service,*[14] where the court had to consider an implementation of an eight hour shift system by SAPS in the place of a prevailing 12 hour shift system. The Labour court held that:

> 'I agree with Mr. Bruinders that clause 1 of agreement 5/2002 expressly grants a right to work 8 hour or 12 hour shifts at the discretion and convenience of the Commissioner. There is no evidence before me, nor has any argument to such effect been made, to support a claim that a tacit term exists conferring the right to work a 12 hour shift. Nor do the regulations imply any such term into the contract. 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. That this is so is borne out by the description of the shift system as such in an earlier collective agreement. Clause 3 of agreement 2/2000 provides: "the employees who currently perform twelve-hour shifts will continue with this *work practice*". Hence, a change in that work practice was not per se a breach of contract.'

[39] It is significant to note that all these decisions emphasised the fact that there was no contractual right, based either on the employment contract or collective agreement, providing a right to the employee, expressly, tacitly or impliedly, against unilateral change to working terms and conditions. This means, therefore, that if the contracts of employment or the collective agreements provided otherwise, changing the shift patterns or systems would not be regarded as a mere work practice, but a term of employment

[13] Ibid at 357C-I.
[14] (2005) 26 ILJ 2403 (LC); [2006] 1 BLLR 42 (LC)at para 84. See also *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU andOthers* [2011] 3 BLLR 231 (LC) at paras 86 and 87. *NUMSA v Lumex Clipsal (Pty) Ltd* [2001] 2 BLLR 220(LC) at para 13.

irrespective of what effect or difference the unilateral change would have on the employee's work.

[40] In *Air Products (Pty) Ltd v CWIU and Another*,[15] the employee was charged with insubordination and dismissed for his refusal to accept a transfer from one plant to another, where he would be required to perform night shift which was not done in the first plant. His position in the first plant had been declared redundant on the employer's operational requirements. Myburg JP, who wrote for the majority, and also the scribe in *A Mauchle (Pty) Ltd*, held *inter alia*, that the transfer of the employee did not constitute an amendment to the contract of employment because it was not an express, implied or tacit term of the contract of employment that he would only work at the one plant. He was employed as an operator and he would do the same work at the new plant, the only difference being that he would be required to do night shift. The majority held further that the company never intended to retrench the employee but to alleviate the pressure on the plant at which he worked. Furthermore, the fact that there was a moratorium on retrenchments placed by a collective agreement would have precluded the employer from retrenching the employee. The majority concluded that there was no obligation on the employer to consult the employee for transferring him. All that the employer was required to do, as a matter of fairness and sound industrial relations and peace, was to attempt to persuade the employee to co-operate and to accept the change in working conditions, which the employer did unsuccessfully. The majority finally found the conduct of the employee to amount to gross insubordination and that the employer had a valid reason to dismiss him.

[41] The view adopted by the minority (Froneman DJP) was, in my view, with respect, correct, as well as more sensible and reasonable in circumstances of the case. Froneman DJP differed with the majority in three areas, namely, the different emphasis on the significance of certain facts, the majority's inconsistency in the application of their own view of the law to the facts and the law. Froneman DJP emphasised the fact that the employee was

[15] [1998] 1 BLLR 1 (LAC) at 5.

dismissed for his refusal to obey an instruction from the employer to move to another department, after a decision was taken that his post in his department had become redundant. Both decisions to declare his position redundant and to transfer him were taken without consulting the employee. The employee was also going to work night shift which had not been the case at his former department.

[42] With regard to the reliance of the majority view in *A Mauchle (Pty) Ltd*, Froneman DJP had the following to say:

> 'The logical consequence of this approach is that it is futile exercise, when determining fairness, to seek guidance from decided cases on matters of principle. For the reasons that I will later set out I do not, with respect, agree that the approach apparent from the excerpts quoted above should still be followed. I am unsure, however, where exactly the majority stands in this regard , because the judgment does refer to and rely on the decisions in *Mauchle (Pty) Ltd t/a Precision Tools*..., *Atlantis Diesel Engines v National Union of Metalworks of South Africa* (1994) 15 ILJ 1247(A). In terms of the *Vetsak* decision these cases did not lay down binding legal principles, or even guidelines. They cannot, therefore, be regarded as binding authority.'[16]

[43] In conclusion, Froneman DJP found the decision taken to declare the employee's position redundant and to transfer him without consulting him, as well as the instruction to report for work at the other department, to have been unfair and held that the employee's dismissal was consequently unfair.

[44] The facts of this case are distinguishable from the facts and circumstances of the cases referred to above. In this case, some of the contracts specified the starting times of the employees. They are referred to as "The Official Hours of Work". Furthermore, the employees have been working these times for many years and changing them would without doubt have an effect in the manner in which they had structured their lives for many years. It would, therefore, be not only unfair, but also unreasonable for the appellant to change the starting time without a meaningful engagement process with the affected employees with a view to reaching an agreement. It would be unfair to the employees in

[16] Ibid at 10.

their position to be compelled to change what has been a term of their contract, because of the employer's operational reasons, and comply with an instruction under threat of a disciplinary inquiry and subsequent dismissal.

[45] It is important to observe that the appellant's conduct at all times was consistent regarding the starting times as a term and condition of employment for the employees. At no stage during the parties' engagement was it categorically stated by the appellant that it did not regard the starting times as a term and condition of employment. The employment of these words was used in the correspondence from the appellant and in the minutes taken by its officials. Oosthuizen conceded, during cross-examination, that what the appellant wanted to achieve was to change the terms and conditions of employment. For this Court to find that even if the starting times were indeed terms and conditions of employment, they were nevertheless immaterial, would be to depart from the terms of the parties' contract, and be tantamount to making a new contract for the parties. It is, therefore, appropriate to consider the case that was actually presented by the appellant, which had always been that there was an agreement on the change in the starting times and that the refusal by the respondents to comply with the agreed starting times was unreasonable, warranting disciplinary action. The fact that some of the contracts of employment did not stipulate the starting times seems not to have been an issue during the engagement between the parties. Neither was it an issue in the court *a quo*. This may be the reason why there was no distinction drawn in the court *a quo* between those employees whose contracts stipulated stating times and those whose contracts did not.

<u>Was there agreement on the new starting time?</u>

[46] The question whether there was agreement between the appellant and the respondents' representative to the change in the starting time is a factual inquiry that must be determined on the facts presented to the Court. The evidence on record does not support the contention that there was indeed an agreement. The decision to change the starting time was taken by the appellant unilaterally and it thereafter sought the consent of the respondents' representatives to accept and implement it. It is evident from the

memorandum of 14 February 2005 that no agreement is mentioned. The memorandum states in no uncertain terms that management is "forced to implement any business changes without consultation." This was after the ballot process to elect the employees' representative did not take place. This memorandum was followed by another one of 17 February 2005 wherein the appellant indicated, among others, that it was obliged to change the starting times of the respondents and offered a process to address the employees' problems regarding its decision.

[47] The minutes of 4 March 2005 only show that the appellant's management was pleading with the respondents' representatives to accept the new starting time and further offered to address the concerns of the employees regarding implementation of the new starting time at the subsequent meeting of 11 March 2005. Furthermore, in the memorandum of 18 March 2005, the appellant's management was still attempting to persuade the employees' representative to accept the change and threatened disciplinary action for failure to comply. To show disagreement, the employees refused to comply with the new starting times and further wrote back to management to confirm that there was never an agreement. It is also surprising that the appellant's own witnesses who testified gave two different dates on which the agreement on the starting time was allegedly reached. Of importance is the concession made by De Wet that the change was unilaterally implemented.

[48] In so far as it is the appellant's case that there was agreement on the starting time, I am of the view that the court *a quo* was correct in finding that there was never such an agreement. It is also evident from the record that this was at all relevant times the basis on which the appellant presented its case, namely, that the employees were refusing to comply with an agreement changing the starting times. Absent such an agreement to change the starting times, the appellant had to rely on another argument to justify their finding of misconduct on the part of the employees.

[49] One must not lose sight of the fact that the respondents were dismissed for misconduct pursuant to disciplinary enquiries held against them by their employer. The significance of this fact is that the employees had to answer

specific charges of misconduct to avoid being dismissed. The decision to dismiss the employees can therefore not be justified on grounds that were never the basis for the disciplinary inquiry.

[50] The appellant seems to have acted under a mistaken belief that the interim order granted by Revelas J in the Labour Court vindicated the appellant by confirming that the respondents had to comply with the new starting times. Counsel for the appellant also contended that the order set out the interim relationship between the parties, and in so far as the new starting time was concerned, that the employees were obliged to comply with the order. This may be the correct legal position. However, upon a careful reading of that order, it is clear that the order was not made operative until the return date. I have no doubt that the appellant wanted to have the order operational in the form of an interim interdict, and that the respondents believed that it had that effect. However, that was not the case. Therefore, the conclusion that the respondents were in contempt of the order by failing to comply with the new starting time, was incorrect.

[51] The charges relating to the "breach of the Labour Relations Act" are vague and not supported by any evidence. The same applies to the charge relating to breach of the recognition agreement and other collective agreements. The issue was adequately dealt with by the Labour Court and its reasoning in that regard cannot be faulted.

[52] The criticism of the court *a quo's* finding that the dismissal of the respondents was procedurally unfair, is without merit. It is clear from the record of the proceedings and the excerpts quoted above that the chairperson of the inquiry adjourned the proceedings for, what he referred to as 'to have a caucus' with the appellant's representative about the case and not to have or enjoy a smoke. Immediately after the caucus, he placed on record what they had agreed upon during the caucus. He saw himself as part of the employer and could not have been impartial. His remarks bear testimony to this. The second disciplinary inquiry was also a sham. One could not have expected to have a fair inquiry if the evidence presenter, on behalf of the employer, in one inquiry, becomes the chairperson on the subsequent inquiry on the same set of facts.

It will be illogical to expect him to find differently to the case that he had presented the previous day. He cannot be said not to have been biased. In any event, justice must not only be done, but it must be seen to be done. All that is required for a recusal is a reasonable perception of bias. The attitude of the respondents who appeared before him shows that they lacked confidence in the process for good reasons. This was, in my view, one of the worst cases of procedural unfairness.

[53] The next ground of appeal relates to the reinstatement order as remedy in favour of the respondents. The appellant contends that there are two circumstances that militate strongly against reinstatement, namely, the delay between the dismissals and the vindication of the respondents' rights, and the respondents' disregard for the court order. In my view, it would be unfair to deny the respondents a primary remedy prescribed by the Act for a delay which was not of their making. The court *a quo* already granted the appellant some advantage by limiting the retrospective effect of reinstatement. The second ground, which according to the appellant is its strongest ground, is not a valid ground in view of my finding that the order pronounced by Revelas J did not have interim operative effect. Furthermore, I have already found that there was no agreement on the starting time and as such it would not be fair, in my view, to punish respondents for something that they rightly contested only because of the court order. It must be noted that the appellant's case is that the appellant were not dismissed for breaching the court order but that the court order set out the interim relationship between the parties. I am, therefore, of the view that failure to report for duty as instructed, cannot, on the facts in this case, be a reason for a breakdown in the trust relationship.

[54] In conclusion, the appeal must fail. As regards costs, in my view, it would be in accordance with the requirements of the law and fairness that costs should follow the result.

[55] In the result, the following order is made:

1. The appeal is dismissed with costs.

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Tlaletsi ADJP

Acting Deputy Judge President of the Labour Appeal Court

Waglay JP and Coppin AJA concur in the judgment of Tlaletsi ADJP.

APPEARANCES.

FOR THE APPELLANT:	CE Watt-Pringle SC assisted by KS Mclean.
	Instructed by Macgregor-Erasmus Attorneys.
FOR THE RESPONDENTS:	N Voyi of Ndumiso Voyi Incorporated.