REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 484/11

In the matter between:

NATIONAL DEMOCRATIC CHANGE & ALLIED

WORKERS UNION (NDCAWU) **First Applicant**

MARY MOKGALE & 8 OTHERS **Second to Tenth Applicants**

and

CUMMINS EMISSION SOLUTIONS (PTY) LTD **Respondent**

Heard: **8, 9, 10, 11, 14 and 28 October 2013**

Delivered: **14 January 2014**

Summary: **Automatically unfair dismissal – the case for automatically unfair dismissal not made out – Court exercising jurisdiction in terms of section 158(2)(b) of the Labour Relations Act, 66 of 1995 – dismissal substantively and**

procedurally fair save in respect of one individual applicant – reinstatement ordered in respect of the one individual applicant.

JUDGMENT

MAENETJE AJ

[1] The respondent employed the second to tenth applicants ("individual applicants") until their dismissal on 28 October 2010.

[2] All of the individual applicants were charged with intimidation, which was allegedly committed on 6 September 2010 around 14h00 at Rosslyn. There are differences in the detail of the alleged misconduct (such as what happened; how it happened; who was intimidated; and so forth). These details appear below.

[3] The individual applicants were all members of the first applicant. They were among fifteen employees who were charged with intimidation arising from incidents that allegedly took place during a protected strike on 6 September 2010. Six of these were found not guilty and therefore not dismissed.

[4] It was alleged that the individual applicants intimidated the following non-striking employees of the respondent on 6 September 2010: Ms Mary Mokgale ("Mokgale") was alleged to have intimidated Ms Clyder Ndlovu ("Ndlovu"); Mr Xavier Madras ("Madras") was alleged to have intimidated Ndlovu and Ms Sylvia Mogodiri ("Mogodiri"); Mr Donald Nkosi ("Nkosi") was alleged to have intimidated Ndlovu, Mogodiri and Ms Maria Mokoena ("Mokoena"); Mr Vincent Lephuting ("Lephuting") was alleged to have intimidated Mokwena; Mr Thabo Mosombuka ("Masombuka") was alleged to have intimidated Mogodiri; Mr Daniel Manekus ("Manekus") was alleged to have intimidated Mogodiri; Mr Jacob Monageng ("Monageng") was alleged to have intimidated Mogodiri; Mr Oupa Kau ("Kau") was alleged to have intimidated Ndlovu and Mogodiri; and Ms Kealeboga Maubane ("Maubane") was alleged to have intimidated Mogodiri, Mokwena and Ndlovu.

[5] The protected strike resulting in the dismissals was part of a national strike in the automotive industry for wages. It is unclear from the evidence presented exactly when the employees of the respondent joined the national strike. Some of the witnesses suggested that the employees of the respondent joined the strike action on 2 September 2010, whereas others believed they went on strike for the first time on 6 September 2010. Resolving this difference in the evidence presented is not material to the determination of the dispute referred to this Court.

[6] The individual applicants were dismissed following a collective or mass disciplinary hearing chaired by an independent chairperson, Mr JC Kruger. The disciplinary hearing was conducted on 29 September and 1 October 2010.

[7] An internal appeal against the dismissals of the individual applicants was unsuccessful.

[8] The first applicant referred an unfair dismissal dispute on behalf of the individual applicants to the Dispute Resolution Centre ("DRC"). The dispute could not be resolved through conciliation.

[9] It is clear from a ruling that the DRC gave in February 2011 that the applicants contended that the dispute should be referred to this Court for adjudication. The ruling states the following:

> 'The applicants are of the view that the dismissal was as a result of harassment/discrimination. The DRC … lacks jurisdiction to determine the matter. This matter should be referred to the Labour Court for determination'.

[10] The statement of case referring the dispute to this Court on 22 March 2011 summarizes the statement of facts that were relied upon to establish the applicants' claim as follows:

> 'Following national automotive component strike which happened around

September 2010. The Second Applicants that are members of first applicant took part in that strike. On the 6 September 2010 at about 14:30, Respondent alleged that the Second Applicants 'intimidated' other fellow employees.

The incident or alleged incident happened outside the Supplier Park where both members of First Applicant and NUMSA gathered to demonstrate'.

[11] The statement of case states the legal issues that arise from the pleaded facts as follows:

'…

The hearing was conducted which involved fifteen employees and was meant to be collective.

The First Respondent selectively dismissed 9 employees out of fifteen (15) employees. Amongst the 9 employees 3 of them are union representative. See annexure H.

The First Respondent clearly shows ulterior motive by only head hunting union activists including leaders of the First Applicant.

The appeal was lodged but First Respondent confirmed dismissal'.

[12] In this Court, the individual applicants contended that their dismissal was automatically unfair, alternatively that it was unfair because their guilt on the charges of intimidation was not proved and, further alternatively, that dismissal was not a fair sanction in all the circumstances of the case. In support of the contention that an automatically unfair dismissal claim is before this Court for determination, the applicants referred *inter alia* to the parties' pre-trial minute, which records in paragraph 71.2 that one of the issues for determination is:

' Whether the dismissal of the Second Applicants is due to them being on strike'.

[13] Thus the applicants relied for their claim of automatically unfair dismissal on section 187(1)(a) of the Labour Relations Act, 66 of 1995 ("the LRA"). To the extent that certain of the individual applicants appeared to also pursue a claim of automatically unfair dismissal based on unfair discrimination, this will also be considered under the provisions of section 187(1)(f) of the LRA.

Automatically unfair dismissal

[14] The applicants bear the onus to prove that their dismissal was for reasons contemplated in section 187(1)(a) and/or (f) of the LRA.

[15] The determination of the question whether or not the dismissal was automatically unfair depends upon what the reasons were for the individual applicants' dismissals.[1] If the reasons fell within section 187(1)(a) and/or (f) of the LRA, then the dismissal would be automatically unfair. The test is one of causation. Both factual and legal causation must be satisfied.[2]

[16] The individual applicants contended that they were dismissed for their participation in strike action on 6 September 2010.

[17] In order to support their contention that the real reason for their dismissal was their participation in the protected strike action, each of the individual applicants testified and explained the circumstances pertaining to his or her participation in the protected strike action. The respondent led the evidence of Mogodiri, Ndlovu and Mokoena *inter alia* to prove that the dismissal was as a result of their intimidation by the individual applicants during the protected strike action.

[18] The applicants' evidence does not bear out the contention that their dismissal was automatically unfair, for the reasons set out below.

[19] First, the individual applicants were charged with misconduct in the form of

[1] *Kroukam v SA Airlink (Pty) Ltd* [2005] 12 BLLR 1172 (LAC) at para 20.
[2] *SACWU & Others v Afrox Ltd* [1999] 10 BLLR 1005 (LAC) at para 32.

intimidation on 6 September 2010 during a protected strike action. It emerged during the evidence of Mogodiri, Ndlovu and Mokoena that the charges of intimidation were based on grievances that were laid by them following the alleged acts of intimidation by the individual applicants, or statements that they had made to the police and to the employer regarding the alleged intimidation. The aforesaid grievances or statements were not placed before the Court. However, the fact that they were laid soon after the alleged acts of intimidation could not be seriously challenged.

[20] Secondly, the findings of the chairperson of the disciplinary hearing make it plain that he found the individual applicants guilty of intimidation, which resulted in their dismissal.

[21] Thirdly, whereas a large number of the respondent's employees took part in the protected strike action on 6 September 2010, only fifteen employees were charged with intimidation, nine of which were ultimately dismissed. In his evidence, Nkosi estimated that about ninety-six or ninety seven percent of the respondent's employees took part in the protected strike action on 6 September 2010.

[22] The respondent's contention carries weight that if it intended to dismiss participating employees in the strike action merely for their participation in it, it would not have selected to charge only fifteen of them with misconduct. Furthermore, the strike action started earlier than 6 September 2010 and continued on 7 September 2010, but the individual applicants were charged with and dismissed for alleged intimidation on 6 September 2010.

[23] Fourthly, during their cross-examination the individual applicants were unable to dispute that the respondent never discouraged its employees from taking part in the protected strike action and that they were charged and dismissed for intimidation.

[24] In addition, the individual applicants were confronted with a management record of a meeting between the first applicant and the respondent on 7 September 2010, which shows that instead of discouraging participation in the protected strike action, management's main focus was with picketing rules and concerns about acts of intimidation. That the meeting did take place and that management raised concerns regarding acts of intimidation was not disputed. Under "Point 4: General", the management's record of the meeting states the following:

> 'Point 4: General
>
> Individuals lodged complaints of intimidation to the South African Police. This matter is in the hands of the South African Police Service. CES management has no say in this matter.
>
> CES management will however, lodge their own investigation into acts of intimidation, and deal with this according to the Cummins disciplinary code as soon as the employees return to work'.

[25] Mokgale, who is a shopsteward, testified that she was present at the meeting of 7 September 2010 and could not dispute that the respondent raised concerns regarding intimidation as quoted in the passage above. When asked whether she accepted that concerns regarding intimidation were raised at the meeting, all she said was, 'I can see, here it is'. She even accepted under cross-examination that the basis for her dismissal was intimidation.

[26] Madras conceded under cross-examination that he was not charged with participating in the protected strike action, or found guilty of participating in the protected strike action. His contention was that the chairperson of the disciplinary hearing did not give reasons for finding him guilty of intimidation.

[27] Nkosi conceded under cross-examination that Mogodiri, Ndlovu and Mokoena complained that he intimidated them during the protected strike action on 6 September 2010. He disputed that he had intimidated anyone. He further

contended that this is the main reason why he contends that he was dismissed for participating in the protected strike action. He returned to work after the strike action and was disciplined and dismissed.

[28] Lephuting confirmed that he was charged and dismissed for allegedly intimidating Mokoena during the protected strike action on 6 September 2010. Save for disputing that he intimidated Mokoena as alleged, Lephuting did not put forward any evidence to support the contention that he was dismissed for his mere participation in the protected strike action.

[29] Masombuka admitted that he was charged and dismissed for allegedly intimidating Mogodiri on 6 September 2010 in that whilst in the company of the other striking employees he allegedly uttered the words 'we hit others and we will hit you'. He denied the allegations and asserted that he did not intimidate any person during the protected strike action on 6 September 2010.

[30] Manekus confirmed that he was charged and dismissed for allegedly intimidating Mogodiri by physically pushing her during the protected strike action on 6 September 2010.He did not dispute that she then laid a complaint against him for this, which resulted in him being charged and dismissed. The focus of his evidence was to deny the alleged intimidation and explain his whereabouts on 6 September 2010 during the protected strike action.

[31] Kau confirmed that he was charged and dismissed for allegedly intimidating Mogodiri during the protected strike action on 6 September 2010 by physically bumping against her chest, and Ndlovu by holding a sjambok and telling her that they had hit others and would hit her. He disputed the alleged intimidation. The focus of his evidence was to support this denial.

[32] Monageng confirmed that he was charged and dismissed for intimidating Mogodiri during the protected strike action on 6 September 2010 by physically bumping his chest against hers. He denied this and contended that it was unfair

for the chairperson of the disciplinary hearing to have found him guilty of intimidation. The focus of his evidence was to support this denial.

[33] Maubane confirmed that she was charged and dismissed for allegedly verbally intimidating Mogodiri, Ndlovu and Mokoena on 6 September 2010 during the protected strike action. She denied the alleged intimidation and testified in support of the denial to prove her innocence. When she was asked in her evidence in chief what her comment was regarding the finding of guilty, she said that the chairperson of the disciplinary hearing discriminated against all of those who were charged with misconduct. When she was pressed under cross-examination to explain the reason for which the chairperson discriminated against all those that were charged with misconduct, Maubane said the employees charged with misconduct were fifteen but that six were found not guilty and reinstated. She said that the chairperson of the disciplinary hearing did not say why the six were reinstated whereas the individual applicants were dismissed. When she was asked to explain why the chairperson discriminated against the individual applicants, she said she did not know the reason. She was then referred to the chairperson's findings where he stated that he did not accept the evidence of the individual applicants, and thus accepted the evidence of their accusers, i.e. Mogodiri, Ndlovu and Mokoena, that the individual applicants had intimidated them on 6 September 2010 during the protected strike action.

[34] It is correct that the findings of the chairperson show that he rejected the evidence of the individual applicants and accepted that of Mogodiri, Ndlovu and Mokoena regarding the alleged intimidation.

[35] In light of the evidence summarized above, as well as the reasons given, it is difficult to find that the individual applicants were charged and dismissed for merely participating in the protected strike action on 6 September 2010 or on any other days.

[36] In their evidence, the individual applicants appeared to contend that their

dismissal was for participation in the protected strike action because it was for conduct in connection with the strike. This is not sufficient because a protected strike action does not insulate participating employees from disciplinary action and dismissal for misconduct, such as intimidation committed during the strike action or in connection with the strike action.[3]

[37] For their part Mogodiri, Ndlovu and Mokoena testified that it was their reports to the police and to management regarding alleged intimidation by the individual applicants on 6 September 2010 that led to the individual applicants being charged with misconduct and ultimately dismissed. They gave evidence to explain how the intimidation happened and by whom on the part of the individual applicants. Their evidence implicated each of the individual applicants. They said that this was the evidence that they had led at the disciplinary hearing. Whether or not the evidence proved the alleged intimidation by the individual applicants is only relevant to the question of substantive fairness under section 188(1)(a) of the LRA, which is a separate issue from the alleged automatically unfair dismissal.

[38] Fifthly, the individual applicants did not prove that their dismissal was the result of unfair discrimination as contemplated in section 187(1)(f) of the LRA. The evidence of Maubane summarized above was woefully inadequate in this regard. She did not even attempt to identify any of the grounds contemplated in section 187(1)(f) of the LRA as a ground for the alleged discrimination. In contrast, it is clear from the findings of the chairperson of the disciplinary hearing that he, rightly or wrongly, accepted the evidence of the six employees who he found not guilty and rejected that of the individual applicants. The finding of not guilty in respect of these six employees was not based on any ground that falls within the grounds of discrimination listed in section 187(1)(f) of the LRA. There was no suggestion by any of the individual applicants, including Maubane, that this was the case.

[3] *CEPPWAWU and Others v Metrofile (Pty) Ltd* [2004] 2 BLLR 103 (LAC) at paras 53-54].

[39] In the circumstances, the individual applicants have failed to prove that they were dismissed for their mere participation in the protected strike action on 6 September 2010 or for any reason that renders their dismissal automatically unfair. The evidence shows that they were dismissed for misconduct, in the form of intimidation. Whether or not the alleged intimidation was proved relates to the substantive fairness of the dismissals under section 188(1)(a) of the LRA, which is dealt with below.

Jurisdiction in terms of section 158(2) of the LRA

[40] It is common cause that only the automatically unfair dismissal claim fell within the jurisdiction of this Court. The unfair dismissal claim, based on the substantive and/or procedural fairness of the dismissals ought to have been referred to arbitration unless this Court exercised jurisdiction in terms of section 158(2) of the LRA.

[41] Section 158(2) of the LRA provides as follows:

> '(2) If at any stage after a *dispute* has been referred to the Labour Court, it becomes apparent that the *dispute* ought to have been referred to arbitration, the Court may —
>
> (*a*) stay the proceedings and refer the *dispute* to arbitration;
>
> (*b*) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make'.

[42] This is not a case in which the proceedings could be stayed for the entire dispute to go to arbitration. The automatically unfair dismissal dispute had to be determined by the Court exercising its jurisdiction as such, albeit that the evidence underlying the automatically unfair dismissal dispute overlapped with the evidence relating to the alternative claim of unfair dismissal.

[43] The parties consented that the Court should sit as an arbitrator and determine the unfair dismissal dispute as an arbitrator in terms of section 158(2)(b). For this purpose, the Court has to determine whether or not it would be expedient for it to arbitrate the unfair dismissal dispute.[4]

[44] In the *Mias* case referred to above, the LAC identified certain of the difficulties that may arise where this Court sits both as a Court and as arbitrator:

> ' Inferring consent, and allowing for the overlapping evidence it may at first blush appear expedient for the court *a quo* to have decided the item 2(1)(b) issue as well. There are, however, some difficulties in the way of this course. In contrast to the *Reactor* case *supra*, the trial court would have sat in two capacities at the same time: both as court and as arbitrator. Its decision on the first item was appealable (with leave) while a decision on the merits of the second item was not. On appeal it is open to this Court to correct the decision on the first item but save on review, not the second. Depending on the reasoning of the court *a quo* and on this Court's view of the merits, this could lead to inconsistent findings or conclusions, which would be undesirable. Furthermore, we do not have the benefit of the trial court's reasoning and conclusions on the merits of the second item. We may, as a court of appeal, interfere with the trial court's decision not to exercise jurisdiction, but what then? Absent a review, and there is none, we cannot in our appellate capacity simply substitute our view on the merits of item 2(1)(b), whether favourable to the appellant or not. The most we could do would be to remit the item 2(1)(b) issue to the tribunal below for a decision on the merits, which may or may not prompt review proceedings. In such event it would, I think, be inadvisable for this Court to dispose of the appeal on item 2(1)(a) while leaving item 2(1)(b) hanging potentially in the air. If there is to be a review, which we cannot predict either way, then appeal and review should be heard together'.

[4] *Mias v Minister of Justice and Others* [2002] 1 BLLR 1 (LAC) paras 32-33. The LAC has confirmed that when this Court exercises jurisdiction in terms of section 158(2)(b) of the LRA it does not adjudicate the dispute – it arbitrates it. See *Wardlaw v Supreme Moulding (Pty) Ltd* [2007] 6 BLLR 487 (LAC) paras 19-20.

[45] Brassey *Commentary on the Labour Relations Act* Volume Three also expresses the view that it is unenviable for this Court to sit as an arbitrator and that cases in which jurisdiction is assumed will be rare.[5]

[46] There may be such rare cases, in which expedience could justify this Court sitting as a Court in respect of that part of the dispute that falls within its jurisdiction, and as an arbitrator in respect of an alternative claim that falls outside its jurisdiction.

[47] In this case the alleged facts and the evidence underlying the automatically unfair dismissal claim and the ordinary unfair dismissal claim are the same. The parties presented evidence over a period of five days. They submitted written submissions on 23 October 2013, and oral submissions on 28 October 2013. If the alternative claim is referred to arbitration in light of the Court's findings on the automatically unfair dismissal claim, then the parties would have to incur further costs in the arbitration in presenting the same evidence before an arbitrator.

[48] I am persuaded that this is a case in which expedience justifies this Court sitting as an arbitrator in respect of the alternative claim of unfair dismissal. There are cases in which this Court, in fairly similar circumstances, has exercised jurisdiction in terms of section 158(2)(b) of the LRA to determine an alternative claim of unfair dismissal where an automatically unfair dismissal claim failed.6 Ultimately, it is a question that turns on the facts and circumstances of each case.

Unfair dismissal

[49] As explained above, Mogodiri, Ndlovu and Mokoena testified in support of the allegations of intimidation against the individual applicants.

[5] At A7-151.
[6] See for example, *NUM and Others v Black Mountain Mining (Pty) Ltd* [2010] 3 BLLR 281 (LC); *NUPSAW obo MANI and 9 others v National Lotteries Board*, (JR953/2008) [2011] ZALCJHB 199, (3 February 2011).

[50] Mogodiri testified first. She testified that the respondent employs her as an operator. She has been in the respondent's employment for about six years. She chose not to participate in the protected strike action in September 2010. On 31 August 2010, a representative of the first applicant had told all employees that they had a choice whether or not to take part in the strike action.

[51] She reported for work on 6 September 2010 at 6h00. She left work at 14h00. As she walked towards the entrance security gate a group of striking employees confronted and surrounded her. She was placed in the middle of the group. She identified Masombuka, Kau, Monageng, Manikus, Nkosi, Madras, Maubane and Eunice Sithebe ("Sithebe") as part of this group of striking employees.

[52] Prior to her being surrounded by the group of striking employees, she heard an employee that she could identify only as "Teacher" shouting out from amongst the group of striking employees that here comes a rat.

[53] It is common cause that a "rat" refers to a traitor. This means someone who betrayed others by going to work whilst other employees are on strike.

[54] The group of striking employees obstructed her movement. She then described what some of them did. Masombuka pushed his hands almost against her face. He pushed her backwards and said they were going to hit her because she was working whilst others were on strike.

[55] Mr Siphiwe Mokoena appeared in front of her. Monageng, Manikus and Kau took turns pushing her forwards and backwards, bumping her with their chests. Nkosi pointed her with his finger and said that they would burn her shack.

[56] Madras also pushed her with his hands.

[57] Security officers rescued her from the group of striking employees. Before she could be rescued, Kau said that they would give her (Mogodiri) to the ladies to deal with her. Maubane shouted at her that she was reporting for work whilst they

were on strike. Eunice Sithebe said the same thing to her.

[58] Mogodiri said that after being rescued by the security officers she took a bus home. She said the whole incident in the middle of the group of striking employees lasted between fifteen and twenty minutes.

[59] On 7 September 2010, Mogodiri reported for work again at 6h00. She then reported to her foreman and management what had happened to her on 6 September 2010. She also laid a charge with the police. This evidence was not challenged.

[60] Mogodiri denied the version of the individual applicants that they had formed a human chain, through which she had forced her way and called the striking employees crazy. She emphatically denied that the striking employees had formed such a human chain, through which she forced herself, and that she insulted them.

[61] The cross-examination of Mogodiri focused largely on putting versions of the individual applicants to her. It was put to her, in line with the evidence of the individual applicants, that they all denied that they were near her on 6 September 2010 close to the security gate. She insisted that the employees that she identified as having been part of the group of striking employees were there at the time on 6 September 2010 and did what she alleged.

[62] Ndlovu testified next. The respondent employs her as a team leader, production. She chose not to participate in the strike action. She reported for work on 6 September 2010 at 6h00. She worked the whole day until 14h00. After work she left in a motor vehicle belonging to Mr Khomotso Duiker ("Duiker"). She was in the motor vehicle with Mr Albert Ndlovu ("Mr Ndlovu"), who is her husband, one other employee who she identified as Mr Jimmy Mangayi ("Mangayi"), and two of their students whose names she could not recall.

[63] She, Mr Ndlovu, Mangayi and the two students got off Duiker's motor vehicle at

the traffic lights next to a Zenex garage. The traffic lights are next to a bus stop where they intended to catch a taxi home. They waited at the bus stop.

[64] Whilst waiting at the bus stop, she saw four motor vehicles stop next to them. The people in the motor vehicles alighted. They were all fellow employees at the respondent. These employees approached them and surrounded them. Nkosi was amongst them and was the first to speak. He said to her that they were there to warn them not to come to work the next day. She responded that she would report for work. Madras then spoke and said to her that they were there to warn her not to come to work the next day. She testified that she asked them to stop and said that Mr David Maluleka, the union organizer, had told everyone that joining the strike action was a choice. She had heard him well. Maubane then pointed a finger at her and said that she was lying. Kau came forward with a sjambok. He hit it on the ground next to Ndlovu's feet. She started shivering and asked Kau what he was doing. Kau lifted the sjambok and said to her (Ndlovu) "do you see this? We have hit others, we will hit you too".

[65] Ndlovu said that she responded that no one would hit her and she would report for work. Mokgale responded to this and said they would deal with her.

[66] Ndlovu testified that Nkosi dispersed the group of employees. They all got into their cars and drove off. She, Mr Ndlovu and the two students caught a taxi and went home. Upon arrival at home, Ndlovu and Mr Ndlovu reported the incident to the police and laid a charge of intimidation.

[67] All of the individual applicants denied Ndlovu's allegations. Kau even suggested that he never held a sjambok. Instead, he testified that he was carrying a car component to fix his car, which was very small.

[68] Mokoena was the third witness to testify for the respondent. She is employed as an operator and has been working as such for seven years.

[69] Mokoena reported for work on 6 September 2010. Whilst at work two individuals

came into where she was working and warned her and other employees who were at work that the striking employees were waiting for them. The two individuals were Ms Apesage Sefike and Ms Idah Phalwane.

[70] She heeded the warning and asked for a lift with one of the managers when she knocked off at 14h00. The manager dropped her off at the traffic lights next to the bus stop for her to catch a bus.

[71] Mokoena testified that when she arrived at the traffic lights she found a gentleman sitting on a rock and joined him. She did not know his name. It is common cause that he was not an employee of the respondent at the relevant time. Whilst waiting for a bus with the unknown gentleman, certain employees of the respondent arrived in motor vehicles. They alighted from their motor vehicles. Amongst them were Nkosi, Maubane, Kau, Lephuting and Mr Oupa Masango ("Masango"). These employees approached her.

[72] She testified further that Nkosi then poked her with his fingers in her face and asked why she was working whilst others were on strike. He said she was betraying them. Masango warned her that she should not report for work the next day or else they would deal with her. Maubane shouted that they needed her support. Kau had a sjambok with him and hit the ground with it.

[73] Lephuting did not speak to her at all or do anything to her. He, however, hit the unknown gentleman who was sitting on the rock next to her. In his evidence Lephuting explained that he had an altercation with the gentleman regarding a cell phone that the gentleman had not returned to him. They quarreled with each other and Lephuting hit him. This seems to be a matter for the police.

[74] Except for Lephuting who explained that hitting the unknown gentleman had nothing to do with the strike action or attempting to intimidate Mokoena to join the strike action, all the other individual applicants implicated by Mokoena denied her allegations.

[75] Having listened to the evidence of all the individual applicants and the respondent's three witnesses discussed above, I have no reason to disbelieve Mogodiri, Ndlovu and Mokoena. They all testified that they reported the incidents to management on 7 September 2010 when they reported for work. Mogodiri and Ndlovu reported the incidents to the police on the day that the incidents allegedly happened. It is unlikely on the probabilities that they would have reported the incidents as they did if the incidents did not happen at all.

[76] Any threat of violence in the work place is serious misconduct that warrants dismissal. This is particularly so in circumstances where the union organizer and management, recognizing the right of each employee to choose whether or not to engage in strike action, had assured all employees that it was their choice whether or not they wanted to join the strike action.

[77] It was made clear in argument for the respondent that the alleged intimidation is based on the individual actions of the individual applicants, albeit as members of a group of striking employees. Hence only employees who did something to intimidate any of Mogodiri, Ndlovu and Mokoena were charged, disciplined and dismissed. On this reasoning, I find that all of the individual applications, with the exception of Lephuting, were correctly found guilty of intimidating Mogodiri, Ndlovu and Mokoena on 6 September 2010 to prevent them from reporting for work on 7 September 2010 as they had chosen to do. Mokoena could not link Lephuting's conduct of hitting the unknown gentleman with any alleged intimidation for her not to report for work. The others' conduct complained of was linked to the alleged intimidation of Mogodiri, Ndlovu and Mokoena to prevent them from reporting for work on 7 September 2010.

[78] In my view, and on the evidence presented, the respondent has proved that the dismissal of the individual applicants, except for Lephuting, was for a fair reason. In all the circumstances, dismissal is a fair sanction for misconduct in the form of intimidation. The contention by the applicants that the respondent's disciplinary

code does not indicate dismissal as a sanction for intimidation, however, serious, is unhelpful. The disciplinary code expressly states that it is a guideline. Mr Xolani Mashinini ("Mashinini"), the respondent's Employee Relations Manager, confirmed this. Mashinini also drew the Court's attention to the fact that the disciplinary code expressly states that intimidation could lead to dismissal in the case of unprotected strike action. There is no rational reason why intimidation during a protected strike cannot in all circumstances carry the sanction of dismissal.

[79] There was no challenge to the fairness of the dismissal based on the requirement of procedural fairness. In any event, the applicants did not present a case that would render the dismissal of the individual applicants procedurally unfair.

[80] In the circumstances, I conclude that the dismissal of the individual applicants, except for Lephuting, was substantively and procedurally fair.

[81] The respondent did not lead any evidence to show that if any of the individual applicants was found not guilty of intimidation, reinstatement, being the preferred remedy under the LRA, should not be granted. This was despite the Court drawing the respondent's attention to this issue. There is therefore no basis upon which the Court should deprive Lephuting of the remedy of reinstatement without any loss of benefits.

[82] The applicants raised the issue of inconsistency because six of the employees who were originally charged with the individual applicants were found not guilty by the chairperson of the disciplinary hearing and were not dismissed.

[83] It is clear from the findings of the chairperson of the disciplinary hearing that he accepted the defences put up by the six employees in question. No admissible and cogent evidence was presented to this Court to enable it to assess whether the chairperson of the disciplinary hearing, and consequently the respondent,

failed to treat like cases similarly without any objective justification at all. Thus I am unable to find for the individual applicants on this issue.

Order

[84] I therefore make the following order:

1. The dismissal of Mr Vincent Lephuting is substantively unfair.
2. The respondent is directed, within five days of the date of this order, to reinstate Mr Vincent Lephuting without any loss of salary or benefits.
3. The unfair dismissal claim in respect of the other eight individual applicants is dismissed.
4. There is no order as to costs.

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Maenetje AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr H Kgotleng (Kgotleng Attorneys)

For the Respondent: Advocate T Manchu

Instructed by Norton Rose