



REPUBLIC OF SOUTH AFRICA

Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,  
IN JOHANNESBURG  
JUDGMENT**

**CASE NO: JS 437-2007**

In the matter between:

**NEHAWU OBO MPHALE AND 4  
OTHERS**

**Applicant**

and

**DEPARTMENT OF HEALTH (FREE  
STATE)**

**Respondent**

Heard: 27 – 31 August and 19 November 2012

Delivered: 23 June 2014

**Summary:** (Dismissal for participating in a strike in an essential service and for influencing employees to participate in a strike – differential treatment of shop stewards upheld).

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**JUDGMENT**

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**LAGRANGE, J****Introduction**

- [1] This matter was originally part heard by the Honourable Mr Justice Mthembu on 5 and 6 May 2009. The hearing was due to resume on 14 and 15 October 2009 that at the request of the applicant union was removed from the roll because the union representative conducting the case at the time, *Mr Dladla*, was appearing in another case in the Eastern Province. For reasons unknown to myself the trial could not be finalised by the honourable judge and the parties eventually agreed the matter could proceed as a *de novo* trial before another judge save that the record of the proceedings before Mthembu, AJ would form part of the record of the new proceedings. In consequence, the respondent was not required to present its evidence twice. A transcript of the first two day's proceedings was made available to the court for this purpose.
- [2] The matter was eventually re-enrolled for a hearing on 27 August 2012 and ran until 31 August 2012, at which point it was adjourned to 19 November 2012 to conclude the applicant's evidence. However, when the hearing resumed on that date, no further witnesses were called and oral argument was heard. The parties were given an opportunity to file written arguments as well.
- [3] The matter originally concerned the alleged unfair dismissal of four staff of Katlego District Hospital in Virginia ('the hospital') in May 2006 for allegedly participating in an unprotected or unlawful strike at the hospital on 15 November 2005 or for instigating others to participate or embark on such action. Although the citation appears to identify five individual applicants, there were in fact only four, namely Mr M J Phukuntse, Mr T L Mcandi, Ms M Masama (a senior nursing sister) and Mr T J Mphale (an auxiliary nurse), all of whom were shop stewards of the applicant union, ('Nehawu') save for Mr Mcandi. By the time the applicants came to lead their evidence during the second part of the trial in 2012, Mr Mcandi had advised Nehawu he was no longer interested in his claim being pursued. Consequently, the only individual applicants are the remaining three.

- [4] Some of the issues identified by the parties to be determined were:
- 4.1 Whether or not strike action took place and, if so, if it was protected or lawful.
  - 4.2 Whether the respondent was entitled to investigate, charge and dismiss the applicants.
  - 4.3 Whether the misconduct necessitated dismissal as a relevant punishment.
  - 4.4 Whether the disciplinary action taken against the applicants met the requirement of consistency in terms of the LRA.
  - 4.5 Whether the chairperson of the hearing ought to have recused himself on account of being involved in the investigations into the alleged misconduct.
  - 4.6 The appropriate relief if any to be awarded if the applicants' dismissals were found to be unfair.

Ultimately, the second issue fell away after the CEO testified on these issues.

- [5] The respondent's witnesses were: Mr M Mokgosi (formerly a Senior Administration Officer: Employment relations in the Human Resources Directorate and currently Clinical Programme Co-ordinator at Thusanong District Hospital); Mrs P Chaka (at the time of the incident she held the post of CEO of Katlego Winburg Hospital Complex); Ms K Mofokeng (Head of Nursing at Katlego District Hospital); Ms N Moletsane (a Patient Care Manager at Katlego District Hospital) and Ms D Malebu (an Assistant Manager in the Employee Relations sub-directorate of the Department of Health). Mr T Mphale and Ms M Masama (identified above) gave evidence for the applicants.

### **The material evidence**

#### *The origination of the grievance over appointments*

- [6] Mr Mofokeng testified on the background events giving rise to the alleged strike which took place on 14 November 2005. Following the appointment

of seven nurses on 18 October 2005 the existing unions at the workplace being NEHAWU, PSA, DENOSA and HOSPERSA filed a joint grievance with the CEO on 24 and 25 October 2005 complaining about the appointments. The gist of the letter recorded a lack of confidence in the CEO with whom the unions had deliberated in the joint Union Management Committee at the hospital ('the UMC') and a decision to refer the matter to a higher structure. At the same time the letter called for an investigation into the management of the hospital arising from the recent appointments to determine if there was corruption involved and "recommended" that the matter be addressed within ten working days.

- [7] At the same time, a more detailed grievance was submitted by the unions to the Head of Department, Dr Mokada. That document expanded on the unions' unhappiness about the lack of consultation over the recent appointments and a failure to give prior notice to the UMC that the vacancies now existed. It complained of the nepotism by the head of nursing in employing staff from her previous workplace, and a failure to follow the headhunting process properly. The more detailed recommendations asked for the cancellation of the appointments with immediate effect and for a proper procedure to be followed to favour those "who have been sidelined".
- [8] When Mphale testified, he struggled to explain the reason for the grievance, except to suggest that the problem was not with the persons who were appointed but with the process by which they were appointed, in particular that the posts were not advertised. He did not add much clarity under re-examination when he suggested that it was a second batch of seven appointments that had caused the problem because they were not advertised. It was also only under re-examination that he suggested there should have been consultations in the UMC before the second batch of nurses was employed.
- [9] When Masama testified she identified four tranches of appointments in March, August, September and October 2005 and said it was appointments from August onwards that were the cause of the grievance, because the unions were not consulted about them and hiring procedures

were not followed in that the posts were not advertised and they were not aware of any short-listing or interviews conducted. Under cross examination it seems there were no appointments in September but seven in August and three in October, which were contentious because of the manner in which they had been done. She did not know why the figure of ten appointments had never been mentioned previously in the trial.

*The UMC and dispute resolution hierarchy*

- [10] The UMC was a structure comprised of management representatives and two representatives from each union. It was a measure to democratise the workplace and to deal with employment-related issues. Mofokeng did not attend the UMC meetings except when requested to assist. The shop steward representatives of Nehawu on the UMC were Mr Phalane and Ms Masana. Mphale agreed the UMC had been established as a body to address workplace related dissatisfactions and to ensure it functioned properly, it met frequently. According to Mphale, if a problem could not be resolved in the UMC then the respective unions could refer it to their respective regional structures which in turn would address the issue with the employer's regional counterparts. If it still could not be resolved there, the next step was to refer it to the parties' respective provincial structures.
- [11] According to Mphale, the reason the unions had referred the issue which led to the events on 14 November to the level of the Premier's office was that the lower levels had failed to resolve the matter. Masama confirmed the basic dispute process hierarchy sketched somewhat confusingly by Mphale, but she said that if the matter could not be resolved at the level of the UMC, then it would be referred to the regional levels of the union and the department respectively. Dr Mokada would then come to the hospital to try and resolve the issue with the UMC. After that, the union would involve regional representatives in the issue. The union at branch level would give a mandate to regional representatives to deal with Dr Mokada. She differed with Mphale in that she did not understand the branch level would be involved at all levels except in the sense of mandating the higher levels. It was up to the regional level of the union to initiate further steps.

*The recruitment of nursing staff*

[12] A meeting of the committee had taken place on 10 October 2005 at which one of the long-standing issues at the hospital, namely a shortage of staff had been discussed. At that meeting in relation to a standing matter, it was recorded that in the previous meeting on 25 August 2005 management had reported that for the time being it was not able to make appointments due to financial constraints. The extract of the minutes from the August meeting read:

*"9. Standing matters*

*9.1 Budget*

*Management reported that they are currently overspending on personnel and as a result of having difficulties in terms of filling the vacant posts. Management further indicating that they had a meeting with the General Manager about the issue of overspending on personnel, and the general manager indicated that the institution should not fill vacant post for now."*

(sic)

[13] According to Mofokeng, this statement was not intended to be a reference to the entire financial year but simply a reference to the financial position at that point in time. Masama said that it was after the UMC meeting on 8 August 2005 had passed, that the appointments in August became known and hence the matter was raised with the Head of Department, the CEO and Dr Mokada. As she did not attend all UMC meetings, she could not say if the issue was specifically raised in that forum, but conceded that as far as she knew it was not discussed there. Likewise the October appointments were also not raised in a UMC meeting.

[14] By the next meeting on 10 October 2005, it was apparent that appointments would be made and Nehawu is recorded in the minutes as raising a query about the change in circumstances as follows:

*"From the report that was provided by management Nehawu request to be provided with a policy for Headhunting, also from the report that was presented by management, Nehawu indicated*

*that they were informed in the previous meeting that due to budget constraints in the financial year, there will be no appointments, Nehawu requested management to explain how the Management managed to make the appointments.*

*Management responded by saying that the decision of not feeling the posts in this financial year was taken by the General Manager, and after the presentation to the General Manager by the institution, in relation to the problems of under staff and the utilisation of agencies, the General Manager gave the institution a go a head in terms of filling the posts.*

*Nehawu responded by saying that they should have been consulted after the general manager gave a go a head. Nehawu further indicated that seeing the management took a unilateral decision in the matter, Nehawu will take the matter through their respective structures."*

(sic)

- [15] When Mphale testified, he referred to an initial letter written to the Premier by the unions on 22 October 2005, but the existence of this letter was not canvassed with the employer's witnesses, nor was it produced in evidence.
- [16] Mofokeng said that nursing personnel were scarce and since 2002 it had been difficult to make successful appointments by means of internal and external advertising. In consequence of these difficulties, the head of Department in the provincial Department of Health had granted permission to institutions to deviate from the normal recruitment procedures by means of conducting a headhunting exercise, which was set out in a Human Resource Management Circular number 80 of 2004 issued on 22 November 2004. In practice this meant that the headhunting process was used in conjunction with the normal recruitment process. The difference is that suitable candidates would be identified and requested to apply for the advertised posts after which the normal recruitment processes would be followed, including shortlisting and interviews. The circular also made provision for the delegation of approval for headhunting to different levels

of management according to the salary levels of those to be appointed. He also testified that the circular would have been distributed to various levels of management including middle managers such as Ms Masama.

- [17] In accordance with this policy, in March 2005 approval was sought by the head of nursing at the hospital, and recommended by the CEO, for authority to head hunt six professional nurses, five enrolled nurses and three assistant nurses for the hospital. The authority was approved on 15 March 2005 by Dr Makada under his title General Manager: NFSHC. According to Mofokeng, the UMC was aware of the difficulties of obtaining suitable candidates for nursing posts, which is why it was a standing item on the agenda. It was also a matter of great concern to the unions who wanted to ensure that there would be correct staffing levels especially when it came to nursing personnel. He could not say whether they were aware of the headhunting process that conveyed the impression they were unaware of the circular mentioned.

*The rapid escalation of the grievance*

- [18] At a meeting of the hospital board which included the hospital management the vote of no confidence in management was brought to the board's attention. It was determined that the board and management and the unions should meet at 10H00 on 7 November 2005. The meeting was convened and at the meeting the unions asked management to initiate the discussion as it was the board which had called the meeting. The chairperson advised the unions that management had been advised of the concern raised by the unions about the appointments and allegations that there might be a strike if management did not respond. The union spokesperson responded that there was no strike anticipated, but that if there was no response from management within the timeframe given the unions would meet with their members and advise them of the outcome on 9 November 2005, the day after the unions' 10 day deadline or resolving the grievance was due to expire. The unions complained that management had failed to respond to their concerns and the CEO replied that she had not been in office for three weeks and had not seen the documents from the unions but emphasised that the concerns raised in



the grievance had not been raised in UMC meetings. Initially, the unions indicated that they would meet with management at the scheduled UMC meeting on 14 November 2005, but after a caucus were not prepared to commit themselves with meeting with management unless they were given the go-ahead by members.

[19] Mphale commented that he had suggested that the unions could meet with management during the scheduled UMC meeting on 14 November 2005. He also confirmed that at the meeting with the board and management on 7 November 2005 the unions had declined to discuss the matter in a meeting in view of having written to the Premier because they could not discuss the matter in a meeting before they had received her response.

[20] The CEO, Ms P Chaka, testified that it was only on 7 November 2005 that she learnt of the unions' dissatisfaction with the appointments that have taken place as she had just returned from three weeks compassionate leave. Hence, at the meeting on that date she asked the unions to give her chance so that the issue could be discussed but they would not do so then and said that perhaps it could be discussed at the UMC meeting on 14 November 2005. When confronted with a letter dated 31 August 2005 written to the management of the hospital by Nehawu Chaka denied ever having seen it. The letter raised a concern about interviews held on 29 August 2005 and referred to a report at the UMC meeting of 8 August that there would be no staff hiring during the financial year. The letter warned that the union will not recognise interviews unless the procedure was followed

[21] It is common cause that on 10 November 2005, the day after the meeting at which the unions were due to report back to their members four separate letters were sent to the Premier of the Free State Province, the head of Department of the Department of Health in the Province, the General Manager in the Northern Free State region and to the CEO of the hospital. The letter to the Premier demanded a meeting with her on 14 November 2005 over the grievances which the unions had submitted and which they felt had not been resolved. The letter to the Premier also stated: "Failure to attend an action will lead to an action been decided"

(sic). Each of the other letters were similar to each other in that they were titled "NOTICE OF AN ACTION TO BE TAKEN ON 14/11/200". The letters also contained an unequivocal statement that the unions would be "taking action" in the hospital because their "demands" had not been met. Mofokeng said that management interpreted the letter to mean that whatever action the unions intended to embark on, it was to remedy the grievance that they claimed was not addressed.

[22] Mphale claimed that the unions realised that they were not getting assistance on the issue from the hospital management at the UMC level and decided to escalate the matter to the level of the Premier. Commenting on the meaning of the threat that the premier's failure to attend would lead to an action been decided meant that the unions would need to see what the next step would be if they did not get assistance. He placed the same interpretation on the references to action being taken in the other letters sent out by the union. He denied that it was intended to refer to strike action. He claimed that an earlier meeting had been requested with the Premier, but she had been unable to make it. The Premier had agreed to a meeting on 14 November and the letter of 10 November was merely a reminder to him of the previous letter requesting a meeting. It was not a threat of action but an expression of 'frustration' because action was needed. He could not adequately explain why the Premier had not been furnished with a copy of the grievances or why the letter made no reference to the alleged previous letter of 22 October 2005.

[23] He was also tackled on why the letters sent on the same date as the letter to the Premier made no mention of the supposed meeting with the Premier on 14 November and made no mention of the referral of the matter to her office. Mphale could not adduce any evidence to show that Chaka knew of the alleged arrangement for the meeting with the Premier at that stage. When pressed in cross-examination he changed his testimony from saying that Chaka had been notified of the Premier's visit to saying that they had asked orally for her permission for the Premier to be invited, which is yet another allegation not put to her during her testimony. Mphale also claimed that if she had refused that would have been the end of the matter.

- [24] Mphale also could not provide an explanation why the anticipated meeting with the Premier was not mentioned in the minutes of the meeting with the board and management on 7 November 2005. The minutes of that meeting in fact contain a suggestion by the unions that there was a possibility of a meeting with management under the auspices of the UMC meeting scheduled for the same date. Although the minutes of the joint meeting were not disputed by the applicant's when they were referred to in earlier evidence, Mphale now claimed that the unions had expressly told the chairperson that they would be meeting with the Premier and had written a letter to that effect. Consequently, the union's advised the meeting that they would not air their grievances in the joint meeting and the meeting agreed there was nothing that it could discuss since the unions had already approached the Premier.
- [25] Under cross-examination he could not explain why the unions had supposedly escalated the matter to the level of the Premier directly from the local level, except to assert what he believed was the union's right to raise matters at any level if they needed assistance. When pressed, Mphale claimed that the region had been advised telephonically of the letter sent to the Premier and that both the region and the provincial structures of NEHAWU were aware of the letter.
- [26] Masama readily agreed that the branch had referred the issue directly to the regional level even though it had not been tabled first at the UMC. She was the drafter of the letter to the HOD, Chaka and Dr Moraka, though oddly she claimed to have no knowledge of the letter to the Premier until 14 November 2005. In her view they had taken it to the person in charge of the institution and her understanding was that if that person failed to deal with it, they could take it 'outside'. Under cross-examination she could not give a clear answer as to which of the persons to whom the letters of 10 October had been addressed were expected to respond first. She also commented that even though Dr Mokada was the person to whom the matter should have been referred on account of them having no confidence in Chaka, he had not responded to a previous letter on the same issue. By implication, she saw the approach to the HOD as appropriate, even though this did not explain the simultaneous referral of

the other letters. No physical evidence of the prior letter to Dr Mokada was provided.

- [27] However, Masama said she first became aware that a letter had been written to the Premier when she attended the gathering at the hospital on 14 November 2005. Mphale had addressed the gathering around 11h00 and advised the employees that a letter about their grievances had been written to the Premier for her attention but unfortunately she was not coming. Similarly, Masama said she only learnt of the letter from Dr Mokada of 10 November at the gathering.

*The threat of 'action'*

- [28] Under cross-examination, Mofokeng, Chaka and Moletsane agreed that the notices did not specify strike action as such and that the letter written by the General Manager on 10 November 2005 to the provincial and branch offices of the unions explicitly acknowledged that the notice did not say what type of industrial action was contemplated. Moletsane commented that even though it had not been clear what kind of action was being contemplated in the letter it was clear that when the incident took place on 14 November it was industrial action. She also dismissed a suggestion that people had gathered simply to wait for the Premier because the actions of the demonstrators that day were at odds with such an intention.
- [29] Initially, Mphale acknowledged seeing the General Manager's letter after receiving a copy from the union's regional office. Later he backtracked on this statement, saying the contents of the letter had merely been conveyed telephonically. He stated that the regional organiser had responded to the letter saying that they were not on strike but were going to welcome the Premier and denied that they had simply ignored Dr Mokada's letter. Mphale further stated that no arrangements to invite regional or provincial representatives to attend the meeting because no proposal to do this had been agreed on with the committee and employees. The intention was simply to assemble at 09h00 to welcome the Premier. The intention had been that the committee would meet with the Premier and the employees were just advised that they should come and greet him. They knew where

they should assemble to do this as it was not the first time there had been such an event. Masama claimed ignorance of why regional officials of the union were not invited to such an important meeting. On the one hand she said they had not been invited to attend by the branch and on the other said they knew of the invitation to the Premier and it was for them to decide.

[30] The General Manager's office responded to this notice by issuing an urgent memorandum to the provincial offices of the various unions warning them that their members at the hospital including the shop stewards intended on embarking on an unprotected strike on 14 November 2005. The letter reminded the unions that the contemplation of industrial action by the unions would be unprocedural and unlawful. It also reminded them that the Department of Health was an essential service and such action would be viewed by the employer in a very serious light as it might compromise or disrupt essential services and held potentially life threatening consequences. The letter called upon the unions to advise their members of the ramifications of embarking on an unprotected strike or of inciting employees to do so. It expressly warned that the letter would serve as notice to the union members to refrain from the contemplated action or face disciplinary measures which could include dismissal. It must be mentioned that, this was the only portion of Mofokeng's evidence which was disputed. Chaka was also questioned about the meaning of the term industrial action and agreed that the term could also refer to industrial action and that was not a strike and that management was not sure what type of action unions would embark on at that stage.

#### *Events of 14 November 2005*

[31] According to Mofokeng, the scheduled UMC meeting on 14 November could not take place because the shop stewards and their union constituents had gathered in front of the administration block of the hospital as early as 07h00 to 07h30 where they were singing and shouting slogans. Chaka found the demonstration in progress when she arrived on duty at 07h30 in the morning. She said the workers were 'toyi-toying' and

were singing songs belittling management saying management was 'full of shit'. Chaka also identified Masama and Phukunzi as part of the group that was singing in front of the administration block when management left to attend the UMC meeting scheduled for 10h00. She said that the group was comprised of various staff including nurses, administrative staff and cleaners. Similarly, Mofokeng testified that when she arrived at about 07H15, nurses and other staff were gathered in what she described as the 'foyer' area between the administration block and the wards. Mphale testified that the distance between the wards and the administration block at this point was about 30 metres.

- [32] Moletsane, the Patient Care Manager, said she became aware of the noise of singing when she was doing her report taking at about 06H45 that morning and on visiting the patient care units realised that some of the nursing staff who should have been on duty were missing. She also verified this by going to see what was happening outside. This necessitated her making arrangements to deal with the shortage by reorganising patient care in all the nursing units, and nurses who were on duty were stretched as a result.
- [33] According to Mphale, workers had simply gathered to welcome the Premier when she arrived as it was known that when an outside person paid a visit to the hospital they would be welcomed in this way, such as they had when Provincial Head of Department, Mr Tshuping had visited the hospital. He denied that this constituted a strike and expressed the belief that most of the persons participating in the welcoming activity were not on duty. According to him the singing of the crowd was peaceful and singing freedom songs and songs of happiness. While denying hearing the kind of chanting testified to by management witnesses, he conceded that such singing would not have been proper and would have been belittling and humiliating.
- [34] Masama, who was the other Nehawu shop steward member of the UMC, testified that she was on leave but was visited by another shop steward who told her that the Premier was going to be welcomed. She arrived at the hospital at about 11h00 and found night shift nurses sitting nearing the

administration block. She joined them and was told shop stewards were in the CEO's office, but she was not informed why they were there. Masama could not explain why Chaka was not challenged when she testified having seen Masama before 10h00. Likewise her explanation of why she only attended at 11h00 was somewhat vague, varying from an explanation that she only went when it seemed the Premier might arrive to one that she went when she had finished attending to other matters she was busy with that day. She did emphasise that she was bound to be there as a branch secretary, because she was not on leave from her union activities and she was a co-author of the letter written to the HOD. She did not dispute that she was associating herself with the activities of the union members that day, but did not see anything wrong with what they were doing.

[35] According to Masama there was no singing or chanting at that time: it was only after that when Mphale had reported to them about the Premier that they started singing 'revolutionary songs'. According to her this ended at 12h00. When asked to elaborate on the singing, she said she was referring to songs sung at union meetings and when politicians, such as the Premier, were welcomed. She confirmed that the singing was peaceful but that the employees were 'toyi-toying'. Under cross-examination Masama gave an accomplished rendering of an example of a peaceful song which she translated loosely as meaning 'Communists are people who appreciate peace.' Like Mphale she denied hearing the kind of singing Chaka had testified to, but agreed it would not have been proper. Like Mphale she could not explain why Chaka's version of the singing was not challenged. Interestingly, when asked why workers were gathered outside if the shop stewards were already present, she suggested that they probably had come to hear the outcome of the grievances and wanted to hear of developments first hand.

[36] Under cross-examination, Chaka said that she believed the action constituted industrial action because the group was blocking the entrance to the wards and the administration block and the people participating could not have been performing the normal duties and were 'threatening' the patients because they were singing loudly. Mphale said that if the

singing had been disruptive, management would have asked them to speak to the workers. Moletsane corroborated evidence of the singing in the course of her testimony and distinguished the singing of the demonstrators from that of church singing which sometimes took place at the hospital. Apart from testifying that the singing continued until lunchtime, she also stated that, amongst the many things they sang, the demonstrators repeatedly chanted "Chaka is a stupid fool. Nkwani is a stupid fool, Nsthiba is a stupid fool and leave[s] Mofokeng to do as she like. Molotsane beware, Rakatyane beware...", apart from singing that management was corrupt and that they were fighting for their rights. Neither Chaka nor Moletsane were challenged during their evidence about the nature of the chanting and singing. Moletsane also confirmed that nurses only returned back to their units at 13H00. Mphale confirmed, without admitting the insults had been uttered, that the named persons were all part of management.

- [37] Moletsane explained that as a result of employees participating in the action, patients had been neglected because even personnel like cleaners had an obligation towards the patient to perform their duties to ensure a safe and healthy environment.
- [38] Chaka entered the office and Mr Mphane and Mr Motapanyane ( a shop steward from one of the other unions arrived. They told her they were waiting for the Premier and want to find out when she was coming. She said she was unaware that the Premier was coming and refused to phone the Premier because he was not in her line of command to speak to him directly. They then asked for, and took, her phone and called the Premier's office and spoke to someone. The shop stewards said they were expecting the Premier to address them in connection with the grievance they had lodged with him. Mphale confirmed that the shop stewards did not attend the UMC meeting because they were expecting the Premier. As she was leaving the office, Mr Mcandi came in. Moletsane agreed that there was nothing inherently improper about shop stewards going to the CEO's office but they were not supposed to stay in the office when management left to attend the meeting and they were not entitled simply to use the office to communicate with whomever they wanted to.



- [39] Mphale largely confirmed Chaka's version that they had asked to speak to the Premier and that she had told them she had no authority to do so. However he also claimed that the CEO was also aware that the Premier was coming through correspondence sent to her office, a point that was not raised with Chaka when she was cross-examined. He claims that they spoke to the Premier's secretary who told them that he was due to attend a meeting at 10 o'clock and when the meeting was finished she could advise them. The secretary asked them to phone her back. He further claimed that when they phoned later they were told the Premier's meeting was finished and that he had received a message and was going to consult with the MEC for health. They were also requested to write a report and on the same day they received a copy of the Premier's letter to the MEC at about 12H00. In the letter the Premier said once she had got all the information she would come back to them. After this response was conveyed to the gathered workers, who had continued singing until 12h00, they dispersed. He could not say when the workers had first gathered that morning.
- [40] Shop stewards occupied the office of the CEO and demanded to use her phone to communicate directly with the Premier's office. Management pleaded with the shop stewards to refrain from conducting the protest action and to leave the manager's office, but this appeal fell on deaf ears. According to Chaka, Mr Mphane went to speak to the group that was demonstrating that reported back that they did not want to meet with management because they only wanted the Premier. Employees who were participating in the demonstration outside the administration building had left their workstations and were not performing their duties, which was obstructing the hospital services. As far as Mofokeng was concerned the unions did not give the hospital a chance to resolve the problems because on the day of the action they would not communicate with management about the issues. She also pointed out that the meeting on 7 November between the board, management and unions had been an attempt to engage with the unions involving the governance of the hospital and there was also the UMC forum for addressing those issues.

- [41] Mofokeng testified that hospital management accompanied by himself and the general manager for the Northern Free State region, Dr Mokada attempted to meet with the shop stewards who were gathered together with the crowd which was singing. Chaka said that she asked the shop stewards if they were coming to the meeting but they said they were not because they were waiting for an answer from the Premier so she left the office.
- [42] Despite the occupation of the CEO's office, at 10h00 management proceeded to the nurses' hall where the UMC meeting was supposed to take place and discuss the grievances but the shop stewards did not attend the meeting and then returned to the CEOs office at approximately 10H45. The shop stewards told management that they were expecting correspondence or a meeting with the Premier on that day to deal with the grievances. Management was unaware of any anticipated visit by the Premier and would have been involved if the Premier, as a political figure, was going to visit the institution.
- [43] Mofokeng and Chaka testified that supervisors had been instructed to monitor who was still at their workstations and who was absent. Mofokeng dismissed any contention that the action had taken place during the participants' tea intervals because the action had placed considerable strain on the nursing personnel and the supervisor of nurses was kept busy trying to reorganise services on the day. Lists of participants in the action drawn up by the health and nursing departments indicate approximately 36 staff who were absent from duty owing to their participation in the action in those lists where the time off duty was recorded their absence was recorded as lasting from 07H00 to 13 H 30, a period of six hours.
- [44] The absence of Mr Nyandi's name on any of the lists appearing in the respondent's bundle was explained by Mofokeng on the basis that Mr Nyandi was a supervisor in his own right and should have been recording those absent on strike, but he was one of the shop stewards present in the CEO's office. Mofokeng disputed the reliability of documents apparently signed by Mr Nyandi indicating that he was taking x-rays of patients on the

day in question because the original documents did not indicate any times when the x-rays were taken or the name of the patient which was contrary to the normal procedure, even though the forms used did not provide for the entry of the time.

[45] When Chaka testified, she stated that the general list of health staff who participated in the stoppage had been supplemented with an additional seven names when it was realised that not all personnel who had participated were recorded on that register. When trying to explain how the additional names came to be added to the list, Chaka said that she did not know who was specifically missing from the list, but on counting those listed she realised there were names missing and instructed staff to check the list again against the original lists. Although the union initially objected to the admission of the amended list as evidence, it eventually agreed after cross-examining Chaka on the document that it could be admitted and the issue arising from the two versions of the document would be addressed in argument.

[46] It is common cause that on 18 November 2005 the hospital requested a consultation meeting with Nehawu over the disciplinary action it intended taking in respect of the shop stewards, of whom three were identified in the letter namely T Mphale, M Phukuntsi and M Masama.

[47] Chaka testified that she notified applicants of the charges against them, on behalf of the HOP, towards the end of November 2005. The charge sheet consisted of two charges namely:

**"Charge 1**

*That you are allegedly guilty of misconduct in terms of the resolution in that on 14 November 2005, between 07H00-13 H00, you participated in an and procedural, unprotected and/or unlawful industrial action at Katleho District Hospital.*

**Charge 2**

*That you are allegedly guilty of misconduct in terms of the resolution in that you influenced and/or incited your fellow employee is to embark and/or to participate in an unprotected*

*siege rule, unprotected and/or unlawful industrial action at Katleho District Hospital on 14 November 2005."*

[48] Chaka agreed that out of the approximately 42 employees who had participated in the action, only six shop stewards were dismissed. Mofokeng agreed that some of the persons participating in the action had not been on duty at the time and conceded that they could not be accused of neglecting their work in the strict sense of the word but had been acting unprofessionally. Moletsane was also tested under cross-examination how someone who was participating in the demonstration but who had just finished their night shift could have obstructed services. Her response was that such a person contributed to the disturbance at the hospital. She remained adamant that the person in question was participating in the strike action even if they were not supposed to be on duty at the time, and accordingly was correctly recorded on the register of those employees involved in industrial action on the day.

[49] Ms Malebu testified on her refusal to recuse herself as the chairperson of the disciplinary enquiry when it convened in March 2005. A few days prior to the hearing Nehawu had raised in a letter an urgent concern about the appointment of Mr Lekgela from the Department of Health labour relations Sub Directorate as the presiding officer. The complaint was that he had been involved in a number of issues relating to the dispute, had advised management on matters relating to the incident and was appointed as an investigator in the matter. The letter called upon the Department to appoint someone from outside of the sub directorate. Malebu testified that she was not aware of the letter as such but confirmed she was asked to recuse herself at the enquiry because she was from the same office of the person who investigated the matter and as such was believed to have been privy to the case itself. She testified that the first time she became aware of the case was shortly before the hearing was due to take place when she was simply told that she had to go preside in a matter in Virginia. She testified that she knew nothing about the case and did not share office space with Mr Lekgele. In the circumstances, in her view there was not sufficient reason for her to recuse herself.

- [50] On the question of why she had not agreed to postpone the hearing when the union claimed that it received the employer's documents late and was unable to prepare properly, Malebu said that the matter had already been postponed having been scheduled for a sitting two months earlier and the employer had stated that the documents had been given to the individual employees during earlier consultation meetings even before the first sitting of the hearing. She could not recall the exact dates when the documents had been exchanged but remembered that she was satisfied that they had been exchanged previously and insufficient time for the union to prepare. This issue was canvassed more extensively under cross-examination of Masama. It was pointed out to her that in the letter dated 18 November 2005 advising Nehawu of the consultation meeting for shop stewards, reference is made to attached documents. Masama denied ever seeing any documents in the consultation meeting that was subsequently held on 25 November 2005, but did not have an answer why the issue of missing documents was not raised at that meeting if they had not been received. At best she could not remember if it was raised.
- [51] Mphale claimed that the union raised the issue of the late receipt of documents as they had only been received by the shop stewards the previous Friday for the disciplinary hearing which was starting on Monday. They had only been able to give them to the union representative, Mr Natedi, on the morning of the hearing. They had not been able to give them to him on the weekend because he was based in Kroonstad. They had been unable to fax the documents to him as they only received them when they knocked-off at about 16h00 on that day. According to Mphale, when the chairperson refused to grant a postponement Natedi advised her that he would remain seated and the proceedings could continue but the chairperson insisted that they should leave. The enquiry appeared to end about 30 min after the unions had left and he doubted that it had continued in their absence. None of this evidence, except for the request to postpone the matter had been put to the chairperson when she testified. Mphale also oddly could not recall the recusal point being raised in the hearing before they left. However, Masama remembered that both the late receipt of documentation and recusal issues were raised. She also claimed that it

was after some other issues had been raised that the chairperson said they must leave the hall. They left singing, thinking they would be recalled to the hearing, but after some thirty to sixty minutes, the remaining persons in the hall left as well.

- [52] Malebu confirmed that in the original enquiry she had dismissed all the employees but that on appeal she understood that some had been given a two-month suspension without pay if they were on duty and had participated in the strike, and staff who are not on duty were given one month's suspension without pay, but the shop stewards were still dismissed. This was largely confirmed by Mphale except that he said that seven shop stewards were dismissed and one was taken back. Later, under cross-examination he said that the shop steward in question was never charged. Under re-examination he identified the individual as Mr Thinane, a PSA shop steward. This apparent anomaly was never canvassed with the employer's witnesses.
- [53] Ultimately, a ruling was required on whether the alleged discriminatory treatment within the shop stewards was something that could be canvassed in evidence or whether the applicants were confined to a claim of inconsistent treatment based on the treatment of shop stewards and other employees who participated in the action. In the result, I made a ruling that the applicants were confined to lead evidence on the latter issue. When asked what he saw as unequal treatment, Mphale emphasised the fact that some persons were not on duty, or were on leave but were also charged and the charges and the sanctions were different. He eventually agreed that the differentiation of charges was only between ordinary employees and the shop stewards, who were charged with incitement as well as participating in strike action. He also clarified that it was wrong to say that he alone was encouraging employees to participate as all shop stewards were doing so.
- [54] When it was put to Mphale that dismissal was an appropriate sanction given that the shop stewards never advised employees to stop singing and return to work, he simply said it was unfair. Elaborating further to additional questions about the second charge against shop stewards, he

conceded that they had a duty to observe the dispute resolution structures agreed on with the employer and that they could have distanced themselves if employees embarked on a strike. However, his answer as to why they could not do this as shop stewards was that they were bound by what their members decided they needed. Masama's sense that the treatment was inequitable was that some people were 'part of the strike' but were not charged. As far as she was concerned she was not on strike but was only there to welcome the Premier. Under cross-examination Masama emphasised that it was unfair to charge the shop stewards with the second charge when they were only pursuing their member's mandate, but agreed that if members wanted to embark on unlawful action, she would not participate and would try to guide members. She also felt it was unfair she had been dismissed whilst on leave, while other employees who participated on their day off were subjected to suspension without pay. Had she been guilty of the charges, she believed she should merely have been warned. She insisted that even if she was guilty of both forms of misconduct her dismissal would have been unfair because she did not influence anyone.

### **Evaluation**

[55] It should be mentioned that much of the version of the employer's witnesses was unchallenged which significantly affects the strength of the applicant's case. I have made occasional references to this above. Similarly, much of the individual applicant's evidence was not really tested with the employer's witnesses who might have been able to contradict them.

*Were the applicants engaged in unprotected strike action?*

[56] It is not in dispute that the applicant's were engaged in an essential service. In terms of s 65(1)(d)(i) of the Labour Relations Act, 66 of 1995 ('the LRA'), no person may participate in a strike or in conduct in support thereof if they are engaged in an essential service. In terms of section 74 of the LRA such employees only have recourse to compulsory arbitration both in disputes of interest and right, unless a minimum service agreement

has been reached and ratified under section 72 which would permit some employees in the essential service to strike.

- [57] There is no minimum service agreement applicable *in casu*. Therefore any strike action by the applicants would be automatically unprotected. Section 213 of the LRA defines a strike in the following terms:

*“**“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 mutual interest between employer and employee, and every reference to “work” in this definition includes overtime work, whether it is voluntary or compulsory.”*

(emphasis added)

- [58] The evidence shows that between 44 and 46 staff were attending a gathering held in the area in front of the administration building of the hospital and the access point to the wards, which began some time around 07h00 and ended around 13h00 on 14 November 2005. MasamaMasama was on leave at the time of the event but participated in it. Mphale spent most of the morning in the CEO's office communicating with Premier's office or awaiting communications. Phukuntse, even on MasamaMasama's own account, was outside in the gathering. At best for the applicants, neither Phukuntse nor Mphale were performing their duties at least for a considerable part of that morning, but were engaged in the events relating to the ostensible anticipated welcoming of the Premier. Though not obliged to be at work and therefore not personally absent from duty, Masama was engaged in the event activity as well. It is noteworthy that Masama was noticed by Chaka by 10h00 together with Phukuntse at the time management proceeded to the UMC venue. Chaka was not challenged on her observation when she gave evidence.
- [59] Was the activity retarding or obstructing work? There was cogent evidence that the absence from duty of a number of employees meant that services to patients were negatively affected. There was also evidence that the



singing by the gathering not far from the entrance to the wards was a disturbance. When management witnesses testified to the type of singing and chanting that took place the impression is created that the event was noisy and intended to make a disturbance. Their evidence was not materially challenged under cross-examination, so the contrary evidence of the applicants was not really tested against that version, rendering their evidence of little value on the issue. If employees had indeed sung songs in the dulcet tones of Masama, no doubt the singing would have been anything but offensive and would probably have lulled most listeners to sleep, but given the failure to materially contradict the employer's witnesses when they testified, I believe I must accept their evidence as more probable.

[60] Much of the evidence was spent trying to establish that the gathering had no purpose other than to act as a welcoming party for the Premier if and when she arrived. As one of the employer's witnesses stated, that motive did not square with the conduct. It was clear even on the union's best version, that the shop stewards in the CEO's office knew that the visit was no longer certain before 10h00, yet it was only around 13h00 that employees went back to work, even though it was known by about 11h00 that the Premier would not be coming.

[61] Also, the tone of the singing was not joyous and welcoming but was aggressive and directed at management. This is not the conduct of employees who were jubilant at the prospect of the arrival of the political executive head of the Province: it was the conduct of employees who wanted to make clear their critical feelings about management. Masama herself volunteered that the reason the employees were gathered was to pursue their grievance. This also makes sense because, on the union's version, the anticipated visit of the Premier was not a formal or ceremonial event but was in response to their demands that the Premier should meet with them about their grievances. In this regard, it must also be remembered that the shop stewards boycotted the meeting of the UMC that morning even though at that time the Premier's attendance at the hospital was not confirmed. This was consistent with the union's approach that it had no confidence dealing with hospital management on the issue

and could only engage with other levels of the Department once they had met with the Premier.

[62] The most probable explanation for the union activity that morning was to emphasise the importance that was attached to their demands relating to the grievance. It may only have been the shop stewards' hope that the Premier would get involved in the dispute, but the activities were clearly intended to drive home how strongly they felt about the grievances, whether the Premier did arrive or not. Thus there was not the slightest attempt to time the activities of the gathering with the probable arrival of the Premier and the activity endured for half a day irrespective of the likelihood of the Premier coming to attend the supposed meeting.

[63] In the circumstances, I am satisfied that the activities of the shop stewards and the other employees who participated in the activities of the morning had the effect of obstructing normal operations at the hospital, and participants were either absent from duty when they should have been on duty, or were simply supporting the obstructive action. Consequently, they were either on strike as in the case of Mphale and Phukunste or, as in the case of Masama, were participating in conduct in support of the strike.

*Were the applicants also influencing or inciting other employees to embark or participate in such action?*

[64] It is clear from the summary of evidence above, that the applicants were not dismissed simply because of their participation in the strike or conduct in support of it. No other participants in the unprotected strike action were ultimately dismissed, even though that was the original sanction decided upon by Malebu. On appeal, different sanctions short of dismissal were applied depending primarily on whether the employee in question was on duty or not at the time. When it came to the shop stewards who participated, the second charge weighed heavily against them receiving the same sanction.

[65] It may be so that other employees were angered by what they perceived to be irregular appointments of nursing staff. It is unlikely that the union would have been able to win the support of 46 staff to participate in the

demonstration without their willing support. The question is did they encourage or influence such participation by their own actions?

[66] Certain facts are particularly relevant to determining this question. It is apparent that the issue of appointments was a standing item on the agenda of the UMC meetings. It is also not true that the issue of the appointments which aggrieved the unions was not raised in the UMC. It was clearly referred to in the minutes of the meeting of 10 October 2005. However, what is equally clear from those minutes, is that the unions expressed no intention of using the UMC as a vehicle for trying to resolve the grievance. Nehawu shop stewards merely recorded their discontent and announced their intention to pursue the matter through their structures. By the time they attended the joint meeting with management and the hospital board on 7 November 2014, they had already sent off the four letters to the various levels of executive authority governing the hospital and were certainly not willing to engage with the board and management on the issue at that meeting. Although there was a hint that they might be willing to meet with management when the next UMC meeting was scheduled on 14 November, that suggestion was a tentative one and was subject to their members mandating them to do so. If one has regard to the letters sent out at the end of October, it is difficult to read any willingness to engage with management at a local level on the issue.

[67] Quite apart from not showing any real interest in allowing the UMC to be a forum in which the grievance could initially be thrashed out, the intent which emerges was that the shop stewards sought an escalation of the dispute. What emerges later from the train of events is that, from the perspective of the Nehawu shop stewards, the only way of addressing the grievance was to focus on convening a meeting with the Premier at the hospital. It is also clear that the regional level of the union played no active role in this agenda which was driven from the branch level. There was no real interest that was expressed in involving regional Nehawu leaders or officials in the matter even when the shop stewards had escalated the matter to the highest executive political level in the province. In short, not only was there no intention of giving the UMC one meaningful opportunity of resolving the matter, but the union structures at the level of

the hospital were not even interested in following a progressive dispute resolution process using their own avowed dispute hierarchy. Their contempt for the UMC as a forum to resolve matters was starkly illustrated by their boycott of the meeting on 14 November. Rather than use the opportunity to at least attempt to resolve the matter at the forum which had never been used for that purpose, the unions' leadership at the institutional level chose to rather wait and see if the Premier's office reacted to them, while the hospital's operations were obstructed.

[68] There was no effort by the shop-stewards to follow the acknowledged procedures and nothing to indicate that they tried to do so but it was their constituents who refused to allow them to pursue the normal channels. Masama was party to this initiative and there is nothing to suggest she sought to caution any Nehawu members that they were embarking on a path out of line with accepted procedures. Mphale also did not dispute that they were aware of the explicit and cautionary letter from the HOD on 27 October 2005. They consciously chose to minimise it by characterising their planned action on 14 November as merely a planned welcome for the Premier.

[69] However, their own letter to her shows that they expected the Premier to meet with them to address the grievances. Moreover, the other letters make it clear that action was planned for 14 November irrespective of what happened. Additionally, it is apparent that there was no clarity even on that day if and when the Premier would come, but employees were singing and chanting from early that morning and persisted with the action until lunchtime.

[70] The pretence that this prolonged disruptive activity was merely aimed at welcoming the Premier is patently transparent. The shop stewards made no attempt to curtail it or minimise it by discouraging the gathering from continuing until such time as the Premier's arrival was more predictable. Essentially, on the union's version they would have the court believe that they thought nothing was amiss with letting the gathering continue for the best part of the morning shift. Notably, on the union's own version workers were content to return to work when they were told after several hours that

the Premier was not coming. If the intention was solely for workers to be there to greet the Premier and it was dispersed when it was known she would not be coming, it surely would have been just as easy to convene the gathering when it was known the Premier was actually on her way. It is highly improbable the prolonged gathering in the absence of a clear indication the meeting would take place, would have continued if a welcome was its main purpose.

[71] The shop stewards did nothing to dissuade employees from participating in the action, and there was no evidence they conveyed the warning from the General Manager about how he saw the planned action. Masama acknowledged that she was 'a leader' and that is why she had to attend the event. That could only have been to lend support to the action and so that others would be encouraged by her presence and participation. She might not have been striking herself but it is most probable she attended to demonstrate her support for the action that was being undertaken.

[72] In light of the evidence, I am satisfied the applicants' participation in the events of the day was intended to support the disruptive stoppage and would have encouraged or influence other participants' participation in the stoppage because of their role as leaders. All their actions showed their support for the stoppage and nothing suggested they used their leadership function to try and curtail the event or persuade participants to return to work until there was certainty about the Premier's attendance or non-attendance that day.

[73] In fact everything indicates that the shop stewards believed they were acting within their rights and there was no reason to believe that in their interactions with employees over the grievances and on the day of the strike that they would not have influenced employees in conformity with that view. Masama recognised her role as a leader in participating in the event. It is also significant that there were no further developments after Mphale made the announcement at 11h00 that the Premier was not coming to the hospital, but no mention was made that he then encouraged the gathering to disperse and return to work, which would be the natural expectation if the gathering was purely to welcome the Premier. Instead

the stoppage continued for at least another two hours before ending. *Mr Jonas* in his cross-examination of the applicants repeatedly emphasised the complete absence of any attempts by them to persuade employees to return to work and they never contended that they had. It is also noteworthy that the applicants led no evidence of how they had obtained a mandate for issuing the letters to a multiplicity of authorities, nor indeed of any consultative process between themselves and the members to support an inference that they were merely reflecting their members' wishes in every initiative they took.

[74] Everything points to a conclusion that the shop stewards conduct would have positively influenced employees to participate in the action on 14 November 2014 and it seems reasonable to conclude that they were not simply the passive instruments of their members' will. I am satisfied that the second charge against the shop stewards was well founded and that they were guilty of influencing employees to participate in the strike action.

### **Sanction**

[75] It is clear that the employer singled out the shop stewards for different treatment because of the role they played as leaders in undermining the established dispute resolution mechanisms and in supporting unprotected strike action and the employees' participation in it. It was conceded that the contents of the letter warning that the employer viewed any threatened strike action as potential strike action and the possible consequences thereof was conveyed to the shop stewards. Their response indicates they did not take it seriously. They did not even seek to curtail their planned 'welcoming' of the Premier to minimise any disruption it might cause. They proceeded with the action in circumstances where the consequences of doing so had been made clear.

[76] In the trial neither Masana nor Mphale showed any regret or contrition for what had transpired, but defended every aspect of their actions. What makes it worse is they showed no concern for the disruptive effect of the action on the hospital services and at the time made no attempt to assist management in minimising the disruption caused by, for example, discussing staffing arrangements beforehand. They displayed no concern

for the fact that the action occurred in an essential service and they initiated a course of action which knowingly tried to short circuit established dispute processes and involved recourse to industrial action.

[77] Their attitude demonstrated that they had no regard for management of the institution as they had lost faith in them. There is no reason to believe that they would feel any less righteous about repeating similar action in the future. In the circumstances, I do not think their dismissal based principally on the second charge was unfair.

### **Procedural issues**

[78] Two procedural matters were canvassed. The first relates to Malebu's failure to recuse herself. It is well established that a suspicion of bias must have a reasonable basis to justify a chairperson's recusal. In this case, the request was based entirely on a perception that someone working in the same Sub-Directorate of the Department as the person first appointed to chair the enquiry must necessarily have been influenced by the first appointee.

[79] In the *BTR Sarmcol*<sup>1</sup> case, the Appellate Division, as it then was, considered the test of bias in the context of when an Industrial Court judge should recuse himself or herself. The court found that the existence of a reasonable suspicion of bias satisfied the test for recusal.<sup>1</sup> The test was further tightened up by the decision of the Constitutional Court in the *SARFU*<sup>2</sup> case and elucidated by it in the *SACCAWU*<sup>3</sup> case. Without detracting from the nuanced reasoning expressed in those judgments, a major theme in the Constitutional Court's refinement of the test was to emphasize that not only must the apprehension of bias be that of a reasonable person in the position of the person being judged who has an objective factual basis for their suspicion, but the apprehension of bias

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<sup>1</sup> *BTR Industries SA (Pty) Ltd & others v Metal & Allied Workers Union & another* 1992 (3) SA 673 (A); (1992) 13 ILJ 803 (A)

<sup>2</sup> *President of the Republic of SA & others v SA Rugby Football Union & others* (1999) (4) SA 147 (CC) at 177 para 48

<sup>3</sup> *SA Commercial Catering & Allied Workers Union & others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC); (2000) 21 ILJ 1583 (CC), per Cameron AJ at 714-5

they have must be one that in law would be recognized as raising a legitimate concern about the adjudicator's impartiality.

[80] The applicants had no other factual basis for their suspicion than this. Anything else in the applicants' minds regarding the working relationship between Malebu and the previous appointee was purely speculative on their part. When Malebu testified on the limited notice and information she had received when she was appointed to chair the enquiry in March 2006, the hypothetical basis of their preconceptions became even more stark.

[81] On the basis of the information about Malebu available to the applicants at the time, there was insufficient grounds for them to expect Malebu to recuse herself and her decision not to was not incorrect.

[82] The second matter concerns the documentation which was supposedly only received by the applicants the Friday before their hearing and was only conveyed to the union official representing them on the morning of the hearing. What this complaint did not adequately explain away was the prior consultation over the intended disciplinary measures which took place in 2005. The notice advising of that consultation clearly referred to attached documentation and yet there was no evidence at that stage of the union raising any query about missing documentation, whereas it is a natural inference to assume that an issue would have been made of it if no documentation was received.

[83] Moreover, it was also not explained how the applicants' preparation would actually have been hampered if they had the documentation over the weekend and only gave it to the organiser on the morning of the hearing. It may not have been ideal for the representative, but I cannot say Malebu was unfair in deciding that there was sufficient reason to believe that the documentation had been provided previously and that the enquiry should not be delayed. Accordingly, I am not satisfied the applicants ought not to have been a position to defend themselves in light of the first occasion when documentation was exchanged, and they did not suffer any procedural unfairness as a result of Malebu not postponing the enquiry.



**Costs**

[84] The trial was lengthy, but I cannot say the applicants did not pursue their claim in good faith albeit misguidedly so. The dismissal of the applicants was no doubt a serious matter for them and the union. Accordingly, I do not think it is appropriate to order costs in this matter.

**Order**

[85] The dismissal of Messrs T J Mphale, M J Phukuntse and Ms M Masama for participating in unprotected strike action in an essential service and for influencing other employees to do so was both procedurally and substantively fair.

[86] No order is made as to costs.



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**R LAGRANGE, J**

**Judge of the Labour Court of South Africa**

**APPEARANCES**

APPLICANTS: Mr Dladla of NEHAWU on 5 and 6 May 2009 and  
M Mamorobela of Mamorobela Attorneys for the remainder of the proceedings

FIRST RESPONDENT : S S Jonase of the State Attorney's Office.