THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not Reportable

LAC Case no: JA 47/2023

In the matter between:

NUTRICHEM (PTY) LTD	**Appellant**
and	
SOUTHERN AFRICAN CLOTHING AND TEXTILE WORKERS UNION	**First Respondent**
ABEL MAHLABA AND OTHERS	**Second to Further Respondents**

Heard: **12 November 2024**

Delivered: **26 February 2025**

Coram: **Nkutha-Nkontwana JA, Musi AJA and Mooki AJA**

JUDGMENT

MUSI, AJA

Introduction

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[1] This is an appeal against the judgment and order of the Labour Court (Swartz, AJ), in which it found that the second and further respondents' (employees) dismissals were automatically unfair, in terms of section 187(1)(d) of the Labour Relations Act[1] (LRA). The appeal is with the leave of the Labour Court.

Facts

[2] The appellant (Nutrichem (Pty) Ltd) manufactures and sells chemicals to farmers. The employees were employed by the appellant. They worked in three departments, namely, general workers, leaf and soil sample collectors and the production and product mixers.

[3] On 25 September 2018, the employees embarked on an unprotected strike because they alleged that the appellant was not implementing the minimum wage for farm workers. On 26 September 2018 they joined the first respondent (Southern African Clothing and Textile Workers Union (Union)). By March 2019, the union represented approximately 50% of the appellant's employees. The union members elected Mr. Abel Mahlaba and Mr. Sydney Pasiya as shop stewards.

[4] During March 2019, the appellant contemplated retrenchments. It issued a notice in terms of section 189(3) of the LRA[2]. Mr. Senzo Myeni, the union organiser,

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[1] No. 66 of 1995, as amended.
[2] Section 189 Act 66 of 1995 reads:
'(1) When an employer contemplates dismissing one or more *employees* for reasons based on the employer's *operational requirements*, the employer must consult
(a) any person whom the employer is required to consult in terms of a *collective agreement*;
(b) if there is no *collective agreement* that requires consultation-
(i) a *workplace forum*, if the *employees* likely to be affected by the proposed *dismissals* are employed in a *workplace* in respect of which there is a *workplace forum*; and
(ii) any registered *trade union* whose members are likely to be affected by the proposed *dismissals*;
(c) if there is no *workplace forum* in the *workplace* in which the *employees* likely to be affected by the proposed *dismissals* are employed, any registered *trade union* whose members are likely to be affected by the proposed *dismissals*; or
(d) if there is no such *trade union*, the *employees* likely to be affected by the proposed *dismissals* or their representatives nominated for that purpose.
(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on
(a) appropriate measures
(i) to avoid the *dismissals*;
(ii) to minimise the number of *dismissals*;
(iii) to change the timing of the *dismissals*; and

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got wind of the fact that the appellant intends embarking on a retrenchment process. On 29 March 2019, he wrote to the appellant, lamenting the fact that the union was not informed or invited to be part of the consultative process. He was informed that he is welcome to join the first consultation meeting, which was scheduled for 1 April 2019. On 1 April 2019, he wrote to the appellant requesting that the meeting be postponed to 10 April 2019. His request was refused and the parties proceeded with the meeting in his absence. On 3 April 2019, Mr. Myeni attended the second consultative meeting and the appellant confirmed that it intended to retrench 12 employees.

[5] Subsequent meetings were held, culminating in the meeting of 18 April 2019, in which the parties agreed to implement short-time consisting of a three-day work week. Mr. Cornelius Kodisang represented the Union during this meeting. The workers were to work from Monday to Wednesday until 30 September 2019. They further agreed that if the gross sales did not improve by 15% by 30 September 2019, then the affected employees would be retrenched on 31 October 2019.

[6] On 29 April 2019, the appellant issued a warning to all union members, complaining about the union members' behaviour, their interference with management activities and their refusal to execute orders relating to their core duties. It further demanded that the union members stop their recalcitrant behavior failing which it would have no option but to continue with the retrenchment process. Additionally, it gave all the employees a written warning valid for six months. It

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(iv) to mitigate the adverse effects of the *dismissals*;
(b) the method for selecting the *employees* to be dismissed; and
(c) the severance pay for dismissed *employees*.
(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to
(a) the reasons for the proposed *dismissals*;
(b) the alternatives that the employer considered before proposing the *dismissals*, and the reasons for rejecting each of those alternatives;
(c) the number of *employees* likely to be affected and the job categories in which they are employed;
(d) the proposed method for selecting which *employees* to dismiss;
(e) the time when, or the period during which, the *dismissals* are likely to take effect;
(f) the severance pay proposed;
(g) any assistance that the employer proposes to offer to the *employees* likely to be dismissed;
(h) the possibility of the future reemployment of the *employees* who are dismissed;
(i) the number of *employees* employed by the employer; and
(j) the number of *employees* that the employer has dismissed for reasons based on its *operational requirements* in the preceding 12 months.

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dispatched the warning letter to the union and requested a meeting to discuss the matter. The union members complained to Mr. Myeni that they saw other persons on the appellant's premises doing their (employees') work.

[7] Despite numerous attempts, the union and the appellant eventually met on 31 May 2019, before then, on 20 May 2019, the shop stewards wrote a letter to the appellant. The letter, without emendation, reads as follows:

> 'First of all I would you to please understand and try to know the laws regarding the workers and the workplace without undermining and discriminating.
>
> 2. The union have asked the shop stewards to approach the company what is happening inside the premises and what the law sys and also what have been agreed between the parties on the previous meeting.
>
> 3. We also want our contracts of employment if the company have so that we can know what to do next if it doesn't have one, so that we will correctly deal with the current situation.
>
> 4. If the company doesn't change the situation of this three days we will further go on in a good way to make extra efforts to expose the unfair labour practice inside this company all the way from the gate.'

[8] At the meeting of 31 May 2019, which Mr. Myeni attended, the employees were served with letters terminating their employment with effect from 31 May 2019. They were purportedly retrenched. The termination letters stated that because the workers had by their actions and in writing confirmed their dissatisfaction with the short-time agreement, and, further that they made unacceptable threats towards the company and its management and '*therefore in effect disputed and cancelled the short-time agreement in writing'*.

[9] Mr. Myeni testified that the appellant displayed animosity towards the union and undermined its members. He further testified that the meeting of 31 May 2019 did not take long and that the appellant had not been interested to listen to his explanation and interpretation of the 20 May 2019 letter. The termination letters were prepared before the meeting and there were security guards at the meeting venue.

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[10] On 1 June 2019, the appellant entered into an agreement with Magnificent Electrical to provide replacement employees. It provided between 7 and 10 employees to do the work that the dismissed employees used to do.

[11] Mr Hendrik Swart, the CEO and Marketing and Technical Manager of the appellant testified that there were no hostilities or animosity between the appellant and the union. He appreciated Mr. Myeni's assistance during the consultations. Mr. Swart interpreted the letter of 20 May 2019 as a cancellation of the short-time agreement. According to him, Mr. Abel Mahlaba verbally confirmed the cancellation at the meeting of 31 May 2019.

[12] When he was asked about the reason for this meeting, he initially said that it was to discuss the retrenchment process and later added that it was also to discuss the contents of the 20 May 2019 letter. Further, that Mr. Botha, the appellant's labour relations advisor, wanted the workers to confirm that the short-time agreement had been cancelled. He confirmed that the termination letters were prepared before the commencement of the meeting. He denied that union members were targeted for retrenchment, and pointed out that Mr. Sewape who had been a union member was not retrenched and that a Mr. Liebenberg, who was not a union member, but identified for retrenchment, opted to take a voluntary severance package.

<u>In the Labour Court</u>

[13] The Labour Court gave a well-reasoned judgment. It painstakingly analysed the two versions and pointed out the improbabilities in the appellant's version. It underscored the incongruity in the appellant's version and its pleaded case. It accepted that the appellant had been under financial stress. It found that regardless of a substantial part of Mr. Myeni's testimony amounting to hearsay evidence, the documentary evidence, the appellant's witnesses' testimonies and the probabilities favoured the Union's version.

[14] The Labour Court pointed out that throughout the section 189 process only 12 workers were affected but after the 20 May 2019 letter the number increased to 18, all of whom were union members. It distinguished Mr. Liebenberg and Mr. Sewape's

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situations from that of the dismissed employees. It found that the appellant corresponded with the union during March 2019 but it, strangely, did not invite the union to the 1 April 2019 meeting.

[15] In conclusion, the Labour Court found that the letter of 20 May 2019 was the actual reason for the dismissals. It found that, had it not been for that letter the short-time agreement would have continued until at least 30 September 2019.

In this Court

[16] The appellant launched a multipronged attack on the Labour Court's judgment. It challenged the judgment on the following grounds:

16.1 jurisdiction;
16.2 findings on the reason for the dismissals;
16.3 findings on hearsay;
16.4 findings on substantive fairness;
16.5 findings on relief; and
16.6 finding on costs.

[17] The Union and the workers supported the findings of the Labour Court. I will now proceed to discuss these challenges seriatim.

Jurisdiction

[18] The appellant argued that the Labour Court lacked jurisdiction to adjudicate this dispute because the union members were not part of the dispute referral and conciliation process. The fact that the matter was referred by the union and conciliated is not disputed. A list of the workers who mandated the union to act on their behalf was not attached to the referral form. Absent a list of the dismissed employees' particulars, so the argument went, the referral fell foul of the rules for the Commission for Conciliation, Mediation and Arbitration (CCMA Rules). My conclusion on this issue renders it unnecessary to delve into the CCMA Rules.

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[19] The improper referral issue was not disputed or mentioned in the Labour Court. The referral form was not presented as evidence in the Labour Court. It did not form part of the record. The appellant did not raise the issue of the referral form in any of its pleadings. The union and its members specifically pleaded that:

> '[o]n 26 June 2019 the union referred a dispute, about the fairness of the dismissals of its members to conciliation. The dispute was enrolled for conciliation; but could not be resolved. A certificate of outcome of conciliation was issued on 15 July 2019'.

The appellant responded as follows:

> 'The referral was made on 11 June 2019; this paragraph is otherwise admitted. The referral was baseless and unjustified.'

[20] In this Court the appellant attached a supplementary volume to the record, without explanation or application that this new material, that was not before the Labour Court, be accepted by this Court. This is not only unconventional but also totally unacceptable. This Court is a Court of Appeal and appeals are adjudicated based on the material that was before the Labour Court. An appeal is a 'record review': this Court is generally restricted to consider the record of the matter as it unfolded in the Labour Court.

[21] In *Moroka v Premier of the Free State Province*[3] the legal position was succinctly stated:

> "The law governing the raising of a new point of law on appeal is trite. In Provincial Commissioner, Gauteng South African Police Services and Another v Mnguni, this court expressed itself as follows:
>
> 'It is indeed open to a party to raise a new point of law on appeal for the first time, with the provision that it does not result in unfairness to the other party;

[3] *Moroka v Premier of the Free State Province and Others* (295/20) [2022] ZASCA 34 (31 March 2022).

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that it does not raise new factual issues and does not cause prejudice. In *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC) Ngcobo J said the following (para 39):

"The mere fact that a new point of law is raised on appeal is not itself sufficient reason for refusing to consider it. If the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is directed, this Court may in the exercise of its discretion consider the point. Unfairness may arise, where for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved and that "[it] would similarly be unfair to the party if the law point and all its ramifications were not canvassed and investigated at trial.".' (Emphasis added.)

In developing the jurisprudence on this matter, the Constitutional Court has laid a further requirement that it must be in the interests of justice that the new point of law be entertained. The court in *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another* (Mighty Solutions), per Van der Westhuizen J, expressed itself as follows in this regard:

'It would hardly be in the interests of justice for an appeal court to overturn the judgment of a lower court on the basis that Court was never asked to decide. As lawyers always say, "on this basis alone" this Court should not entertain the enrichment argument.'"[4]

[22] The union and its members were led to believe that the propriety of the referral was not an issue. Both parties presented their respective cases with that understanding. The Labour Court was never asked to consider this point. The issue was not foreshadowed in the pleadings. The appellant has not shown that it would be in the interests of justice for this Court to consider the new material. Raising this point on appeal for the first time would involve prejudice to the respondents. The appellant is therefore precluded from raising the issue.

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[4] *Moroka* (Ibid) at paras 36 to 38.

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Hearsay evidence

[23] The appellant urged us to find that the Labour Court's conclusion that the probabilities favour the version that the employees were dismissed as a result of joining the union is wrong. The appellant argued that the Labour Court erred when it favoured Mr. Myeni's hearsay evidence over the appellant's evidence. The appellant further contended that the Labour Court erred by regarding Mr. Myeni's evidence as direct evidence and or primary facts.

[24] The Labour Court was alive to the fact that Mr. Myeni's testimony was predominantly hearsay evidence. It, however, considered the totality of the evidence before arriving at the conclusion that the employees' version should be favoured above that of the appellant. It said that it did so after '*having considered the documentary evidence, together with Nutrichem's witnesses' evidence as well as the probabilities highlighted by the chronology of this matter*'.

[25] The relevant facts of this matter were to a great extent common cause. The Labour Court correctly found that there was a genuine reason to initiate the section 189 process: being the appellant's dire financial position. It, however, found there were alternatives that could have been implemented to avoid retrenchments. The chronology and documents exchanged between the parties support the Labour Court's conclusion.

[26] Mr. Myeni's testimony with regard to the following facts is not hearsay:

26.1 the appellant's reluctance to recognise the union and to grant it organisational rights;

26.2 that the union was not notified about the first consultative or information sharing meeting;

26.3 that he contacted the appellant to enquire why the union was not informed and his request for a postponement;

26.4 that the employees were not satisfied with the manner in which the short-time agreement was implemented;

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26.5 that the employees spoke to him before writing the 20 May 2019 letter;

26.6 that the appellant took umbrage at the contents of the 20 May 2019 letter;

26.7 that the appellant did not discuss the aforesaid letter; and

26.8 that the appellant went to the 31 May 2019, with its finger on the trigger: ready to dismiss the employees.

[27] The appellant submitted that the Labour Court conflated aspects pertaining to the procedural fairness of a retrenchment with the proximate cause for the dismissal test as all of the factors mentioned by it related to procedural deficiencies of the process, which should be adjudicated under the consideration of the procedural fairness of a retrenchment.

[28] This submission is not cognisant of the intertwined nature of the evidence in these kinds of matters. A procedural lapse or deficiency might on the one hand be innocent or caused by inadvertence, on the other it might indubitably point to malice and the state of mind of the employer. It has been said that courts should be slow to infer that the reason for a dismissal is an illegitimate reason such as union activities unless there is sufficient evidence to justify such a conclusion.[5] However, if a proper factual basis exists for a Court to make such an inference, the Court should not hesitate to make it.[6]

[29] How can an employer's failure to consider obvious alternatives to retrenchment be irrelevant when a Court is endeavouring to discern the true reason for the termination or the motive of the employer? By the same token, how can the employer's intention to dismiss 12 workers but ultimately dismissing 18 union members be irrelevant to the inquiry? In order to come to a particular conclusion in such matters, the Court is enjoined to consider the totality of the evidential material presented by the parties and the probabilities. This is par for the course and it is exactly what the Labour Court did. The Labour Court was thus justified to consider all the relevant aspects, including those that point to procedural lapses in order to make the inference that it did.

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[5] *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) at para 86 of the minority judgment. The majority judgment did not express a view about this conclusion.

[6] *Kroukam* (Ibid).

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[30] The hearsay and the conflation submissions are without merit. I now turn to consider the reason for the dismissal.

Reason for the dismissals

[31] Since this matter involves an automatically unfair dismissal it is opportune to set out some of the relevant Constitutional and legislative provisions. I turn to consider the relevant Constitutional provisions[7]. Section 16 of the Constitution of the Republic of South Africa, 1996, states that everyone has the right to freedom of expression. In terms of section 17 everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions. Section 23 reads as follows:

> '(1) Everyone has the right to fair labour practices.
> (2) Every worker has the right –
> (a) to form and join a trade union;
> (b) to participate in the activities and programmes of a trade union…'

[32] The LRA gives effect to the right to fair labour practices. In its preamble, it is stated that it is enacted to change the law governing labour relations and, for that purpose to give effect to section 23 of the Constitution.[8] A party should therefore rely on the provisions of the LRA to vindicate their right to fair labour practices.[9]

[33] Section 4(1)(a) of the LRA provides that every employee has the right to participate in forming a trade union. Every member of a trade union, subject to its constitution, has the right to participate in its lawful activities.[10] Section 5(1) states that no person may discriminate against an employee for exercising any right conferred by the LRA.

[7] The Constitution of the Republic of South Africa, 1996.
[8] See: section 1(a) of the LRA.
[9] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (30 September 2005) at paras 434 to 436.
[10] Section 4(2)(a) of the LRA.

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[34] Section 187(1)(d) provides that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is that the employee took action, or indicated an intention to take action, against the employer by (i) exercising any right conferred by the LRA; and (ii) participating in any proceedings in terms of the LRA.

[35] The Labour Court correctly found that the employees carried an evidential burden (onus) to prove that they were automatically unfairly dismissed and therefore they had to produce evidence to raise a credible possibility that they were so dismissed. The employer thereafter had to prove that the dismissal was not automatically unfair.[11] After considering the evidence, the Labour Court concluded that the employees were automatically unfairly dismissed in terms of section 187(1)(d). Was this conclusion justified?

[36] The appellant pleaded that the reason for the dismissal was not the aggressive and unacceptable letter but was due entirely to the respondent's operational requirements. It denied that the real reason for the dismissals was the employees' union membership or their participation in the union's activities.

[37] It is common ground that the union was not informed by the appellant about the contemplated retrenchments and it was not invited to attend the first meeting. After Mr. Myeni got wind of this development, he wrote an email to the appellant, on 29 March 2019, informing it that it had come to his attention that the appellant intends embarking on a section 189 process. He pointed out that the appellant and the union are scheduled to meet on 10 April 2019, and, requested that the meeting scheduled for 1 April 2019 at 9h00 be postponed to the former date. In response, the appellant informed the union that it was welcome to attend the meeting.

[38] The appellant was aware that the union represented approximately 50% of its workforce, yet the union was not properly invited to the first consultation. Mr. Botha,

[11] See: *Kroukam* (Id fn 5) at para 28 of the majority judgment.
Section 10 of the LRA reads: 'In any proceedings-
(a) A party who alleges that a right or protection conferred by this Chapter has been infringed must prove the facts of the conduct; and
(b) The party who engaged in that conduct must then prove that the conduct did not infringe any provision of this Chapter.'

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the appellant's labour relations consultant, denied knowing that a sizable number of the employees belonged to the union.

[39] This is improbable because, firstly, Ms. Dané Oosthuizen from his firm had corresponded with the union from as early as 6 March 2019. On 6 March 2019, Mr. Swart had informed Mr. Myeni that Ms. Dané Oosthuizen from Maruis Botha consultants would request certain legal documents from him before they could schedule a meeting to discuss the granting of organisational rights. On the same day at 15h20, Ms. Oosthuizen requested the union to furnish her with, *inter alia*, its constitution and proof of the number of workers it represents at the appellant. Secondly, Mr. Botha, as a labour relations practitioner is supposed to know that union involvement in a section 189 process is crucial and he would therefore have enquired from the appellant whether there was a representative union.

[40] Mr. Swart knew about the union's presence at the workplace. It is improbable that he would not have told Mr. Botha that some of the employees are represented by a union. Mr. Swart kept on emphasising that they received the union's request for a postponement late: two minutes after the commencement of the meeting. Neither he nor Mr. Botha testified that the union requested a postponement on 29 March 2019. Mr. Swart testified that it was only after the first meeting that Mr. Botha said that the union must be involved. It is probable that the exclusion of the union was deliberate rather than inadvertent.

[41] During the meeting of 12 April 2019, Mr. Swart first warned Mr. Myeni and later Mr. Mahlala not to interfere with the management of the business. Mr. Myeni requested the appellant not to undermine them and to watch their language. At this meeting, Mr. Myeni pointed out that the proposed retrenchments only affect union members. Mr. Swart responded by pointing out that Chris Liebenberg, who was not a union member, took a voluntary severance package. There is no evidence as to when and how this severance package was offered. Neither the section 189 notice nor the minutes of the meeting reflect any offer or discussion of voluntary severance packages. There is no evidence indicating why he was treated differently.

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[42] Mr. Sewape, who was a union member was not dismissed. Mr. Sewape's union membership was initially disputed but the respondents later conceded that he paid his union dues. Mr. Sewape was a driver and was not affected by the short-time agreement. This probably explains his apathy which made his co-employees conclude that he was no longer a union member. He also informed the appellant that he intends to resign from the union. His situation is distinguishable from the dismissed employees.

[43] The union pleaded that '*on 20 May 2019, two shop stewards wrote a letter to the company protesting the discriminatory way it had implemented the short-time*'. To this the appellant responded by admitting the paragraph and stated that:

> 'The contents of the letter are wrong, and the allegations therein made are false. The allegations are made *contra* the agreements reached by the parties.
> The conduct of the first applicant (union) is disingenuous and *mala fide*.'

[44] In the pre-trial minute the parties couched the issue to be determined with regard to the letter as follows:

> 'Whether the contents of the letter written by the shop stewards on 20 May 2019, were wrong and the allegations in the letter [were] false and *contra* the agreements reached by the parties and that the conduct of the first applicant [is] mala fide'

[45] During the trial, the appellant mounted a different case. Both Messrs. Botha and Swart testified that the letter of 20 May 2019 cancelled the short-time agreement. Mr. Swart went further to state that Mr. Abel Mahlaba verbally confirmed, on 31 May 2019, that the intention behind the letter was to cancel the short-time agreement. This was not pleaded. Mr. Swart embellished his testimony. The difference between the pleadings and the *viva voce* testimonies is palpable. On any interpretation of the 20 May 2019 letter, there is no way that anyone, except the appellant, can reach the conclusion that the letter cancelled the short-time agreement. More about the letter later.

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[46] Mr. Myeni testified that the meeting of 31 May 2019 was very short and the appellant and Botha did not give the union a chance to explain its contents. Mr. Swart testified that it was a long meeting: approximately an hour. Mr. Botha could not remember its duration. The probabilities favour Mr. Myeni's version. There was no reason for a protracted meeting when the appellant already prepared the termination letters. The meeting was probably requested to discuss the contents of the letter but morphed into a meeting to hand over the termination notices. When the appellant could not timeously secure a meeting with the union it became annoyed and decided to dismiss the employees, regardless of the fact that some of them were not necessarily going to be retrenched.

[47] On 29 April 2019, the appellant wrote a missive to all union members in which it stated:

> 'Please take note that the union members are interfering with management activities and refusing to execute orders that form part of their core duties. This conduct is unacceptable to the employer and does not show good faith on the part of the employees involved. It will also lead thereto that the agreed upon three-day work week is not feasible. This conduct and behavior must stop immediately, alternatively the employer will have no other option available than to continue with the retrenchment procedure. Henchforth, all employees involved will receive a written warning valid for 6 months.
> We hereby further request a formal meeting with the union in order to discuss this as a matter of urgency.'

[48] This missive was written two days before the 31 May 2019 meeting. The appellant conflated discipline with the retrenchment process. It used the retrenchment process as a threat. The appellant could institute disciplinary proceedings against the employees.

[49] The appellant accepted that there were alternatives to the dismissals, for example, it could have dismissed fewer employees and that it could utilise the others as seasonal workers. These alternatives were not implemented. Instead, the

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appellant mentioned that it complied with a demand by the union that it improved the ablution facilities, which it did at a cost of approximately R45.000. Despite this and the fact that it increased the employees' wages during September 2018 and adjusted it in January 2019, they still demanded a salary increase.

[50] The union pleaded that the appellant failed to comply with section 189(7) of the LRA because it failed to select the employees for dismissal according to criteria that had been agreed upon; or according to criteria that were fair and objective. The appellant responded that the retrenchments were based on '*criteria that were fair and objective, namely due to the respondent's (appellant) decreasing production, sales and orders'*. This can hardly amount to a sensible response to the union's plea. The appellant's inability to properly respond to the union's allegation is because it did not apply any discernable criteria except union membership.

[51] The employees had become a thorn in the appellant's flesh. After it locked itself into the short-time agreement, as an alternative to retrenchments, the only way out of it was to cancel it. The letter presented an imperfect solution. I now turn to Mr. Swart's testimony about the effect of the letter.

[52] I will demonstrate, with the assistance of Mr. Swart's testimony, that the impugned letter was the direct or proximate cause for the dismissals. During Mr. Swart's cross-examination by Mr. Daniels, for the respondents, the following exchange happened:

> '<u>Mr Daniels</u>: … in the absence [if] the short-time agreement, [in your,] in your version if the short-time agreement had not been cancelled there would have been no need to retrench the workers not so?
> <u>Mr. Swart</u>: According, that is correct Sir According to the agreement then we must carry on until 30 September 2019 with the agreement.'

[53] Mr. Botha also confirmed that the letter of 20 May 2019 cancelled the short-time agreement. Later during cross - examination the following was said:

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'Mr. Daniels: Okay. Okay. And we know that you started initially with the possibility of retrenching 12 workers and ultimately you retrenched 18.

Mr. Swart: Yes.

Mr. Daniels: And that decision to increase the number would have occurred after the letter of [the] 20 May'

Mr. Swart: That is correct.

Mr. Daniels: And as a result of the letter.

Mr. Swart: that is correct. The initial retrench number was 12.'

[54] It is clear from Mr. Swart's testimony that the number increased to cover all affected union members.

[55] Mr. Swart testified that the appellant accepted that the 20 May 2019 letter was written on behalf of the union and its members. However, he stated that Mr. Myeni informed Mr. Botha that he was not pleased with the contents of the letter. Neither Mr. Myeni nor Mr. Botha confirmed that Mr. Myeni was not pleased with the contents of the letter. Mr. Swart probably embellished his testimony in this regard. Mr. Daniels then delivered the *coup de grâce*:

'Mr. Daniels: Okay. Then this letter, do you accept that this letter relates to a union activity.

Mr. Swart: That is correct.

Mr. Daniels: Okay. And it is a union complaint.

Mr. Swart: That is correct, M'Lady.

Mr. Daniels: And it relates to the union's members.

Mr. Swart: The union, according to me this letter relates to the shop steward and the union members.'

[56] The latter exchange clearly indicates that Mr. Swart correctly accepted that the letter contained a complaint on behalf of union members and that it therefore related to a union activity. The next question is whether the union activity was a lawful union activity.

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[57] In *National Union of Public Service and Allied Workers obo Mani and Others v National Lotteries Board*[12] it was said:

> 'Although it may not be necessary on the facts of this case to give an exhaustive definition of the phrase "lawful activities" in sections 4(2)(a) and 5(2)(c)(iii), it seems to me that, on a proper restrictive approach, the phrase must exclude illegal activities or activities that constitute contraventions of the law. It definitely excludes conduct that constitutes criminal offences. The provisions include participation by union members in union activities that form part of the core functions of a trade union. These include taking up its members' complaints or grievances with their employer, representing them in grievance and disciplinary proceedings, collective bargaining, attending statutory tribunals to represent their members' interests and communicating with its members' employer about workplace issues.'[13]

[58] It has been said that in interpreting any document one must have regard to the text, context and purpose of the document. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[14] it was summarised as follows:

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to

[12] *National Union of Public Service and Allied Workers obo Mani and Others v National Lotteries Board* (CCT 75/13) [2014] ZACC 10; 2014 (3) SA 544 (CC); 2014 (6) BCLR 663 (CC); [2014] 7 BLLR 621 (CC); (2014) 35 ILJ 1885 (CC) (10 April 2014).
[13] *National Union of Public Service* (Ibid) at para 153.
[14] *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012).

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> one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[15]

[59] The letter, firstly, contains a plea that the appellant should not discriminate against or undermine [the employees]. Secondly, that the union mandated the letter. Thirdly, that the shop stewards were requested to enquire about what is happening at the appellant's premises, in light of the agreement entered into and the law. This probably refers to the 'new faces' which were seen at the appellant. Fourthly, it contains a request for the employees' employment contracts. Lastly, it informs the appellant that if it does not change the three-days a week short-time agreement, the employees would in a good [legal?] way expose the unfair labour practice at the appellant all the way from the gate.

[60] The letter certainly does not cancel any agreement, instead it voices the dissatisfaction of the employees with the short-time agreement. Whether they were justified in raising their discontent so soon after they entered into the agreement is neither here nor there. The letter further conveys in no uncertain terms that the workers would expose the unfair labour practice in a good way. There is nothing in the letter that suggests that the workers would act illegally. In fact, the indication is that they were going to act in a good way to expose what they perceived to be an unfair labour practice.

[61] Mr. Botha's testimony that he interpreted the letter to mean that the employees were going to *'cause a riot at the gate… and not do the work any further'* is clearly not supported by the text. His hypothesis that they wanted to deliver a

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[15] *Natal Joint Municipal Pension Fund* (Ibid) at para 18, footnotes omitted.

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petition at or from the gate is more plausible. There is nothing unlawful for union members to gather at the employer's gate to hand over a petition. The testimonies of Messrs. Botha and Swart that the letter cancelled the short-time agreement is untenable.

[62] The employees had a right in terms of section 4(2)(a) of the LRA to participate in the lawful activities of the union including associating themselves with the lawful contents of the letter. The union was entitled to the support of the employees. The employees were entitled to give their union support in lawfully promoting their dissatisfaction, grievance or demand. Their dismissal for exercising a right guaranteed in the LRA: taking part in lawful union activity, renders their dismissal automatically unfair in terms of section 187(1)(d)(i) of the LRA.

Substantive fairness

[63] The appellant argued that the Labour Court accepted that there was a valid reason for retrenchment by referring to the ongoing drought, and decline in sales. The appellant asserted that the Labour Court should therefore have found that the appellant had a valid rationale to embark on the retrenchments.

[64] The appellant might have had a valid rationale to commence the retrenchment process. The consultations yielded a positive result: the short-time agreement. This agreement was implemented in order to avoid retrenchments. When the employees misbehaved it should have instituted disciplinary proceedings against them. According to Swart, there would not have been dismissals had the short-time agreement not been cancelled by the employees. There was no cancellation therefore there was no need for the dismissals.

[65] The appellant's case was that the dismissals were as a result of its operational requirements. According to Mr. Swart, there were other viable options to avoid dismissals but those were not implemented because at the 31 May 2019 meeting, the employees said all in or all out. He conceded that there was no need to dismiss all 18 because the operations of the appellant could continue with fewer

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workers. He could not coherently explain why when the contemplation was to retrench 12 workers the number inexplicably rose to 18.

[66] There were no selection criteria discussed, let alone, agreed upon. No fair or objective criteria was applied. The ineluctable conclusion is that union membership was the only criteria. These factors rendered the dismissals substantively unfair. This finding is of no moment because of my finding that the workers were automatically unfairly dismissed.

Remedy

[67] The appellant argued that the Labour Court should not have ordered the reinstatement of the workers because it was clear that the trust relationship had broken down. This argument is captured as follows in the appellant's heads of argument:

> 'Despite Swart's undisputed evidence in relation to the trust relationship having broken down, the members having threatened to burn down the appellant's premises during September 2018 during their illegal strike action, the members' threats to go on strike if the bathrooms [are] not renovated, their refusal to comply with the short-time agreement and the clear threat enunciated in the 20 May letter at paragraph 4, the court a quo finds at paragraph 131 that "Nutrichem has failed to make out a case that a continued employment relationship would be intolerable".'

[68] Section 193(2) of the LRA provides that after a finding that an employee's dismissal was substantively unfair, the Labour Court must require the employer to reinstate or re-employ the employee unless: the employee does not want to be reinstated or re-employed; the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; it is not reasonably practicable for the employer to reinstate or re-employ the employee; or the dismissal was only procedurally unfair.

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[69] Retrenchments are no fault dismissals. The trust relationship is generally still intact, at the time of dismissal, but due to the employer's operational requirements the relationship cannot continue. The considerations that apply in dismissal for misconduct cases would not necessarily apply in retrenchment cases. However, since the appellant gallantly argued that we should consider the conduct of the employees in order to determine whether the trust relationship has been damaged irretrievably, I shall do so.

[70] The threat, if there was one, was in September 2018. No disciplinary proceedings were instituted against those workers. The employer agreed to renovate the ablution facilities in order to avert a strike. The workers have a right to strike. All that they have to do is follow the right processes to strike about an interest dispute. Their threat was lawful. They did not threaten to embark on an unprotected strike. In any event, the appellant kept them in its employ beyond the renovations. As stated above, the 20 May 2019 letter did not contain an unlawful threat. The trust relationship was not affected by the conduct of the employees. There is no indication that the continued employment would be intolerable. The appellant is grasping at straws. The finding of the Labour Court is unassailable.

Costs

[71] It is correct that generally costs orders are not made in labour matters. However, when there has been such a grave violation of the employees' constitutional rights then the Courts must show its deprecation by means of appropriate costs orders. The dismissals were clearly part of a plan to get rid of perceived troublesome employees. It was a ruse. Employers should be discouraged from utilising the LRA for nefarious purposes. One of the ways of doing that is through appropriate costs orders.

[72] In conclusion, there is no reason to interfere with the Labour Court's order. I therefore make the following order:

Order

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1. The appeal is dismissed with costs.

CJ Musi AJA

Nkutha-Nkontwana JA *et* Mooki AJA concur.

<u>APPEARANCES:</u>

For the Appellant: C. Higgs
Instructed by Steenkamp van Niekerk Inc

For the Respondents: J. Phillips
Instructed by Cheadle Thompson & Haysom Inc

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