THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

JS 802/08

Reportable

In the matter between:

Security Officers Civil Rights and Allied Workers Union (Socrawu)	First Applicant
Persons Listed in Annexure A	Second to Further Applicants

And

Fidelity Security Services (Pty) Ltd	First Respondent
Brygro Security Services (Pty) Ltd	Second Respondent

JUDGEMENT

CELE J

INTRODUCTION

[1] This claim is for an automatically unfair dismissal of the second to further applicants while or after they participated in a protected strike. The claim was opposed by the first respondent. In relation to the second applicant, the first respondent contended that he did not take part in a strike. In respect of the third to the sixteenth applicant, the first respondent said that they did not participate in a protected strike simply because their strike was for reasons other than those in respect of which a certificate of outcome was issued. Finally in respect of the seventeenth to the sixtieth applicants the first respondent contended, by means of an amended statement of defence, that it did not dismiss them.

[2] The applicants sought no relief against the second respondent even though it was joined as a party. Effectively therefore, the second respondent did not oppose this claim. I shall henceforth refer to the first respondent as the employer or the respondent, to the second to further applicants, generally as employees and to the first applicant as the union.

BACKGROUND FACTS

[3] The parties in this industry were organized at the level of the National Bargaining Council. There arose a collective

bargaining dispute between them. The union referred it to the Commission for Conciliation, Mediation and Arbitration (CCMA) after the parties had failed to resolve it among themselves. Conciliation also failed to resolve the dispute and the CCMA issued a certificate of outcome dated 4 March 2008. The dispute concerned:

- DOS allowance;
- fireman allowance;
- two full time shop stewards;
- a fixed salary of R 4 000 or an allowance of R 1500
- a new funeral scheme;
- drivers allowance of R 1000 and
- bullet proof vests.

[4] On 17 March 2008 the union issued a notice for the strike, indicating therein that it would commence at 05h00 on 20 March 2008. On 19 March 2008 employers in the security industry brought an urgent application to interdict the strike. This court sitting in Braamfontein ruled the strike to be protected. The strike did commence as indicated but was temporarily suspended on notice, with effect from 28 March 2008.

[5] On Friday 11 April 2008 the company received information that some of its employees were planning to engage in a strike on Monday 14 April 2008. An ultimatum was then issued by the company to its employees, warning them that such conduct would amount to an unprotected strike which would jeopardize life, property and the contract. The company said it would regard the participation in such a strike, in a very serious light which could result in a disciplinary action possibly followed by a dismissal or a removal from the contract. Mr Peter Bolz, the Branch Manager of the company at Rustenburg served the ultimatum to the staff that was on duty at the time at the Rustenburg branch. The ultimatum was issued by the Group Legal Counsel of the company, Advocate Hennie Myburgh.

RUSTENBURG EMPLOYEES

[7] At about 04h45 on 14 April 2008 the employees at Rustenburg station had made it clear to their Branch Manager that they would not commence work. Mr Bolz proceeded to issue an ultimatum to them at 04H55, instructing them to report on duty by 05h20. The employees continued with a strike. At about 12h20 Mr Bolz issued and served notices to attend a disciplinary hearing to the staff at Nelson Mandela and Klopper Street. A collective charge sheet was given to the union official,

Mr Ntshauba. It had a list of employees who were said to have been involved in the strike. The strike continued for some days.

[8] On 16 April 2008 the union issued a letter informing the company that the strike was protected in terms of the Labour Court ruling which it said was of 4 March 2008 but later corrected it to be of 19 March 2008. The letter informed the company that any disciplinary action taken by the employer against its members for participating in the protected strike would be automatically unfair. On 18 April 2008 the company postponed the date of the disciplinary hearing to 8 May 2008.

[9] The disciplinary hearing of 8 May 2008 proceeded. The employees were represented by the union official. Mr Johan Joubert, an attorney, was appointed as the chairperson while Mr Bolz was the complainant. When the union official was not satisfied with the turn of events at the hearing he walked out of it, taking along some of the employees he had come to represent. There are employees who remained. The hearing proceeded. On 13 May 2008, Mr Joubert issued his findings which he recorded as:

> "I am of the opinion that the services rendered by everyone concerned are essential. A strike for whatever reason cannot be condoned and therefore I cannot come to any finding but a sanction of dismissal."

[10] The services rendered by the employees were linked to the Cash Paymaster Services (CPS), involving the payment of old age pension benefits to the public. It was always common cause between the parties that these services were never declared to be essential services in terms of the Act.

[11] An automatically unfair dismissal dispute was then referred to CCMA. Various referral forms were used by the union to refer the dispute of its various members. The applicants involved in this regard are third to the sixteenth. The dispute was thereafter referred to this court.

THE BRITS EMPLOYEES

[12] On 14 April 2008 employees similarly withheld their labour. Their Branch Manager, Mr Johannes Lourens served them with an ultimatum which had been issued by Mr Myburgh on 11 April 2008. That ultimatum did not deter them from continuing with

the strike, except only a few employees who tendered their services.

[13] The company proceeded to issue a notice to attend a disciplinary enquiry for participation in an unprotected and illegal work stoppage on 14 April 2008, for its employees. The hearing was scheduled to take place on 26 May 2008. It was then postponed to 29 May 2008 and thereafter to 2 June 2008. In the meantime attorneys of Bowman Gillfillan were corresponding with the company, as they were instructed by the union, advising the company to halt the disciplinary proceedings at Brits and to reinstate dismissed employees at Rustenburg due to the strike having been pronounced by this court in March to be lawful.

[14] The company lodged an urgent application against the union and Mr Mboniseni Mafa. Mr Mafa was the deponent to an answering affidavit filed in opposition to the urgent application. Advocate Hendrik Myburgh, who had been the deponent to the founding affidavit, was the deponent in the replying affidavit filed with this court on 19 May 2008. In paragraph 21 of the replying affidavit he had the following to say:

"21. Ad Paragraph 29

> These disciplinary proceedings have been withdrawn and were instituted because the applicant was under the *bona fide* but mistaken impression that the strike was unprotected and that striking employees could therefore be disciplined for participating in such an unprotected strike."

[15] It had been agreed between the parties that in the hearing of the 2 June 2008, 5 people would attend to represent the employees. The 5 included the union officials. The 5 attended the hearing of 2 June 2008, Mr Franklin Mokovhi, the company's Industrial Relations (IR) Officer for Brits, Pretoria, Mpumalanga and Limpompo areas, was appointed to chair the hearing. Mr Bolz represented the company.

[16] Instead of the disciplinary proceedings commencing, the company told the employees' representatives that the company had decided to abort the hearing and in its place, to enter into a consultation process with the aim of reaching an agreement to have the employees' services transferred to the company clients based in Pretoria and Witbank. Parties are indispute on how the employees' representatives reacted to the offer. A written document was then issued and given to Mr Mishack Shaube, the union official who was also the organizer. The contents of the document read:

"As you are aware all fixed term contracts have been terminated based on clause 3.6 of your contract. The client requested for your removal

Fidelity Security Services has alternative positions available at our Pretoria Branch. The company would be in a position to re-employ you on those specific contracts.

If you should consider this position, please report to Pretoria Fidelity Security Services Branch on 3 June 2008 at 08h00. Please take note that these positions could not be reserved for any later date.

No positions currently exist in Brits.

Please note that as Fidelity Security Services has given this alternative to re-employment you will not be allegeable for a retrenchment package. (sic)

P.P. Bolz"

[17] According to the company, the process ended with the employees and their representatives agreeing that the employees would report for duty on the next day in Pretoria. The applicants dispute this on the basis that the company could not lawfully change a disciplinary hearing to a consultative meeting and that no agreements as alleged were reached by the parties. On 3 June 2008 none of the applicant employees reported for duty in Pretoria. Instead an automatically unfair

dismissal dispute was referred to the CCMA for conciliation and when it could not be resolved, it was referred to this court by means of a statement of case.

THE TRIAL

RUSTENBURG APPLICANTS

[18] There is not much material dispute of facts between the parties on the events leading to the decision of the company to dismiss these applicants. Court is to determine whether the issues for which they embarked on a strike were or were not those in respect of which the CCMA issued a certificate on 3 March 2008, secondly it is to be determined whether these applicants did show intent to prosecute the dispute to its finality in the absence of their evidence to that effect.

THE BRITS APPLICANTS

[19] The company has disputed dismissing all these employees. The applicants therefore bore the onus to prove their dismissal. The evidence on Mr Shaube is that he told Mr Mokovhi that the company could not substitute a disciplinary hearing with a consultation meeting. He said that the offer to transfer applicants to Pretoria was rejected because:

- workers had not been paid due to the strike on 14 April 2008;
- workers had no money for transport to go to Pretoria;
- the company said workers were responsible for their transport to and their accommodation in Pretoria.

[20] Mr Shauke said that they left the meeting and went to workers who were present nearby to get their opinion on the job offer but that workers declined the offer. They returned to the office to report to Mr Bolz. He was then accused by Messrs Bolz an Mokovhi of influencing workers and that they wanted to go to speak to the workers themselves. Instead of going to the workers they said that the letters would be issued to each employee by the company. After sometime the letter dated 2 June 2008 (already referred to) was given to him. He signed to acknowledge receipt of it but made it clear that the workers were not accepting the offer.

[21] According to Messrs Bolz and Mokovhi the employee's representative accepted the offer of placement in Pretoria but outrightly rejected placement in Witbank. Because of the interest shown to the Pretoria placements, Mr Mokovhi said he telephoned head office to inform them and was told they could start on the following day. He said that Brits was in anyway

operating from Pretoria and that all Depot Managers of Brits reported in Pretoria. He said that he then proceeded to address all workers to confirm that positions were available in Pretoria and that all had to report there on the next day. He was met with no problems either from the workers or the union officials. He also spoke to Mr Mozamba the union official who said that some of the workers were not present then. Mr Mozamba then telephoned his principal, Mr Mokoena and Mr Mokoena agreed to the re deployment of the workers. According to him therefore, there was no dismissal in respect of the employees. He explained the phrase "re-employ" in the letter of 2 June 2008 to have meant "re-deployment".

[22] Mr Mokovhi was called upon to explain the phrase "have been terminated" in the same letter. He said that when he realised that employees did not report in Pretoria, he telephoned the Brits depot and he found that no one had reported there as well. He said the union officials left the meeting with the undertaking that they would revert to the company but had failed to do so. It is in those circumstances that he then issued individual letters to the employees each of which reads:

"Date 09 June 2008

RE Termination of service

> You are here by notified that your service with Fidelity Security Services are terminated as from 9th June 2008 as you failed to report for duty at the Pretoria Branch on 3rd June as agreed on 2nd June 2008. You also did not contact this office at any stage to discuss any problems you might have occurred concerning your duties (sic).
>
> Please finalise all administration regarding money owed to you and/or money you owe the company as soon as possible". (sic)

[23] Mr Mokovhi said that as an IR officer, he initially reported to a Mr P. Naidoo who then left for Dubai. There after he received instructions from and reported to Adv. Myburgh and that it was Adv. Myburgh who instructed him to chair the disciplinary hearing. He said that Adv. Myburgh had not told him that there was a mistake in charging the employees who took part in the strike of the 14 April 2008.

[24 Mr Mokovhi made a further reference to a document which he said was issued by Mr Bolz, entitled "RE: Operational Requirements/Removal from contract-possible retrenchment". He said that he had received a telephone call from Mr Val Bortman, the CEO of the company, telling him that the company was withdrawing the charges and instead would proceed on the terms of the retrenchment document or to recharge the employees if they did not accept the Pretoria offer.

[25] According to Mr Bolz, the wording of the letter of 2 June 2008, was given to him by a person at head office after a telephone call had been made with the company head office. He could not remember the identity of a person he spoke to. While the first paragraph of the letter referred to “all fixed term contracts have been terminated” Mr Bolz said nobody’s services were terminated as they were offered an alternative job.

[26] Mr Michael Jack also testified for the company. In April 2008 he was working in Brits. He had not joined the first applicant but heeded their call for the strike on 14 April 2008, without being forced. The union agreed to stand for him if he was dismissed. He joined the strike for two days and therefore he stayed away from work and could not tell how long the strike lasted. He was summoned for the disciplinary hearing. The company told them to go to and report in Pretoria as CPS had said it did not want the staff who participated in an unprotected strike. He did recognize the letter from the company of 2 June 2008. He said that he did not accept the Pretoria offer as they had not been paid and therefore he had no money to go to Pretoria. He had not told the company of the reason why he did not report in Pretoria. He said that he had not been dismissed nor did he hear of anyone in Brits having been dismissed by the company. He had returned to work for the company on 25th June 2009,

more than a year after the strike of 14 April 2008. He had not attended any of the meetings which were called by the union. Nor did he hear of any such meetings. He said that he had changed his cellular telephone number and had not supplied the new one to the union. He said that he could not challenge his dismissal because he did not receive a dismissal letter and that he did not want the court to rule on his case in this matter.

SECOND APPLICANT'S VERSION

[27] He was a senior shopsteward of the union based at Robertsville in Johannesburg. He knew that the national strike which commenced on 20 March 2008 was suspended with effect from 28 March 2008. On 20 April 2008 a meeting was convened in which workers were told that the strike had to resume at Robertsville on 21 March 2008. It would be a protected strike.

[28] On 21 April 2008 he left the union office for Robertsville Depot with other 5 union members including Messrs Mafa, Mdanda, Ndabana Mbusi, Simphiwe Mbusi and Dlomo. Mafa and Mdanda travelled ahead of them as they followed in a taxi which dropped them at a Caltex garage, about 80m from the workplace head office. Company cars were parked on the road where there were about 24 guards in new uniforms whom they did not know except for 10 of them. They were also about 15

members of the company management, including a Mr Selia Truther, Messrs Mafa and Mdanda had come up to the spot where management people were. Mr Truther verbally identified Mafa. One grabbed Mafa and thereafter a number joined in assaulting him with batton sticks, handcuffed him and took him away. When Mr Mbusi tried to use a telephone he was similarly beaten up hand cuffed and whisked away. They went for Mdanda. On seeing all this second applicant realised it was finished with their plans to prepare for the start of the strike and he took to flight with Messrs Ndabana and Dlomo. They went to the petrol station where they telephoned the police for help. Police came later and informed them that the rest of their group had been taken to Florida Police Station. They proceeded to the police station where they found the rest of them and telephoned their lawyers for the certificate of outcome on the basis of which a strike was embarked upon. The police released the three who had been detained.

[29] On 22 April 2008 the second applicant proceeded to New Canada, a pick up point for the staff. He reported to the workers he found there that some of them had been arrested on 21 April 2008 and that members were to continue to sit and not work as the strike was still on. The employees reflected on whether the strike was to continue but on 23 April 2008 decided to suspend it seeing that the situation was bad and people could die.

[30] The company subsequently charged him with acts of misconduct described as:

- unauthorised absence on 21,22 April 2008;
- incitting and intimidating co-workers to participate in unlawful work stoppage on 21,22 April 2008;
- breach of trust;
- jeoperdising co operation and client contract and
- bringing good name of FSS into disrepute.

[31] The date of the disciplinary hearing was initially scheduled for 5 May 2008. It appears that the hearing proceeded on some other date after 5 May 2008 but on 20 June 2008 he was found guilty as charged and was dismissed with immediate effect. The union helped him to refer an automatically unfair dismissal dispute to the CCMA for conciliation. When conciliation failed to resolve it, the dispute was referred to this court by means of the statement of case.

[32] No evidence was led by the respondent to gainsay the version presented by the second respondent.

SUBMISSION BY PARTIES

[33] With the exception of the dismissal of the seventeenth to the sixtieth applicants, the respondent accepted the duty to prove the fairness of the dismissal of all other applicants. The amendment of the statement of defence at the commencement of the trial, had the consequence of placing the burden to prove a dismissal on the sixteenth to the sixtieth applicants.

SUBMISSION BY THE RESPONDENT

MANDATE

[34] The respondent right from the commencement of the trial put into dispute the mandate of the union to carry on with the proceedings on behalf of the individual applicants in dispute, partly because a limited number of the applicants were members of the union and partly because at most 22 of the applicants at any given time attended the Court proceedings.

[35] It is well established law that trade unions are entitled to litigate for the benefit of their members. Accordingly, the first applicant could have launched the present proceedings for the benefit of its members without the second to further applicants being cited

as applicants. It was however not entitled to do so for employees of the respondent who were not its members.

[36] At the commencement of the trial the respondent pointed out that only the second applicant, 5 of the 14 applicants dismissed at Rustenburg and 23 of the 44 applicants employed at Brits were members of the union.

[37] During the cross examination of the first witness for the union, Ntshauba, it was put to him that it was clear from the documentary evidence that not all the applicants were members of the union. Ntshauba confirmed with reference to p 72 of the evidence bundle that it was clear that a number of applicants had never belonged to the union. In addition, the record of the respondent in respect of the applicants' membership of the union was never put in dispute. Furthermore, on Ntshauba's own evidence at least 8, and even more of the applicants previously employed at Rustenburg, no longer wished to be party to the proceedings before the Court. He also pointed out at least two employees who had distanced themselves from the proceedings before the Court, and it should be remembered that when he gave evidence, Ntshauba was very vague on the exact number of employees who had given instructions to the union.

[38] Despite having ample opportunity to do so, the union could not, or perhaps would not, inform the Court of the active participants at Court. Then there is also the evidence of one Jack, which was not challenged, that he had never instructed the union to proceed to Court on his behalf. In the premises, it is submitted that unless and until the union was prepared to take the Court into its confidence, it is unclear (except in respect of the second applicant) who were participating in the proceedings and who wanted the matter to proceed. Accordingly, it is submitted that the application must be dismissed (except in respect of the first and second applicants) on this ground alone.

THE SECOND APPLICANT

[39] The second applicant, Ngobese, alleges that he was dismissed for participation in protected strike action. Ngobese confirmed the evidence of one Mafa deposed to under oath in case number JS 733/08, that he and a number of other persons arrived at the Robertsville premises of the respondent “for preparatory work in relation to the strike”. This was not strike action, and despite inter alia the charge framed that the second applicant had participated in an unlawful work stoppage, it is submitted that the applicant had not been dismissed for participating in strike action.

[40] It is trite law that a person cannot strike on his own. The second applicant confirmed that he was the only person charged in respect of the events on 21 & 22 April 2008. As the second applicant does not seek reinstatement, and has already been employed at the trade union since February 2009, he is best entitled to compensation for period July 2008 to January 2009.

THIRD TO SIXTEENTH APPLICANTS

[41] The respondent admits the dismissal of the applicants at Rustenburg. The uncontested evidence of Bolz was that Ntshauba and his members walked out of the disciplinary enquiry held at Rustenburg. They can therefore not deny that the procedure followed was fair-indeed. The disciplinary enquiry was chaired by an independent attorney. Then only the substance of the dismissal remains in issue and possibly only in respect of the ninth, tenth, eleventh, fourteenth, and sixteenth applicants (none of which presented evidence that they were interested in the proceedings before Court) as members of the union.

[42] It is submitted that even if Court were to find that any of these applicants have shown any intent to prosecute the dispute to its finality, they have not participated in a protected strike action, simply because they striked for other reasons than those in

respect of which the CCMA issued a certificate on 3 March 2008, namely the introduction of a funeral benefit and bullet proof vests. Consequently, it is submitted that the claims of the Rustenburg employees stand to be dismissed.

THE SEVENTEENTH TO SIXTIETH APPLICANTS

[43] The uncontested evidence of the respondent's witnesses was that it never dismissed any of the applicants employed at Brits. Ntshauba, the only witness for the applicant in respect of the events at Brits, did not even testify about the dismissal of the applicants. The claim of the seventeenth to sixtieth applicants falls by the wayside very silently if one bears in mind the express provisions of section 192 (1) of the Act, that the applicants bore the burden to prove that its members had been dismissed. Unless and until the applicants could establish dismissal, there is no duty on the respondent.

[44] In the premises, the application of the so-called Brits employees (none of which presented evidence that they were interested in the proceedings before Court) also stands to be dismissed. The applicant brought the matter to Court. It failed dismally in the prosecution of its case. It should bear the respondent's costs. The respondent employed two counsel,

and is entitled to the costs of two counsel. Accordingly it is submitted that the Court should make the following order:

> The applicants' referral is dismissed with costs, including the costs of two counsel.

SUBMISSIONS BY THE APPLICANTS

MANDATE

[45] A union can bring a case to court without citing applicants and can say that members are set out in a list which is provided. The issue of representivity was never pleaded by the respondent up to its last amendment. The applicants concede that not all workers were members of the union when the strike began. However none union members were entitled to join the strike called by that union. When one worker asked who would protect him against a dismissal, the first applicant undertook to provide such protection. None of the 4 workers who stayed behind at Rustenburg's hearing and refused to be represented by the union were applicants.

[46] At Brits the company and the union agreed that there would be 5 people to represent employees for the hearing. As such the offer to Pretoria was given to the 5 representatives. The company gave a list of employees and a letter to the union

without any objection to the union acting in a representative capacity.

[47] The union convened mass meetings. The members had no email addresses or fax numbers for communication. Employees had not even been paid their salaries. Further, the union had forwarded to the company thousands of applications for membership which the company failed to process.

THE APPLICANTS

[48] The evidence of the second applicant was not disputed. He was a shop steward and that is why he was the only applicant from Robertsville.

THE THIRD TO THE SIXTEENTH APPLICANTS

[49] The chairperson for the disciplinary hearing found them guilty became they were involved in essential services. The respondent admitted dismissing these employees. None of its witnesses said that the strike was unprotected. Court was referred to posters carried during the strike. These posters did

not show that the issues were different from those in respect of which a certificate was issued. Advocate Myburgh deposed to an affidavit in which he said that Rustenburg disciplinary proceedings were a *bona fide* mistake. Mr Mafa described what happened at Robertsville and Adv Myburgh concurred with him in his affidavit. Adv Myburgh said that charges had been withdrawn. By then workers had already been dismissed. They should have been reinstated.

THE SEVENTEENTH TO SIXTIETH APPLICANTS

[50] When the matter was initiated, the respondent admitted dismissing these employees until it sought an amendment of the statement of defence. The union was told that charges would be withdrawn and yet the company sent Mr Mokovhi to chair the hearing. The allegation that the union was to revert was inconsistent with the documentary evidence of 2 June 2008, which is inconsistent with any agreement allegedly reached by the parties. The letter was in fact an ultimatum as workers had to report in Pretoria on the next day. The letter of 9 June 2008 terminated employment contrary to what Mr Mokovhi said.

[51] In a labour brokerage a client should not be allowed to reject employees who participate in a protected strike. There was a

right to strike which makes a difference between co-ersed employees and free workers. Such a dismissal is a violation of the Constitution Act.

[52] The respondent has also not made out a case for the retrenchment of the employees. There was one meeting where workers were called to a disciplinary hearing.

[53] All applicants are to be found to have been automatically unfairly dismissed and those who want their jobs back to be reinstated. There are only 3 employees who do not seek reinstatement but compensation and they are applicants numbers 2, 5 and Mr Dlamini.

EVALUATION

[54] The applicants are claiming that they were all dismissed by the respondent and that such dismissal was automatically unfair. Mr Jack has asked to be excluded from this finding. Section 187 of the Act deals with automatically unfair dismissals. To the extent relevant in these proceedings it reads:

> "187 automatically unfair dismissals

> (1) A dismissal is automatically unfair…….if the reason for the dismissal is-
>
> (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of chapter IV."

[55] Mr Todd appearing for the applicants hit the nail on the head when he submitted that no evidence was led by any of the witnesses of the respondent that the strikes of 14 April 2008 and of 20 and 21 April 2008 were unprotected. The respondent correctly conceded that it bore the onus of proving the fairness of the dismissal of the second to the sixteenth applicants. Instead of the respondent proving that the strikes in question were unprotected, the applicants proved that the respondent, through its Group Legal Counsel, Adv. Myburgh, knew that the strikes were in fact protected. As a consequence, the respondent undertook to have the charge based on a participation or intention to participate in a protected strike withdrawn. Yet, in respect of the Rustenburg group, the respondent went ahead with a disciplinary hearing, found the employees guilty and dismissed them.

[56] The various unions in the private security industry secured a protected strike based, among others, on wages, at the level of the National Bargaining Council. It commenced on 20 March

2008 but was suspended on 28 March 2008. The suspension of the strike entitled the unions to resume the protected strike without having to refer the same dispute for conciliation. Inherent in the suspension of this protected strike, was its resumption without a new referral.

[57] In respect of the Rustenburg group of employees it was suggested, but without proof, that the employees made demands other than those for which a certificate was issued. The posters filed in the record of these proceedings did not support this claim. It is not uncommon in the demands during a protected strike, to make reference to some other issues, provided these do not detract from the main dispute. There was a reference in the posters to certain members of management of the respondent. This was clearly a demand of a better pay, in the context of a national wage dispute. This case is distinguishable from the facts in *Adams & others v Coin Security Group (Pty) Ltd (1998) 12 BLLR 1238 (LC)* where this Court found the underlying issue between the parties to have been a wage claim and the strike to have been protected but on appeal, it was found that the issue was arbitrable, see *Coin Security Group (Pty) Ltd v Adams & others (2000) 4 BLLR 371 (LAC).* No attempt was made by the respondent, in this case to suggest that the dispute for which the strike was about, was Arbitrable.

[58] Accordingly, I find that the dismissal of all employees of the respondent based at Rustenburg for having taken part in a protected strike on 14 April 2008, was automatically unfair.

[59] In respect of the employees at Brits, it was unfair of the respondent to subject the striking employees to a disciplinary hearing. Charges ought to have been withdrawn against them unconditionally and the respondent's clients should have been appraised of the lawfulness of the strike to avoid a demand of their removal from a site, when they were acting within the law.

[60] The prohibition on the dismissal of employees embarking on a protected strike does not preclude an employer from dismissing on operational needs, even if those needs were a consequence of the strike, see *Sacwu & others v Afrox Ltd (1999) 10 BLLR 1005 (LAC).* The central issue is whether or not their dismissal is based on their participation in a protected strike or on the employer's operational requirements.

[61] The letter of 2 June 2008 issued by Mr Bolz to Mr Shauke talks about;

- fixed term contracts having been terminated;
- alternative positions being available at the Pretoria Branch;

- the positions could not be reserved for any later date;
- the offer of an alternative employment disqualifying employees from claiming a retrenchment package.

[62] The letter was issued by an employer who denies having dismissed the employees. The employer asks Court to depart from the parol-evidence rule by reading “has terminated” as not meaning what it says, and instead to give a construction that the employee’s contracts have been terminated. I am asked to read “to re-employ you” as having meant to “re-deploy you” yet there is a further “re-employment” in the last paragraph of the letter. No basis was laid by the respondent for the request. Accordingly, I am unable to accede to this request which clearly would have prejudicial consequences to the other parties.

[63] If the parties had agreed to the redeployment of the employees as suggested by the respondent, a letter such as the one of 2 June 2008 would never have been contemplated, let alone written. It would have antagonized an unanimity reached by the parties as it is an expression of a termination of employment and an ultimatum for an employee to save his position at work by accepting an alternative employment within a very short period. The contents of this letter are in sharp contradistinction

to the version presented by the respondent but are in harmony with the version of the applicants.

[64] Even on the face of the letters of 9 June 2008 headed: “Re Termination of service” given by the respondent to the union official, the respondent denies having dismissed any of its employees at Brits, in connection with the strike of 14 April 2008. In my view, this letter was issued as an after thought, in an attempt to correct disparities in the letter of 2 June 2008.

[65] Accordingly, I find it having proved by the applicants that:

- on 2 June 2008 5 representatives of the employees, as agreed to between the parties, attended a disciplinary hearing of the employees;
- the employees were charged with acts of misconduct of having taken part in an unprotected strike on 14 April 2008;
- the respondent announced to the representatives that it was not proceeding with the disciplinary hearing and it offered to redeploy the employees to Pretoria and Witbank;
- the representatives consulted the employees present at the hearing;
- the offer was rejected;

- the respondent issued the letter dated 2 June 2008.

[66] On the accepted proven facts, I find that the respondent did dismiss the applicants at Brits. Such dismissal was based on the employees having take part in what the respondent wrongly took as an unprotected strike and were refusing to be redeployed. In my view, this dismissal was automatically unfair as the respondent has failed to prove its fairness.

[67] The next enquiry concerns the second applicant. The undisputed evidence of this applicant was then that he left the offices of the union with 6 others to go and organize workers to resume a strike at their work place in Robertsville. They arrived on a spot where management had arranged its staff in anticipation of the commencement of the strike and had planned to frustrate it. There is overwhelming evidence by the second applicant that his actions of 20 and 21 April 2008 indicated his intention to participate in a strike, by urging others to strike. The misconduct alleged by the respondent against him, in the charge sheet, supports this view. The reason for the termination of employment of the second applicant with the respondent was none-other than being found guilty of the acts of misconduct with which he was charged and dismissed. That he did not take part in a strike where he would be alone striking is an after thought by the respondent and is further from the

truth. The respondent does not even explain how the employment contract was terminated.

[68] The second applicant testified that he did not wish to be reinstated and has asked to be compensated. He said that he was still unemployed, though he was assisting the union which paid him about R 500 per month.

[69] I return to the other successful applicants. There is an issue of mandate raised by the respondent. It is well recognised that trade unions and employers' organizations are entitled to litigate for the benefit of their members, see Steel & *Engineering Industries Federation & others v Numsa (1) 1993 (4) SA 190 at p194 and National Union of Mineworkers V East Rand Gold and Uranium Co Ltd 1992 (1) SA 700 (A) at 733 I-743D.* Socrawu has a direct, actual and present interest in the legality of the strikes in this matter and the resolution of issues emanating from the strikes. In *Amalgamated Engineering Union v Minister of Labour 1949 (4) SA 908 (A).* Centlivers JA had the following to say:-

> "The Act encourages collective bargaining ……..it is obvious that what the legislature had in mind was that employees should use the services of the trade union of which they are members……..."

[70] Members of Socrawu were therefore entitled to use their union by having it to represent them in this court. All they need to do in this matter is to prove their membership with Socrawu. Those applicants who are not members of Socrawu had to attend court and show interest in the matter. The keeping of the register of their attendance suffices in this matter, as discussed with parties at the commencement of the trial. No evidence was led by the applicants to show on which of them had applied for membership with Socrawu but were frustrated by the respondent. In the absence of such evidence, it can not therefore reasonably be said that the respondent may not benefit from its own wrong doing.

[71] Further, some of the applicants may no longer be interested in being reinstated. In the absence of their evidence it is difficult to make out who those applicants are. In conclusion, I see no reason why in a case such as this one, where employees have been dismissed by an employer who well knew that the strike was protected, costs should not follow the results.

[72] The following order will consequently issue:

The respondent is ordered to:

(1) compensate Mr Lethukuthula Ngobese in an amount of money equivalent to Fifteen (15) months of the salary he was entitled to earn from the respondent on 14 April 2008. This payment is to be made on or before 5 March 2010.

(2) reinstate each of such applicants as was a member of Socrawu on 14 April 2008 and wishes to be reinstated. Each such applicant is to report for duty on any day within the period 22 February 2010 to 5 March 2010.

(3) reinstate each of such applicants as was a non-Socrawu member on 14 April 2008, did attend court in this matter, signed the attendance register and wishes to be reinstated. Each such applicant it to report for duty on any day within the period 22 February 2010 to 5 March 2010.

(4) compensate each of such applicants as is described in (2) and (3) above as does not wish to be reinstate, in an amount of money equivalent to fifteen (15) months of the salary he/she was entitled to earn from the respondent on 14 April 2008. This payment is to be made on or before 5 March 2010.

(5) pay the costs of this application.

_____

Cele J

Date of Hearing: 26 August 2009

Date of Judgment: 15 February 2010

APPEARANCES

For the Applicant	:	Adv. C. Todd instructed by Bowman Gilfillan Attorneys
For the Respondent	:	T. P Kruger and G. Kyrlazis
Instructed by	:	Blake Bester Incorporated