INTHE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not Reportable

Case no: JA57/12

In the matter between:-

JACKSON MNDEBELE & OTHERS **First to Fifty-One Appellants**

TOGETHERNESS AMALGAMATED WORKERS

UNION OF SOUTH AFRICA OBO

MNDEBELE AND OTHERS **Fifty-two to one hundred and Six Appellants**

and

XSTRATA SOUTH AFRICA (PTY) LTD T/A

XSTRATA ALLOYS (RUSTENBURG PLANT) **Respondent**

Heard: 16 February 2016

Delivered: 14 June 2016

Summary: Condonation for the late filing of the record and reinstatement of the appeal – employees dismissed for participating in an unprotected strike seeking condonation and reinstatement of the appeal some three years after leave to appeal was granted – court limiting its discretion in whether to grant condonation to the prospects of success- evidence pointing on the fact that employees refused to attend the wellness function which is tantamount to refusing to work – employer's warning to employees and the consequences of their action amounting to ultimatum – employer affording employee an

opportunity to participate in the afternoon session - employees had sufficient time and opportunity to consider their stance and to modify their conduct – Labour Court correctly found that strike unlawful and dismissal fair – employees having no prospects of success – condonation for the late filing of the record of appeal and reinstatement of the appeal dismissed with costs.

Coram: Waglay JP, Ndlovu JA *et* Murphy AJA

JUDGMENT

MURPHY AJA

[1] This is an appeal against the judgment (excluding the order as to costs) of the Labour Court (LaGrange J) handed down on 27 August 2012 dismissing the appellants' claim for unfair dismissal arising from their participation in industrial action. The appellants fall into two groups: the first group (1st to 51st appellants) are those who were not represented by a trade union; whilst the second group (52nd to 106th appellants) were those represented by the Togetherness Amalgamated Workers Union of South Africa ("TAWUSA). The appeal is with leave of the court *a quo* granted on 5 October 2012.

[2] The appellants seek condonation for the late filing of the record of appeal and reinstatement of the appeal. Rule 5(8) of the rules of the Labour Appeal Court provides:

> 'The record must be delivered within 60 days of the date of the order granting leave to appeal, unless the appeal is noted after a successful petition for leave to appeal, in which case the record must be delivered within the period fixed by the court under rule 4(9)'.

Rule 5(17) provides:

> 'If the appellant fails to lodge the record within the prescribed period, the appellant will be deemed to have withdrawn the appeal, unless the appellant has within that period applied to the respondent or the respondent's representative for consent to an extension of time and consent has been given. If consent is refused the appellant may, after delivery to the respondent

> of the notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties. Any party wishing to oppose the grant of an extension of time may deliver an answering affidavit within 10 days of service on such party of a copy of the application'.

[3] The appellants did not apply, during the 60 day period, to the respondent for consent to an extension of time to deliver the appeal record. Accordingly, they were required to deliver an application to the Judge President applying for an extension of time. They did not do so. The appeal was therefore deemed to have been withdrawn. Almost three years after being granted leave to appeal, the 1st to 51st appellants delivered a condonation application together with the appeal record on 2 June 2015, and the 52nd to 106th appellants delivered their condonation application on 2 July 2015. They seek condonation and reinstatement of the appeal.

[4] The discretion of this Court to grant condonation is a wide one and in considering whether good cause had been shown, it will take into account such factors as the length of the delay, the explanation for the delay, the prospects of success in the main application and possible prejudice to the parties.[1] The application for condonation must be brought as soon as the party becomes aware of the default.[2] In *Melane v Santam Insurance Co Ltd,*[3] the court restated the principles as follows:

> 'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, but that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to

[1] *Melane v Santam Insurance Co Ltd* [1962] 4 All SA 442 (AD); *Motloi v SA Local Government Association* [2006] 3 BLLR 264 (LAC) at par 16; and *SABC Ltd v CCMA* [2010] 3 BLLR 251 (LAC) at par 19.
[2] *Seatlolo v Entertainment Logistics Service* (*a division of Gallo Africa Ltd*) (2011) 32 ILJ 2206
[3] [1962] 4 All SA 442 (AD).

> harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success that are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'

[5] The nature of this case requires examination of the prospects of success first. If there are no prospects of success, there will be no point in granting condonation and the appeal must fail.

[6] The appellants were employed by the respondent in various positions at its smeltering business. During the period 11 December 2008 and 17 January 2009, the respondent shut down all six of its furnaces and ceased all manufacturing activities at its Rustenburg plant. Its decision to reduce production and shut down the furnaces arose from a slump in steel demand following the world economic crisis in late 2008. The employees were required to take their annual leave during the period in which the respondent's operations had ceased completely. On 18 January 2009, the respondent re-opened the plant but did not resume manufacturing activities. Until such time as full operations resumed at the plant, the employees were required to attend training sessions. The respondent's mine manager convened a mass meeting at the plant on 18 January 2009 to inform employees on the state of affairs, planned operations and to address concerns of possible retrenchments. He made it clear to all employees that the plant would not engage in manufacturing until such time as operations resumed. The employees were obliged to report for work and attend scheduled training at the plant daily until manufacturing operations resumed.

[7] The respondent prepared and circulated a training schedule for each department at the plant for the period January 2009 to July 2009. The employees worked day shift and were remunerated for a normal day shift from 07h00 to 16h30 on Monday to Thursday and from 07H00 to 14h00 on Friday. They were not required to work any overtime or night shift and accordingly did not qualify for overtime pay or night shift allowance. They were ordinarily

expected to continue working in their assigned departments. Some were however requested to assist in the performance of certain designated duties in other departments.

[8] On 26 February 2009, a meeting took place in the office of Ms Fatima Suliman, the respondent's human resources manager, to discuss queries raised by employees of the production department. The meeting was attended by Suliman, two employees from the production department, Mr. Paul Bubisi and Mr. Danny Boy Phetwe, a shop steward from the National Union of Metalworkers of South Africa ("NUMSA"), Mr. Wilson Tshakane, and the respondent's production manager, Mr. Emmanuel Lungi Dzanibe. At the meeting, the employee representatives raised concerns about annual leave, overtime pay, night shift allowances and remuneration. The issues regarding annual leave, overtime pay and night shift allowances were resolved at the meeting. However the issue regarding remuneration was not, because certain production employees had individual pay queries. At the conclusion of the meeting, the respondent's representatives requested the employee representatives to have a meeting with those aggrieved employees in the production department and thereafter to prepare a list (specifically identifying the names of the employees with their corresponding individual pay queries) so that the respondent could deal with these issues. The list was not delivered prior to the industrial action.

[9] The respondent launched a national wellness campaign at all its sites on different dates. Certain employees were chosen as wellness champions. The wellness champions were responsible for training the rest of the employees at the wellness launch at the plant. During February 2009, the wellness champions underwent training for the wellness launch on topics such as the type of medical testing that would occur, what each medical test would entail and how the medical tests would be conducted. All the employees at the plant were informed in advance to attend the compulsory wellness launch scheduled for 3 March 2009 at the administration building. The launch was intended to comprise two sessions: the first session from 07h30 to 11h30 was designated for employees working in furnaces 1 to 4. The second session was

scheduled from 12H00 to 16H00 and was designated for employees working in furnaces 5 and 6.

[10] On 3 March 2009, during the early morning "toolbox meeting", the co-ordinators of the production department reminded the production employees present at the meeting to attend the wellness launch. The employees indicated their intention not to attend the first session. Immediately prior to 07h30, as the first session of the wellness launch was due to start, a group of employees gathered on the grass area outside the tent where the wellness launch was being held, and prevented other employees from attending the wellness launch. The production manager, Dzanibe, and the production superintendent, Mr. Bheki Hlatswayo, were already at the wellness launch waiting for the production employees to arrive. Hlatswayo and Dzanibe approached the production employees at the administration building gate to convince them to attend the wellness launch. Later, Mr. Riaan Cilliers also approached the employees in an effort to get them to attend the wellness launch. The employees refused and informed Cilliers, Dzanibe and Hlatshwayo that they were not interested in attending unless the respondent resolved their pay issues. Cilliers informed the production employees that attendance of the wellness launch and the outstanding pay issues were unrelated and that their refusal to attend the wellness launch constituted unprotected industrial action for which they would be disciplined. Cilliers, Dzanibe and Hlatswayo then returned to the tent for the first session of the wellness launch. At the end of the first session, Cilliers requested the NUMSA full time shop steward to attempt to persuade the production employees who had not attended to attend the second session. The production co-ordinators, Hlatswayo, Dzanibe, the NUMSA shop stewards and all the production employees were called to a meeting in the canteen at about 12h00. In the meeting, the NUMSA full time shop steward informed the production employees who had not attended the first session that they had an opportunity to attend the second session. The majority of the relevant employees chose not to do so.

[11] The next morning, 4 March 2009, Hlatshwayo identified the employees who did not attend either the first or second sessions of the wellness launch by identifying those employees who did not submit a ticket to access the tent where it took place. The respondent regarded the refusal to attend the wellness launch as participation in unprotected industrial action. Accordingly, later that day, the respondent issued individual notices to each employee requiring them to attend a disciplinary hearing to answer to allegations of misconduct. The employees refused to sign for receipt of their individual notices summoning them to the disciplinary hearing.

[12] The disciplinary hearings were scheduled to take place at the Lost City boardroom on 6 March 2009 at 07h30. The employees arrived at the appointed time but demanded that instead of convening disciplinary hearings for each employee separately the respondent should hold all the disciplinary hearings at the same time in one session. The respondent thought that would be impractical but indicated its willingness to hear 10 employees in one disciplinary hearing at a time. The employees rejected the respondent's proposal and became disruptive. Security was called to assist in pacifying the situation. Thereafter, the respondent addressed the employees outside the boardroom and informed them that the disciplinary hearings would continue on that day. The respondent read out the names of the employees whose disciplinary hearings would be held at 13h45 and 16h00 on 6 March 2009, and indicated that the remaining disciplinary hearings would be held at 07h30 on 9 March 2009. The employees' notices to attend the disciplinary hearing were amended to reflect the new time, and in certain instances, the new date for their disciplinary hearing. The appellants did not attend their scheduled disciplinary hearings. Accordingly, the disciplinary hearings continued in their absence. After the respondent's representatives presented evidence, the chairperson of the disciplinary hearing, Dzanibe, found the employees guilty of misconduct. Considering that the disciplinary code provided for dismissal for participation in unprotected industrial action, and the fact that the employees had a previous (albeit expired) final written warning for participation in unprotected industrial action, the chairperson imposed the sanction of dismissal. However, later on 9 March 2009, TAWUSA sent a fax to the

respondent informing it that its members wished to elect 10 representatives to represent the employees at the disciplinary hearings. The respondent informed TAWUSA that the hearings had commenced at 07h30 that day.

[13] The employees received their notices of dismissal and were informed of their right to appeal. All of them appealed. TAWUSA however requested the respondent to have a single appeal hearing for all the employees who had been dismissed. The respondent refused and informed TAWUSA that it would hear five dismissed employees in one appeal hearing at a time. TAWUSA did not accept the proposal and refused to attend the appeal hearings. Some of the dismissed employees also did not attend their scheduled appeal hearings. The appeal chairperson mostly upheld the disciplinary chairperson's findings of guilt and the sanction of dismissal. However, the appeals of some of the dismissed employees who attended the appeal hearings were successful and they were re-instated. The aggrieved employees then referred an unfair dismissal dispute to the Labour Court.

[14] In many respects, the facts are common cause. The main points of dispute relate to the reasons for the employees refusing to attend the launch, whether an ultimatum was given and the issues of procedural fairness.

[15] The central issues for decision by the Labour Court were whether i) the appellants' refusal to attend the launch constituted a strike; ii) an appropriate ultimatum was given; iii) dismissal was the appropriate sanction in the circumstances; and iv) the termination of employment was procedurally and substantively unfair.

[16] In determining whether the conduct of the appellants constituted a strike, the Labour Court started with the definition of a "strike" in section 213 of the Labour Relations Act[4] ("the LRA"). It reads:

> 'strike" means 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

[4] Act 66 of 1995.

> mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory…'

[17] The learned judge *a quo* held that the employees had disobeyed an instruction from Cilliers to attend the launch as pre-arranged and which they were obliged in terms of the contracts of employment to attend, and that the instruction was both lawful and reasonable. Their refusal to attend the wellness launch, he concluded, amounted to a concerted refusal to work. The Labour Court further rejected as improbable the appellants' version that they had in fact not refused to carry out their normal work as they had been engaged in "recovery" work.

[18] The refusal of the appellants to attend the launch is undisputed. The respondent's version is that because operations at the plant had ceased from December 2008, the only work for the appellants on 3 March 2009 was to attend the launch. Their refusal was thus a concerted refusal to work. The appellants' witnesses on the other hand testified that they were performing their normal duties. In particular, they testified that they were performing productive recovery work. The appellants argued that the court *a quo* erred in not believing their version that they were doing work and part of that work was hand recovery of metal from slag piles. All the respondent's witnesses explained that slag is produced when there is spillage during production. This slag goes to the outside recovery plant where contractors recover metal from the slag. The appellants also maintained that the production sheets produced by the respondent, which showed that there was no outside recovery or furnace production for the first quarter of 2009, were not authentic and could not be relied upon. According to the respondent, there is nothing to suggest that the production sheets were not authentic. The appellants bore the *onus* to adduce evidence to show that the production sheets were not authentic or at the very least to put their authenticity at issue. The authenticity of the production sheets was placed in issue for the first time by one of the appellants' representatives in the trial during the re-examination of one of his witnesses. The evidence led by the respondent's witnesses and the surrounding circumstances are consistent with the respondent's version.

Cilliers, Dzanibe, Suliman, Hlatshwayo and Majombosi all testified that during January to June 2009, there was no outside recovery at the plant because production had ceased. Moreover, the appellants never disputed that outside recovery work could not have been performed if the furnaces were not operating and no slag was produced. Majombosi testified that he is the co-ordinator of the A-shift and that he never instructed any of his subordinates to do hand metal recovery during January to March 2009. Suliman, Dzanibe, Cilliers, Hlatshwayo and Majombosi were all consistent in their testimonies that during January to March 2009, all production employees went for scheduled training and did housekeeping functions which included painting and cleaning under the direction and supervision of their co-ordinators. They all stated that employees cannot work on the plant without supervision.

[19] The court *a quo* correctly found a number of problems with the appellants' version, including that it was common cause that no furnace had operated since the previous year. It was also common cause that until production was discontinued at the end of 2008, outside recovery work had been performed by contractors. The need for outside recovery work disappeared once the furnaces were switched off. The court *a quo* accordingly rejected the appellants' version in this regard, correctly in my view, and was right to prefer that of the respondent as being more probable. The appellants had no normal recovery duties that day. Their only work duty was to attend the launch, which they refused to do.

[20] The appellants argued that in any event the court *a quo* erred in concluding that their refusal to attend the wellness campaign amounted to a refusal to work. They submitted that the court *a quo* failed to appreciate that attending the wellness campaign was not part of their contractual duties. Their submission is without merit. There is no requirement in law that all the duties of an employee must be expressly set out in his or her contract of employment. A number of implied obligations are imposed on employees in terms of the common law, including the employee's obligation to obey lawful

and reasonable instructions of the employer;[5] to serve the employer's interests; to act in good faith;[6] and to be subordinate to the employer.[7] Employees do not have a vested right to preserve their working obligations completely unchanged as from the moment when they first begin work.[8] It is only changes that are so dramatic as to amount to the employee having to do an entirely different job which give rise to a right to refuse to do the job in the required manner.[9] The appellants' refusal to work was consequently in breach of their common law obligations. The court *a quo* thus correctly found that the refusal by the appellants to attend the launch constituted a "refusal to work" and that their conduct fell squarely within the meaning of that term as used in the definition of a strike in section 213 of the LRA.

[21] The appellants offered as justification for their refusal to attend the launch their alleged anxiety that they were to be subjected to compulsory HIV testing. The Labour Court rejected this on the probabilities, giving particular weight to the fact that this would have involved a drastic change to its previous policy of voluntary testing, for no obvious reason and contrary to the prevailing norm in the industry and society. The learned judge found furthermore that none of the appellants asked Cilliers to clarify the position when he spoke to them just before the first session began. Moreover, no testing was planned for or in fact conducted on the day of the launch.

[22] The appellants contend that the court *a quo* erred in concluding that they made no effort to clarify their alleged understanding of the wellness campaign. The court *a quo* dealt with this aspect in some detail, in light of all the evidence that was led during the trial. Bubisi testified that the employees wanted to attend the launch but did not do so because management did not explain why testing had become compulsory. They claim they were informed by Molefe, a wellness champion and HIV activist, at a meeting on 11 February

[5] *Commercial Catering & Allied Workers Union of SA v Wooltru Ltd t/a Woolworths (Randburg)* (1989) 10 ILJ 311 (IC).
[6] .*Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) 26D-E.
[7] *SA Broadcasting Corporation v McKenzie* 1999 ILJ 585 (LAC).
[8] *A Mauchle (Pty) Ltd Va Précision Tools v NUMSA and Others* (1995) 16 ILJ 349 (LAC) at paras18 and 19.
[9] *A Mauchle (Pty) Ltd Va Précision Tools v NUMSA and Others* (1995) 16 ILJ 349 (LAC) at para 19; and *Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd* (2013) 34 ILJ 1440 (LAC): [2014] JOL 31995 (LAC) at paras 34 and 35.

2009, that compulsory testing would take place at the launch and were waiting for management to explain the matter. Molefe testified that he told the meeting that testing was voluntary but attendance at the launch was compulsory. Although the appellants had acted as a group, none of them on the morning of the launch asked Cilliers to clarify the issue when he came to address them, even though on their version, they had been waiting since 11 February 2009 for an answer from senior management. They claimed that the Cilliers was angry when he came to speak to them and they were intimidated. The court *a quo* observed that the fact that the appellants had acted as a group was difficult to reconcile with their unwillingness to even voice the concern that caused them not to go to the launch, bearing in mind that, on their own version, they had asked Molefe to call senior management to explain why testing was compulsory. It is improbable that the appellants were intimidated by Cilliers' anger if, at the same time, they were brave enough to disobey his express instruction directing them to go to the tent to attend the launch. The appellants clearly did not take advantage of the available opportunities to clarify their alleged understanding of the wellness campaign, which most likely was a fabrication after the event. The court *a quo* decided that the probabilities favoured the respondent's version that the real reason for the appellants not attending the launch was their wish to pursue the pay issues and force management to address them.

[23] The appellants disputed the finding of the court *a quo* that they failed to attend the launch because they wanted management to address their pay queries. The pay queries could not be finalised while management was still waiting for the individual pay queries list, which the appellants knew they had not furnished. The employees knew that management was waiting for the list from them and thus it was inconceivable that they would strike in relation to it. These contentions are not supported by the evidence led during the trial. Suliman and Dzanibe testified that the meeting on 26 February 2009 was to discuss overtime, shift allowance, annual leave and individual employee pay queries. All the issues except individual pay queries were resolved and the list in that regard was never furnished. Dzanibe, Cilliers and Hlatshwayo all testified that on 3 March 2009, when employees gathered on the grass and

refused to go into the tent where the wellness launch was taking place, the employees raised the issue of the individual pay queries. Both Dzanibe and Hlatshwayo testified that employees by the name of Ramodia and Moeng specifically brought up the pay queries. This evidence was denied by the appellants' witnesses. Neither Ramodia nor Moeng were called to deny this version. Cilliers' testimony, which was corroborated by Dzanibe, was that he told the employees that pay queries and attending the launch were separate issues and that strike action was prohibited. He asked Hlatshwayo to translate what he was saying in Tswana to the employees. During cross-examination, the appellants' representatives disputed that Hlatshwayo could speak Tswana and translated for Cilliers. Bubisi during his testimony did not dispute that Hlatshwayo translated for the employees. Instead, he claimed not to have seen Hlatshwayo in the crowd when Cilliers was addressing the employees. The version that Hlatshwayo was not present in the crowd was never put to Hlatshwayo in cross-examination.

[24] The finding of the court *a quo* that the refusal to work was related to the pay issues was based on the cogent evidence of the respondent's witnesses supported by the inherent probabilities and the implausibility of the appellants' explanations. Due to the shutdown of production work in December 2008, the employees lost a number of allowances and overtime pay. A special arrangement had been made to offset additional annual leave that was granted in the year 2008 against the employees' 2009 annual leave. All of this is consistent with the respondent's version that the issues relating to allowances, overtime and annual leave had been raised on behalf of the employees and that the outstanding issues continued to fester. The appellants refused to attend the launch for the purpose of remedying their grievance about the pay issues, with the consequence that their conduct constituted a strike as defined.

[25] When he addressed the employees on the morning of the launch, Cilliers told them that if they did not go to the launch "separation" would be discussed. Later the employees were given a second chance and instructed to attend the second session in the afternoon. At about 12h00, Suliman addressed a letter

to the union representing some of the employees informing it that its members had embarked on unprotected industrial action and urging it to convey the possible consequences to them. While accepting that this conduct on behalf of the respondent did not amount to "an ultimatum in the conventional sense", the learned judge *a quo* held that the employees had sufficient time to re-consider their position between Cilliers speaking to them in the morning and the afternoon session of the launch. He held furthermore that the meaning of Cilliers' statement was clear.

[26] The appellants contended that no proper ultimatum was given and that the vague language to the effect that separation would be discussed does not meet the requirements for an ultimatum. Item 6(2) of the Code of Good Practice: Dismissal in Schedule 8 of the LRA states:

> 'Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.'

[27] The Code does not suggest how the ultimatum should be distributed, or require that it must 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 but to give them an opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not.[10] The ultimatum must be issued with the sole purpose of enticing the employees to return to work,[11] and should in clear terms warn the employees of the folly of their conduct and that should they not desist from their conduct

[10] *Modise v* Steve's *Spar Blackheath* [2000] 5 BLLR 496 (LAC).
[11] *PTWU v Fidelity Security Services* [2009] 2 BLLR 157 (LC).

they face dismissal.[12] 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.[13] In each instance, the hearing may be collective in nature and need not be formal.

[28] The court *a quo* correctly stated that an ultimatum in the conventional sense was not issued in this case, nevertheless, it was not suggested by the appellants' witnesses that they did not understand what Cilliers meant when he told them that if they did not attend the launch then *"separation"* would be discussed. The peculiar circumstances in this case reveal that the opportunity to attend the launch, which was planned for one day, was slipping away and having been afforded a second opportunity during lunch to attend the launch, the appellants did indeed have sufficient time to consider their stance and to modify their conduct. Having regard to the principles pertaining to ultimatums and their purpose, I agree with La Grange J that the appellants were issued with an ultimatum that served the purpose for which the law requires an ultimatum to be issued. The appellants were cautioned in clear language and were specifically informed of the consequences of their failure to heed the warning. They were accordingly given an opportunity to reflect on their conduct and to desist from it.

[29] The appellants' objections regarding procedural fairness have to do with the manner of their notification of the disciplinary hearing, the impartiality of the chairperson of the disciplinary enquiry and the fact that the appeal hearings were conducted in their absence.

[30] With regard to the question of notification, the appellants complained that after the strike, they were dispersed without being notified of the disciplinary proceedings scheduled for 07h30 on 6 March 2009. Hlatshwayo testified that he drew up notices containing the charges which he distributed to the relevant employees, some of whom refused to accept them or tore them up. TAWUSA conceded in its statement of claim that some of the appellants received

[12] *SASTAWU and Others v Karras t/a Floraline* [1999] 10 BLLR 1097 (LC).
[13] *NUM v Billard Contractors CC* [2006] 12 BLLR 1191 (LC) at 1192.

notices, while the non-union group of employees stated that they received notices on 5 March 2009. However, the appellants alleged in the court *a quo* that they did not receive notices of the hearing. It is common cause that all the appellants reported at the boardroom on the morning of 6 March 2009. They also complained that they were not properly informed of the postponed hearings of 9 March 2009. It was argued in the Labour Court that in terms of the disciplinary code the appellants should have been given two days' notice of the hearing and that consequently the notices were formally defective. The court held that such complaint was not part of the appellants' pleaded case; nor did the appellants allege that they required more time to prepare for the hearing. The claim was rather that they were not notified of the hearing. The court *a quo* held that despite possible short notice, the concessions that notice was received and the fact that the appellants made an appearance at the scheduled hearing, and had an opportunity to appeal, satisfied the requirements of procedural fairness. The notification given was adequate in the circumstances.

[31] The 1st to 51st appellants contend that the court *a quo* erred in disregarding their version that they did not receive any notice to attend the enquiry on 4 March 2009 but only on 5 March 2009. That is not correct. The finding of the court was that such a complaint had not been pleaded. Whilst there is disputed evidence regarding the timing and manner of delivery of the notices, in the final analysis, without any complaint of prejudice in preparation, the appellants' objection is technical and formalistic. All the appellants attended the hearing and refused to participate unless their demand for their preferred procedure was met. They further contended that the court *a quo* failed to consider their version that they were not notified of the hearings scheduled for 9 March 2009 and that it was only on 10 March 2009 that they were advised by their foreman that they had been dismissed. The court *a quo* correctly favoured the respondent's version that the employees were at the very least informed verbally. Hlatshwayo testified that Mr. Magatsela, a security officer, addressed the workers outside the boardroom on 6 March 2009 and read out the names of the employees who needed to attend the hearings scheduled for later on that day and on 9 March 2009. Although the appellants challenged

whether Hlatswayo adequately conveyed the relevant information, it was never meaningfully disputed that Magatsela addressed the workers outside the boardroom. The probabilities favour a finding that the employees knew about the hearings and what the allegations against them were. They did not participate as they wanted a collective hearing. The employees did this on 6 March 2009 and again on 9 March 2009. It is not open to them now to say that they did not receive notice when they knowingly failed to participate in their own disciplinary hearings. The finding is supported by the appellants' own pleadings and their failure to participate in the appeal hearings. Any employee who was not properly notified had the right to appeal on that basis. None of them exercised that right.

[32] The chairperson of the disciplinary hearings was Mr. Dzanibe. He was appointed in accordance with company policy which requires the relevant heads of department to chair disciplinary enquiries in their departments. Dzanibe had been present when Cilliers addressed the workers during the strike. There was no objection to his impartiality prior to the trial in the court *a quo*. The court made no explicit finding in relation to the procedural propriety of Dzanibe acting as chairperson. It merely noted that the wisdom of it had been questioned, but no objection had been raised at the time of the hearings. Dzanibe testified that he was capable of not being biased. The appellants contend that the court *a quo* erred in not determining whether Dzanibe was a suitable person to chair the hearing. When cross-examined, Dzanibe conceded that he was involved in the matter and had interacted with the appellants regarding their conduct. The appellants argued that the court *a quo* failed to appreciate that Dzanibe's mind was already made up in terms of the sanction of dismissal as he had been intimately involved in the matter prior to the hearing. There is no other evidence supporting a finding that Dzanibe had prejudged the question of sanction. While it might not have been ideal for Dzanibe to have acted as the chairperson, given his involvement on 3 March 2009, this alone is insufficient to conclude that he was in fact biased. On the contrary, it is significant that all the employees who did in fact attend their disciplinary hearings were re-instated on final written warnings after testifying that they had been intimidated. This is a clear indication that Dzanibe brought

an impartial mind to bear on the issues before him and that he was prepared to be persuaded by the evidence led at the hearings. There is accordingly no merit in this ground of appeal.

[33] The appeal hearings were conducted in the absence of the appellants on 3 April 2009. Prior to that date, the union requested again for the appeals to be conducted collectively. This led to a postponement of the appeals and some negotiation about the envisaged process. On 27 March 2009, the respondent offered to hear groups of five individuals at a time in combined appeal hearings. The union counter offered that the employees were prepared to participate in a single combined hearing at which they would be represented by five elected employees. The respondent correctly construed this response to be a rejection of its proposal that all employees appealing appear individually in groups of five. It thus proceeded in the absence of the appellants and allowed the appeals of those not attending to lapse. The court *a quo* held that the appellants were the cause of their loss of the right to appeal. The appellants contended that the court *a quo* failed to appreciate that they were present at the premises on the day of the appeal hearings. But that is irrelevant in the face of a clear indication that they intended not to participate. The respondent received no adequate response with regard to its proposal for five appeal hearings at a time. This evidence was not challenged and neither Bubisi nor Zwane led any evidence on the appeal hearings. Accordingly the respondent's version must stand. The court *a quo* correctly accepted it.

[34] The court *a quo* determined that dismissal was an appropriate sanction for the misconduct of the appellants and hence that the dismissal was substantively fair. It is clear from its reasoning that the court *a quo* kept the provisions of item 6 of Schedule 8 to the LRA in mind. It had regard to the nature and seriousness of the contravention of the LRA and the fact that there was no unjustified conduct on the part of the employer that had caused the strike. It emphasised that the unprotected strike in which the appellants participated had unusual features that made it different from typical strikes. It held that although the strike was for a short duration, its duration was determined by

the fact that it consisted of a boycott of the wellness launch which subverted the employer's purpose. Moreover, the appellants persisted in their defiance by failing to take advantage of the second opportunity to attend the launch in the afternoon. The strike's impact was not economic but was designed to ensure that the activities of the respondent could not proceed as planned. It thus undermined the authority and prerogative of the employer in achieving its social responsibility to its employees, which was of obvious importance to the respondent. While, as discussed, an ultimatum in the conventional sense was not issued, the appellants were apprised of the implications of their conduct and understood what Cilliers meant when he told them that if they did not attend the launch separation would be discussed. Though normally an ultimatum would allow employees more time to reflect on their conduct, in this case the opportunity to attend the launch, planned for one day, was lost. Having been warned and having been afforded a second opportunity during lunch time to attend the launch, the appellants had sufficient time to consider their stance. In addition, the strike was not spontaneous, but rather planned to occur at the time that would create maximum pressure on the respondent and the strike was not one that the employer had provoked through any unjust conduct. The reliance placed by the chairperson of the disciplinary hearings on the prior conduct of the appellants and that some of them had previously been issued with final written warnings which had expired was found by the court *a quo* to be legitimate in the circumstances, and in any event in the final analysis did not alter the fairness of the sanction. In my view, the reasoning of the court *a quo* on the question of sanction is cogent and unassailable. I agree therefore with the Labour Court that the dismissal of the appellants was both procedurally and substantively fair and accordingly the appeal is without merit.

[35] Considering that there are no prospects of success, condonation should not be granted and the application to reinstate the appeal must be refused on that ground alone. It is consequently unnecessary to canvass the explanations for the inordinate delay in filing the record two years late. Suffice it to say they are wholly inadequate and unconvincing.

[36] As for costs, the appellants displayed a defiant and insubordinate attitude towards attempts by the employer to resolve the dispute and to enforce appropriate discipline. They ignored two ultimatums. Some of them had blemished disciplinary records for the same misconduct, and thus were probably aware of the fact that their conduct was unprotected. They have shown no remorse for their wrongdoing. There is accordingly no reason to deviate from the principle that costs should follow the result.

[37] In the premises, the application for condonation for the late filing of the record of appeal and reinstatement of the lapsed appeal is dismissed with costs.

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JR Murphy AJA

I agree

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Waglay JP

I agree

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Ndlovu JA

APPEARANCES:

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