IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JS 589/15

In the matter between:

PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA **Applicant**

MALULEKA AND OTHERS **Second – Further Applicants**

and

MEMBER OF THE EXECUTIVE COMMITTEE: HEALTH, GAUTENG PROVINCIAL GOVERNMENT **Respondent**

Heard: **18, 20, 21, 22, 25, 26 and 27 February 2019; 01 March 2019; 18, 19, 20, 21, and 25 June 2019. (Written Heads of Argument: 24 July 2019 and 01 August 2019)**

Delivered: **23 April 2020**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] The Second to Further Applicants ('the Individual applicants') as listed in Annexure A to the Statement of Claim are former employees of the Gauteng Emergency Medical Services (the EMS or Employer). The EMS falls under the authority of the Respondent (the MEC).

[2] The individual applicants were based at various sites in Gauteng and were employed in various capacities including as Basic Life Support Attendants, Basic Ambulance Assistants, Emergency Care Practitioners, and Intermediate

Life Supporters. Their main responsibilities entailed collecting and transferring patients from and between hospitals, clinics, or their homes. They were also required to attend to accident scenes, assist and attend to the injured and transport them to hospitals. For reasons that are apparent, the services that the individual applicants provided are classified as essential.

[3] The circumstances leading to the dismissal of the individual applicants are fairly common cause. They emanate from a dispute related to their hours of work, and their claim of overtime pay. It was common cause that they were required to work 12 hours continuous shift for four days, and were entitled to be off duty (rest days) for four days thereafter. The day shifts commenced at 07h00 and ended at 19h00, whilst the night shifts commenced at 19h00 and ended at 07h00. The combined shifts ensures that emergency services are rendered continuously over 24 hours.

[4] The individual applicants as supported by the first applicant (the PSA) held the view that the shift structure was such that effectively, they worked 48 hours instead of the 40 hours stipulated in the Basic Conditions of Employment Act[1] (the BCEA). Their stance was therefore that they were entitled to overtime pay in respect of the additional/overlapping 8 hours.

[5] The dispute over whether there was an entitlement to overtime pay goes back to June 2008, and had culminated with a referral of a dispute in March 2009 by one of the recognised unions, NUPSAW. The dispute was referred to the Public Service Co-ordinating Bargaining Council (PSCBC) under the provisions of section 24 of the Labour Relations Act (LRA)[2] and in particular, the interpretation and application of Resolution 1 of 2007. The PSCBC in an arbitration award issued in August 2009 had dismissed NUPSAWU's claim, finding that the nature of the shift system was such that it did not entitle the employees to overtime pay. Subsequent discussions between the EMS and the unions over the issue of alleged overtime pay since the arbitration award was issued has not produced any results.

[1] Act 75 of 1997
[2] Act 66 of 1996

[6] Between 13 and 17 October 2014, employees had embarked on an unprotected strike at the EMS' Midrand base in support for demands related to overtime payments. The Gauteng Department of Health had approached this Court on an urgent basis under case number J 2568/14 and obtained a *Rule Nisi* on 17 October 2014, in terms of which the industrial action was declared as unlawful and unprotected.

[7] Various meetings were subsequently held between the recognised unions (PSA, NEHAWU, and NUPSAWU) and the Employer over the issue of overtime pay. A multilateral meeting held on 28 October 2014 failed to resolve the dispute. The PSA at that meeting indicated to the Employer's representatives that it had a mandate from its members to advise that pending further discussions over the matter, employees who were scheduled to be on duty from 1 November 2014 would work between 07h00 – 15h00 (instead of 19h00), and night shift between 19h00 – 07h00. In line with this stance, the PSA had then on 30 October 2014, issued an *'Informus'*, which is its publication to its members, which relevant portions read as follows;

> *'Overlapping hours (Overtime)*
>
> - *No agreement could be reached between labour and the employer on the issue.*
> - *The employer has been informed that as from 1 November 2014, EMS staff will no longer perform overlapping hours.*
> - *Shifts will thus as from 1 November 2014 be as follows: 7am – 3pm and 7pm – 7am.'*

[8] The individual applicants, as further confirmed in their statement of case[3], indeed worked reduced hours during their shifts between 1 and 2 November 2014. On 3 November 2014, the CEO of the EMS, Mr LA Malotana, issued a memorandum to all staff advising that the practice of working less hours was unauthorised, unacceptable, irresponsible and putting lives of communities at risk. The memorandum further advised that those

[3] Paragraph 25 of page 7 of the Statement of Case.

employees who participated in unauthorised shift changes would be subject to disciplinary action, and that the principle of 'no work no pay' would apply[4].

[9] On 4 November 2014, all of the 36 employees the Employer deemed to have refused to work their normal shift hours at various sites of the EMS were issued with generic letters of dismissal which read;

> 'You Mr/Ms… an Emergency Care Practitioner, employed by the Emergency Medical Services of Gauteng Province and therefore being an Officer of the Republic of South Africa.
>
> As an Emergency Care Practitioner, your occupation has been classified under **essential services.**
>
> You are hereby dismissed from the Gauteng Department of Health (Public Service) and the reasons for your dismissal are the following;
>
> 1. You breached your contracts of employment in that you unlawfully changed your shift without authorisation.
>
> 2. In spite of the warning letter issued to you in October 2014, you continued to engage yourself in acts of misconduct by abandoning your shift from 15hrs to 19hrs on 2nd November 2014.
>
> 3. You violated the Constitutional rights of the public and endangered their lives through the above action.
>
> You are hereby Dismissed with immediate effect, (04/11/2014) from Public Service.
>
> You have five working days from receipt of this notice to appeal the Dismissal for the MEC's consideration. Your appeal documents must be submitted to the Human Resource Management, Midrand office, Corner Old Pretoria and Tonetti Street, for attention: **The Chief Executive Officer: Mr. LA Molotana Emergency Medical Services**'

[10] Some of the individual applicants had lodged individual appeals whilst the PSA had lodged a generic appeal on behalf of all its dismissed members. The

[4] Page 71 of Bundle P

grounds set out in the appeal[5] by the PSA are significant insofar as the versions of the individual applicants in these trial proceedings are concerned. In the appeal, the PSA raised concerns surrounding the procedural fairness of the dismissals, and the alleged violation of the rights of its members. Of further importance is that;

10.1 The PSA acknowledged that it had issued the *'Informus'* on 30 October 2014 advising its members that the Employer was informed that as from 1 November 2014, staff would no longer be performing the overlapping hours.

10.2 The PSA contended that the Employer was aware that the contents of the *'Informus'* arose out of the multilateral meeting of 28 October 2014, and further that NEHAWU and the Employer's representatives had agreed to its (PSA's) proposal.

10.3 Thus to the extent that the Employer had not responded to the '*Informus*', or alleged that the contents of the *'Informus'* were incorrect, or instructed its members to continue working the normal hours, its members had no issue with working less hours.

10.4 In a nutshell, the PSA contended that it was as a result of the *'Informus'* that its members did not remain at the workplace between 3pm and 7pm.

10.5 The PSA denied that the employees had abandoned their shifts, and contended that the employees had merely thought that they were acting upon an agreement reached between the Employer and the PSA.

[11] It is common cause that other than lodging an appeal, the PSA had also approached this Court under case No J 2753/13 with an urgent application to set aside the dismissals. That application was struck off the roll on account of lack of urgency in terms of a judgment delivered on 28 November 2014.

[12] For reasons that are not clear, the then MEC for Health, Ms Qedani Mahlangu only responded to the appeals in an outcome issued on 29 July 2015, some

[5] Page 51 -56 of Bundle 'B'

eight months since dismissal. In her outcome, the MEC stated that upon a consideration of the appeal, the employees were summarily dismissed for serious misconduct, and that since no disciplinary hearings were held, she lacked the necessary jurisdiction to consider the appeal. According to the MEC, the appeals could only be considered where the dismissals were preceded by a disciplinary hearing.

[13] At the time that the MEC responded to the appeals, the PSA had already referred an alleged unfair dismissal dispute to the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) on behalf of the individual applicants. A certificate of outcome was issued on 22 February 2015.

[14] With this claim before the Court, the PSA represents 28 individual applicants that remained dismissed. In challenging the dismissals, the PSA contends that none of the individual applicants or alternatively, all, had participated in any alleged industrial action. In the alternative, it was submitted that in the event that it is found that any of them did in fact participate in the strike which was unprotected, the sanction of dismissal was unfair and unreasonable.

[15] It was further submitted on their behalf that the Employer applied the sanction of dismissal inconsistently and arbitrarily, as a large number of employees who had participated in the alleged misconduct were not disciplined or dismissed. The individual applicants seek an order of retrospective reinstatement with no loss of salary or benefits, as they contend that their dismissal was procedurally and substantively unfair.

[16] The Employer's contention on the other hand was that the dismissal of the individual applicants was procedurally and substantively fair based on the nature of the conduct in question, the essential nature of the services required to be rendered, and the consequences of lack of services to communities as a result of the conduct in question.

[17] The issues for determination are;

(i) Whether the individual applicants participated or engaged in any unprotected strike and/or breached their contracts of employment by

unlawfully changing their shifts without authorisation, jointly or severally, despite a letter issued to them in October 2014;

(ii) Whether the individual applicants jointly and severally violated the constitutional right of the public and/or endangered their lives through their action;

(iii) Whether the individual applicants were bound to render their services to the Employer at all material times, notwithstanding the fact that the Employer had at all material times, locked its premises, thereby denying the individual applicants access to render their services;

(iv) Whether the individual applicants who finished their shifts on the morning of 2 November 2014 participated in the strike;

(v) Whether the dismissals were substantively and procedurally fair

(vi) Whether the Employer applied its disciplinary code and/or procedure discriminately, inconsistently and thus unfairly.

[18] Prior to dealing with the evidence and my conclusions in that regard, a worrisome argument was raised on behalf of the Employer that the matter was *res judicata* in the light of the judgment of this Court delivered on 28 November 2014. To recap, upon the individual applicants having been dismissed, the PSA had approached the Court on an urgent basis under case number J 2753/14 to have the dismissals set aside. The Court had struck off the application from the roll on account lack of urgency.

[19] Much was made of certain findings in the judgment, which it was submitted on behalf of the Employer, were final and binding pronouncements on the merits. This contention is in my view baseless. It was common cause that the matter was merely struck off the roll on account of lack of urgency, and not dismissed as alleged in the written heads of argument submitted on behalf of the Employer[6]. This meant that the PSA was entitled to re-enrol the matter. It however chose to bring this claim, and correctly so in the light of the disputes

[6] At para 33.3 of the Written Heads of Argument

of fact arising as can be gleaned from the pleadings. The mere fact that the Court made certain findings on the papers in regards to the conduct of the individual applicants when striking the matter off the roll cannot give rise or sustain an argument that the matter is *res judicata.* This argument is indeed opportunistic, and is put to rest by what was stated in *PT Operational Services (Pty) Ltd v RAWU obo Ngwetsana*[7] as follows;

> "Although I agree that the appropriate order in a matter where urgency has not been shown should be striking the matter from the roll, it seems to me that even where the word "dismissed" is used it does not necessarily mean that the dismissal amounts to a final order. One will still have to enquire, where there is doubt, whether the matter was dismissed on the merits or not. If not, then it so not final. A finding that a matter is not urgent does not mean that there are no merits in the applicant's case. Even if a matter is dismissed for lack of urgency it can and should be re-enrolled. To reason otherwise would be to allow form to triumph over substance."

The legal framework:

[20] In accordance with the provisions of section 188(1)(i) and (b) of the LRA, a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for a dismissal is a fair reason related to the employee's conduct or capacity, and that the dismissal was effected in accordance with a fair procedure. Under section 188(2) of the LRA, any person, including this Court, considering whether or not the reason for dismissal is a fair reason, or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of the LRA. The enquiry therefore is into both the substantive and procedural fairness of the dismissal.

[21] An enquiry into substantive fairness requires an examination of what the essence of the charges proffered against the applicant entailed. Thus, the question to be answered is which rule(s) (if any) is the employee alleged to

[7] [2013] 3 BLLR 225 (LAC); (2013) 34 ILJ 1138 (LAC) at para 35

have breached[8]. This approach had long been stated in *Fidelity Cash Management Service v CCMA*[9] as follows;

> "It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal."

[22] In this case, and notwithstanding the Employer's deliberate refrain from specifically mentioning in the letters of dismissal that the individual applicants were dismissed for participating in an unprotected strike, the essence of the evidence led on its behalf, was that the conduct in question and the incidents of 2 November 2014 were viewed as continuous from the strike of 13 – 17 October 2014. In the written heads of arguments on behalf of the Employer, it was further submitted that the dismissals occurred as a result of the individual applicants having embarked on an unprotected industrial action which commenced on 13 – 17 October 2014 and continued on 2 November 2014.

[23] The reason that led to the dismissal of the individual applicants is that as specifically set out in the letter of dismissal, *viz*, that they had breached their contracts of employment in that they unlawfully changed their shifts without authorisation. To be more precise, the allegation is that the individual applicants had engaged in acts of misconduct by abandoning their shifts from 15h00 to 19h00 on 2nd November 2014. The third charge, which related to alleged violation of the Constitutional rights of the public and endangering their lives through the conduct complained of, is merely related to the consequences of the conduct complained of.

[24] For all intents and purposes, it can be accepted that notwithstanding the formulation of the reason for the dismissal in the letters issued to the individual employees, the alleged conduct of the individual applicants on 2 November 2014, and further in the light of the demand for overtime pay, falls squarely within the definition of a strike as contemplated in section 213 of the

[8] *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others* (2019) 40 ILJ 773 (CC); 2019 (4) BCLR 506 (CC); [2019] 6 BLLR 524 (CC) at para 57
[9] (2008) 29 ILJ 964 (LAC) para [32]

LRA[10]. To the extent that this is what the parties had pleaded, the dispute before the Court entails a dismissal based on participation in an unprotected strike.

[25] In the light of the above, the principal issue before the Court (*i.e*., the substantive fairness) is whether the Employer has discharged the onus placed on it under the provisions of section 192 of the LRA, to prove that indeed the individual applicants *breached their contracts of employment by abandoning their shifts between 15h00 and 19h00 on 2 November 2014*, *i.e.*, embarked on an unprotected strike during the period in question. Equally relevant for the purposes of determining the fairness of the dismissal is the warning letter issued to the employees in October 2014, which it is alleged was ignored.

[26] The bulk of the evidence led on both sides consisted of material disputes of fact, with various versions presented by or on behalf of both sides being diametrically opposed. To the extent that this was the case, this requires of the Court to resolve mutually destructive versions by conducting a qualitative assessment of the inherent probabilities that arise from all the oral and documentary evidence and of the truth of the oral evidence of the witnesses, and to determine which of the two versions is more probable. Courts embark on this exercise by assessing which of the two versions is more logical, coherent, cogent, plausible and credible because it is supported by or consistent with admitted and objective facts such as documents, the evidence assessed in its entirety, and the probabilities[11].

[10] **"strike"** means the partial or complete concerted refusal to work, or the retardation of obstruction of work, by persons who are of have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a *dispute* in respect of any matter of mutual interest between employer and *employee*, and every reference to — work in this definition includes overtime work, whether it is voluntary or compulsory'

[11] See *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5, where it was held;

> 'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and

The evidence:

[27] At a general level, it can be accepted as common cause that the events of 2 November 2014 were preceded by an unprotected industrial action that took place at most of the Employer's sites between 13 and 17 October 2014. It can also be accepted as common cause that flowing from the Court interdict and subsequent multilateral meetings between the Employer and the recognized unions, and in particular the meeting of 28 October 2014, the parties could still not agree on the issue of overtime pay.

[28] To the extent that there was no agreement reached at the last multilateral meeting, there was therefore no basis for the PSA to have assumed for the purposes of the appeals that any such agreement was reached that employees can work less hours. Thus, the information contained in the *'Informus'* was merely a restatement of the PSA's position at the multilateral meeting that its members would not work the normal hours. In fact, it is specifically stated in the *'Informus'* that no agreement was reached with the Employer.

[29] In these proceedings, the individual applicant however sought to distance themselves from the grounds of appeal relied upon by the PSA, which effectively were that they had acted in accordance with the *'Informus'*. Similarly, they sought to distance themselves from paragraph 25 of their statement of claim, in which it was stated that in accordance with the *'Informus'*, they had reverted to work less hours. As the evidence shall demonstrate, in certain case, the individual applicants denied having worked less hours, whilst in some instances, they had conceded that they did, but proffered a variety of explanations, varying from site to site.

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cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[30] For the sake of expedience, I intend to first deal with the overall or general evidence led on behalf of the Employer in regards to the reasons that led to the dismissals. I will thereafter deal with the specific evidence led in respect of each site, and end with evaluations and conclusions in respect of each site.

[31] In opposing the claim, the Employer's case was that in 2014, it had in its employ, 1222 employees, and that 600 of them had participated in the strike action between 13 and 17 October 2014. During the course of the strike, internal memorandums/directives/warnings were issued imploring the employees to return to work.

[32] Upon the strike interdict having been obtained, and at the multilateral meeting held on 28 October 2014, another ultimatum was issued to the employees and their unions, advising that should any further strike action take place, consequences would follow. Further as a result of the strike, final written warnings were issued to the employees between 30 and 31 October 2014. Since some of the employees had not reported for duty or were on their off days on the days that the warnings were issued, copies of the final written warning were then served on them upon their return.

[33] According to the Employer, after the '*Informus'* of 30 October 2014 was issued, 36 employees had not worked their full hours between 1 and 2 November 2014. That conduct was viewed as a mere continuation of the strike action of 13 – 17 October 2014, hence the decision to dismiss.

[34] Dr Richard Lebethe, the Deputy Director General in the Department had issued the letters of dismissal. He justified the dismissals on the basis that the individual applicants did not complete their shifts, and thus left communities without the essential service during the gap between the two shifts.

[35] Lebethe had further testified that prior to the letters of dismissal being issued, the employees were also previously warned of consequences of embarking on industrial action, and were also issued with final written warnings. In total, 600 employees were issued with final written warnings for taking part in the unprotected strike.

[36] In regards to advising the dismissed employees to lodge appeals to the MEC, Lebethe conceded that the advice was incorrect, but that he had only issued it upon being informed by the Labour Relations Department of the Employer that employees were entitled to appeal to the MEC. He further conceded that to the extent that the MEC had declined to assume jurisdiction over the appeals, there were no disciplinary enquiries or appeal hearings held prior to the dismissals.

[37] The evidence of Mr Lesiba Malotana, the CEO of Gauteng EMS was that at the time of the strike between 13 and 17 October 2014, he had issued a memorandum on 14 October 2014 to all personnel, advising that the strike in an essential service was unprotected, and that any staff member participating in the action faced disciplinary action. Copies of the memorandum were placed on notice boards at the various sites and after employees had seen them, some of them had positively responded and resumed their duties. As a result of the industrial action, final written warnings were issued to employees on 31 October 2014.

[38] Mr Selwin Nkomo, the Employer's Director: Human Resources who is based at its Head Office testified that the industrial action embarked upon by the employees affected emergency services throughout Gauteng. He reiterated that the shift cycle the employees were complaining of complained was based on the 24 hour service provided in the contracts of employment.

[39] Nkomo emphasised that there was no agreement reached at the last multilateral meeting of 28 October 2014, and the PSA had nonetheless advised its members to work reduced hours. He further testified that to the extent that the individual applicants had alleged that they had not worked their full hours out of fear for their safety, or that they were threatened or intimidated at the time, these were matters that i ought to have been reported to management.

[40] Nkomo further conceded that some of the dismissed employees may not have received letters of final written warning prior to the dismissal. He however contended that it did not imply that those warnings were not issued.

[41] Mr Gerald Papo, the Employer's Labour Relations Officer testified that all the employees that had participated in the unprotected strike were issued with final

written warnings. He denied that any employee was discriminated against since all of those who took part in the strike were issued with some form of sanction including suspensions without pay.

[42] Papo also testified that to the extent that the dismissed employees had raised concerns about their safety or felt threatened or intimidated on the days in question as they had alleged, those were issues that ought to have been brought to the attention of the supervisor or manager at the base at the time, before the employees decided leave before the end of their shift. He however testified that no such reports were received by or from the base managers. Papo further denied that any of the bases were closed by managers as a result of threats or intimidation, to prevent access to the dismissed employees to carry out their duties.

[43] According to Papo, the letters of dismissal were prompted by the duration of the strike and its impact. He contended due to the seriousness of the conduct in question, convening disciplinary hearings would not have made a difference, as not only would such processes have taken long, but also that there was a breakdown of a working relationship with the employees. He conceded that some of the final written warnings were handed out to the employees simultaneously with letters of dismissal.

[44] Mr Johannes von Benecke, the Deputy Director, Communication testified in regards to the impact of the strike on emergency services and on the main centre. The procedure for responding to calls at the time was that once a call was received by the call centre in Midrand, it was then re-routed to a despatcher in a regional office, who would then sent it to a base for a response to be effected. An automated report calls system referred to had revealed that calls were not responded to at various bases between 16h50 and 19h00 on 2 and 3 November 2014.

[45] According to Von Benecke, the calls not responded to related to serious motor vehicle accidents and cases of serious assault. On 3 November 2014, two patients that were not attended to had died as there was a backlog in response.

[46] Under cross-examination, Von Benecke conceded that it was difficult to determine as to who was responsible for not responding to calls, other than to identify the bases, which were CTC/Prinshof, Themba, Odi, Cullinan and Motsweding.

[47] Von Benecke's evidence was to a large extent corroborated by that of Ms Yvonne Flavello who was based at the Cullinan site and on the night shift on 2 November 2014. She confirmed that she had to respond to an emergency call at about 24h00 in respect of a motor vehicle accident that took place in Ekurhuleni, as none of the usual emergency services had responded to the call in the area.

(i) The evidence led in respect Dewagensdrift Base:

[48] The evidence on behalf of the Employer was led by Mr Raymond Lebese and Ms Suzan Lukhele. Lebese's testimony was that;

48.1 In November 2014, he was the Acting Station Manager at Dewagensdrift, where three of the individual applicants, *viz* Messrs Morris Matika, Jonas Mthombeni and Vincent Tshikhudo, were based.

48.2 The three individuals were on their rest days until 1 November 2014 and were expected to return to work on 2 November 2014 for the 07h00 – 19h00 shift. When they returned however, Mthombeni, Tshikhudu and Matika worked until 17h00 instead of until 19h00. The following day, Mthombeni had knocked off at 15h00, and on both days he had not obtained permission to leave early.

48.3 Only two other employees, the late BA Ubisi and Suzan Lukhele had remained for the remainder of the shift. The other three individual applicants were also issued with their letters of final written warning upon their return from their rest days and subsequently issued with dismissal letters on 4 November 2014 for working less hours.

48.4 Under cross-examination, Lebese confirmed that he did not know whether Mthombeni was issued with a copy of the final written warning.

When it was put to him that Mthombeni had left early because of security concerns or a 'riot' at the workplace, he denied that Mthombeni had informed him of his reasons for leaving early, and testified that he was not aware of any security concerns or 'riot' at the time. Furthermore, Ubisi and Lukhele had worked their full hours despite the alleged safety concerns raised by the other employees. His contention was that Mthombeni left early because of the '*Informus'*, and not for any other reason.

[49] Ms Suzan Lukhele, who is employed as a Basic Ambulance Assistant, had reported for duty on 2 November 2014 on the same shift as Morris Matika, Jonas Mthombeni and Vincent Tshikhudu. Her testimony was that Mthombeni was the shift supervisor and had called all the employees at the start of the shift, and informed them that he had received the *'Informus'* advising the employees to knock off earlier. She testified that notwithstanding what was stated in the *'Informus'*, she had worked the full shift and knocked off at 19h00. Lukhele denied that there were any concerns about her safety for working the full hours, and contended that she had not experienced any form of intimidation from any source, nor was anyone on that shift threatened with any harm for working the full shift.

[50] The evidence of Mr Morris Matika, was that he had reported for the morning shift on 2 November 2014 and knocked off at 19h00 as expected. He confirmed having seen a copy of the *'Informus'* but had ignored it and worked until 19h00. His partner on that shift was Mthombeni, who had however knocked off at 15h00 as he had a family emergency to attend to. The other employees had 'given Mthombeni permission to leave early'. He denied having received or seen copies of the final written warning or ultimatum.

[51] Mr Jacob Tshikhudu's evidence was slightly different to that of Mthombeni;

51.1 He had relied on the attendance registrar which reflected that he had indeed worked the full hours. He testified that he was partnered with the late Mr Bongani Ubusi on 2 November 2014 and did not receive any calls

throughout the shift. He made reference to the attendance register[12] that reflected that he had worked the full 07h00 – 19h00 shift, and contended that all the other employees on that shift had worked full hours.

51.2 Under cross-examination, Tshikhudu denied knowledge of any dispute related to overlapping hours and overtime. He disputed Lebese's version that all the employees, except Ubisi and Lukhele did not complete their shift and contended that he (Lebese) was not even on duty on 2 November 2014.

51.3 He testified that only Mthombeni left at 17h00, and denied that the latter had circulated the *'Informus'.* He contended that he did not see a copy of the *'Informus'* hence he and others had worked the full hours.

51.4 He further denied that the employees who had left early had deliberately recorded incorrect clocking out times in the attendance registrar as alleged by Lebese, and reiterated that he had worked the full hours.

[52] Mr Jabulani Mthombeni confirmed that he was the shift supervisor on the 07h00 -19h00 shift on 2 November 2014. He conceded that he knocked off at 17h00, but contended that this was due to having to attend to a family emergency. He denied that the other employees on the shift left at 15h00 as alleged or that he had instructed them to leave early. In the same token, he conceded that the employees had acted in accordance with the contents of the *'Informus'*. He further denied having received copies of the final warning or ultimatums from the Employer.

Evaluation (*Re: Dewagensdrift):*

[53] In regards to Mthombeni, it was submitted that even on the Employer's version the reasons for dismissing him were bad in law. This argument was advanced in view of the fact that the evidence led on behalf of the Employer was that Mthombeni had left at 15h00, when he had on his own version left at 17h00. This argument in my view elevates form over substance. The fact remains that

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Mthombeni had not completed his shift on 2 November 2014. Whether he left at 15h00 or 17h00 is immaterial, as the clock out time remained as 19h00.

[54] Whilst Mthombeni's version and explanation was that he had left in order to attend to a family emergency, at the same time, two versions destructive to his case were put to Lebese by the applicants' counsel during his cross-examination. The first was that he (Mthombeni) had left due to some 'riot' or some unknown security concerns. It is either Mthombeni had left without completing his shift because of security concerns or because he had a family emergency to attend. It could not have been due to both reasons.

[55] If he had left due to a family emergency to be attended to, there is no evidence to suggest that he had obtained permission from Lebese, even if the latter was off the site at the time. He could not have obtained such permission from his crew as Matika had suggested, as the crew members had no authority to grant such permission. On the other hand, if he had left because of some security concerns, again, Lebese was not informed of those concerns, and if indeed there were such concerns, the question remained why Ubisi and Lukhele had remained until the end of their shift. On Lukhele's version, there was no reason to believe that the employees were intimidated or under some form of threat, necessitating that they should end their shift prematurely.

[56] A second version put to Lebese by the applicants' counsel was that Mthombeni had asked him about the *'Informus'*, and his (Lebese's) response was that it was a legitimate document, which appears to suggest that Mthombeni had acted in accordance with the '*Informus'* by leaving early.

[57] In the light of the contradictions in Mthombeni's versions related to the reasons he had left early and the various versions put to the Employer's witnesses which were at odds with his own version, it follows that his entire version ought to be rejected as lacking in credibility. The invariable probabilities therefore favour the Employer's version that indeed Mthombeni had left early in compliance with the *'Informus'* issued by the PSA, and not for any other reason.

[58] Mthombeni's conduct of leaving early in my view should further be viewed in even more serious light, taking into account the fact that he was the shift

supervisor at the time. He had clearly abandoned his shift and crew, and instead of taking responsibility for his actions, his versions or those put up on his behalf were clearly designed to mislead the Court.

[59] In regards to, Tshikhudu, it needs to be stated that his denials in regards to his knowledge of any strike action, or the *'Informus'* and/or any disputes related to the overtime pay were clearly bare in the light of the overall evidence led. It is indeed improbable that to the extent that he was a member of the PSA, he could not have had any knowledge of the dispute related to overtime or the strike that took place between 13 and 17 October 2014.

[60] Lebese's testimony in regards to Tshikhudu and Matika was that they had not completed their shifts on 2 and 3 November 2014. Taking into account that the individual applicants were dismissed for their conduct on 2 November 2014, it is significant to note that Lebese had conceded that on 2 November 2014, he was not on duty. Lukhele could not shed light in regards to the time that Matika and Tshikhudu had left, and on her own version, she could not recall who was still on duty at the time that she knocked off at 19h00.

[61] In the absence of any evidence to suggest that the attendance register relied upon by Matika and Tshikhudu was manipulated as suggested by Lebese without any form of corroboration, it is my view that their versions that they had completed their shift ought on a balance of probabilities, be given the benefit of the doubt. To that end, I am not satisfied that the Employer had discharged the onus placed on it to demonstrate that Matika and Tshikhudu had indeed left early on 2 November 2014. Accordingly, there was no fair reason for them to be dismissed.

(ii) The evidence in respect of Cullinan Base:

[62] The following individual applicants, *viz* Duduzile Skhosana, Precious Nkosi, Sylvia Mmeti, Richard Nkosi, Brian Mabiletja, Granny Mashishi, Joseph Kakole, Donald Nchabeleng and Kgotleng Jack Shilakwe were based at Cullinan.

[63] Mr Mandla Kgomo, who is currently a Station Manager in the Tshwane district was at the time of the industrial action, based at Cullinan. His testimony on behalf of the Employer was that;

63.1 Final written warnings were issued to employees who took part in the 13 – 17 October 2014 strike. On 2 November 2014 he was off duty and the late Ms. Sibanda was the standby manager at the base. Kgomo came back on 3 November 2014 and found a report compiled by Sibanda, in which she had recorded that;

(i) Skhosana, Granny Mashishi, Joseph Kakole and Richard Nkosi, did not complete their shift on 2 November 2014, and had left early without permission.

(ii) Mabiletja, Mmeti, Nkosi and Nchabeleng had remained at the workplace until the end of their shift, but had however refused to respond to emergency calls.

(iii) Only two other employees, M Tshita and Setladi had remained for the remainder of the shift.

[64] Jack Shilakwe was the shift supervisor on the 07h00 – 19h00 shift on 2 November 2014. His testimony on behalf of the other individual applicants at Cullinan was that;

64.1 At between 14h30 and 15h00 whilst on duty, he had received no less than four threatening telephone calls from unknown persons, warning him and his crew not to work beyond 15h00 on that day.

64.2 He subsequently called the crew members to a meeting to discuss the threatening phone calls. He also called Ms Sibanda, who was at the time, off the base, and informed her of the threatening calls. Sibanda had said that she was also afraid that she may attacked if she came to the base, and told Shilakwe that all staff members should park the ambulances, hand over all the ambulance keys with security officers on duty, and leave the premises.

64.3 He had then reported back to the crew what Sibanda had said, and all the employees except him had left as two crew members, Setladi and Mashishi, had not returned from attending to their earlier calls.

64.4 Sibande had at a later stage called him to find out what their situation was, and undertook to convey a message to the senior manager, Lebethe, that employees had to leave early as a result of the telephone threats they had received. When Setladi and Mashishi came back at about 15h10 without having attended to their call, they all left immediately thereafter.

64.5 Under cross-examination, Shilakwe confirmed that he did not verify where and from whom the threatening calls came, nor did he make any assessment of any potential threat at the base upon receipt of the alleged calls. He however insisted that all the employees on shift at the time left around 15h00 upon being given permission by Sibande.

64.6 When it was pointed out to him that it was never at any stage put to the Employer's witnesses that Sibande had given the employees permission to leave early or that the latter was concerned about their safety, he (Shilakwe) conceded that he did not have a response as to the reason his version was not put to the Employer's witnesses, especially to Kgomo.

64.7 Shilakwe further conceded that as a shift supervisor, he failed to record the alleged threats in the Occurrence Book that the employees, or the fact that the employees had received permission from the late Sibanda to leave early as a result of the alleged telephone threats.

64.8 Shilakwe further confirmed that he never received similar threatening calls on 3 November 2014, and that none of the other employees were threatened or had received similar calls.

[65] Ms Granny Mashishi's testimony was that;

65.1 On 2 November 2014, she had reported for duty and attended to calls. The last call that she and her partner, Setladi had responded to was at about 14h45. When they came back to base at about 15h20, they discovered that all the crew members had left.

65.2 She then called Shilakwe who informed her that the other employees left early because they saw the *'Informus'* directing them to end their shift at 15h00, and further that he had received threatening calls. He also informed her that he had called Sibande about the threatening telephone calls, and that the latter told the employees to leave the premises.

65.3 Mashishi further testified that she had simply followed Shilakwe's instructions to lock up and leave the premises. She left at about 16h20 after cleaning the ambulance allocated to them, and also due to safety concerns.

65.4 She conceded however under cross-examination that there was no threat to her that she was aware of other than what Shilakwe had said. She further testified that she did not see a copy of the *'Informus'* until after her dismissal, even though she was told to leave early because of it and the telephone threats.

[66] Mr Donald Nchabeleng was also a PSA shop steward. His testimony was that;

66.1 He did not receive a copy of the final written warning issued in October 2014 or any other ultimatums or warnings issued by the Employer. He confirmed that he left at 15h00 instead of 19h00 on 2 November 2014 due to the alleged threatening telephone calls received by Shilakwe, and as a result of the alleged permission by the late Sibande.

66.2 Nchabeleng conceded that he was aware of the *'Informus'* as at 2 November 2014. In the same token, he denied that he knew of it and contended that he only became aware of it on 5 November 2014 after his dismissal. He also conceded that he did not verify the threats, and had merely acted on what Shilakwe had said. He also confirmed that he

did not call Sibande to confirm whether indeed they were granted permission to leave early.

66.3 Nchabeleng further complained that other employees, Ms Maria Tsita and Setladi, who were on their shift, were not dismissed despite also leaving early. This was despite the fact that Kgomo had recorded that both employees did not leave early like the rest of the crew.

[67] Mr Richard Nkosi was also based at Cullinan. His testimony was that he was on the 19h00 – 07h00 shift that started on 1 November 2014, and had knocked off at 07h00 on 2 November 2014. He was on that shift together with Mabiletja and Mmeti. The three of them took their four days of rest after their shift on 2 November 2014, and came back on 6 November 2014 only to be issued with letters of dismissal.

[68] After Nkosi had finalised his examination in chief, the Employer's counsel did not proceed with any cross-examination as he sought to take further instructions. The evidence of Nkosi however remained unchallenged.

Evaluation *(Re: Cullinan Base):*

[69] The evidence of Shilakwe, which was equally applicable to Duduzile Skhosana, Richard Nkosi, Granny Mashishi, Joseph Kakole, and Donald Nchabeleng is indeed extraordinary, and so improbable that it ought to be rejected on the following grounds;

69.1 Shilakwe's version that he had received the threatening phone calls between 14h30 and 15h00 on 2 November 2014, or that he and the other employees were granted permission to leave early by Sibande was neither pleaded nor put to any of the Employer's witnesses. The attempts therefore by Shilakwe to rely on the alleged permission granted by the late Sibande is indeed opportunistic in the extreme.

69.2 Even if the late Sibande was made aware of the alleged telephone threats or had given the employees permission to leave early, it is

inexplicable that she would omit to mention such an important matter in her report which she had left for Kgomo.

69.3 The fact that Shilakwe as the shift supervisor failed to make any entries in regards to the alleged threats and permission in the Occurrence Book is even more fatal to his and other individual applicants' case. This omission was not simply an error on his part as he alleged.

69.4 In regards to Nchabeleng and Mashishi, they had simply left early on the alleged threats they had heard about from Shilakwe, without making any attempts to independently verify the veracity of the alleged threatening calls or permission granted by the late Sibande. There was no evidence to suggest that they had also for some reason, personally felt threatened upon coming back to the base.

69.5 In the same token they had made no attempts whatsoever to assess whether the threats were real, nor had they personally felt threatened. On the contrary, and despite the alleged threats, Mashishi only left at about 16h20, and only after cleaning the ambulance allocated to her.

69.6 If Setladi, who had partnered Mashishi had stayed for the duration of the shift as there was no discernable threats to her safety, it can only be concluded that the rest of the crew left for reasons other than concerns surrounding their safety. In the end, the allegation that Shilakwe and his crew left early because of unknown telephone threats is rejected as lacking any credibility, and the only conclusion is that the alleged threats and permission from the late Sibande were made were up .

[70] The circumstances surrounding the dismissal of Richard Nkosi, Brian Mabiletja and Sylvia Mmeti are however different from those of Shilakwe and the other individual applicants in Cullinan. It was not in dispute that they had commenced their shift at 19h00 on 1 November 2014, which ended at 07h00 on 2 November 2014. They had thereafter taken their four days of rest and came back on 6 November 2014.

[71] Richard Nkosi's testimony in regards to the three of them having completed their shift was unchallenged, and despite counsel for the respondent having sought an indulgence to seek instructions in regards to the evidence led by Nkosi, nothing came of it, other than a general allegation that reports were received that the three did not respond to calls between 3h00 and 7h00.

[72] Yvonne Flavello's evidence was that she was on the 19h00 - 07h00 shift on 2 November 2014, and confirmed that telephone calls at Cullinan were not responded to. Her evidence however does not take the Employer's case against Nkosi, Mabiletja and Mmeti any as it pertains to events that took place after the three had completed their shift.

[73] Furthermore, the general allegation that the three did not answer the calls cannot be sustainable in the light of Von Benecke's concessions that it was difficult to ascertain which individuals at which base had not answered calls. In the light of the general and unsubstantiated allegation that calls were not answered between 03h00 and 7h00 on 2 November 2014, it should be concluded that there is no basis for the Court to reject Nkosi's evidence that the three of them had worked and completed their shifts, and it follows that there was no reason to dismiss them.

(iii) The evidence in respect of <u>Themba Base</u>:

[74] The following individual applicants, *viz*, Sydney Mthombeni, Lismos Lekalakala, Victor Sape, and Jeffrey Maluleka, S.M. Matjila, V.S. Mabokela, J.T. Mohomotsi, and Patricia Mokwatlo were based at Themba.

[75] The evidence of Ms Linah Bosielo on behalf of the Employer was that;

75.1 She had reported for the day shift (07h00 – 19h00) on 2 November 2014. The late Mr Thomas Tshabalala was the shift supervisor at the time. Between 14h00 and 15h00 she and her partner, Mabunda had attended to an emergency call. Upon their return to base, after 15h00, they found Tshabalala who was by himself, and who had informed them that the other employees had knocked off early at 15h00 before the end of their shift. Tshabalala advised them to attend to all the emergency calls.

75.2 Bosielo denied that there was any form of intimidation or threats from any source against the employees on duty until the end of her shift at 19h00. She contended that the individual applicants at the base left due to having received and read the *'Informus'*, which was handed to their shift by other employees from the previous shift.

75.3 Upon reading the '*Informus'*, it had occurred to her that it was not official communication from the Employer, and she had ignored it. Bosielo further testified that she was aware that as employees rendering an essential service, they were prohibited from taking part in strikes. All employees had committed themselves to the HPSHA rules of conduct, and were aware of the consequences of breaching those rules, which included a dismissal. Her contention was that it was wrong to abandon one's duties and obligations.

75.4 Under cross-examination, Bosielo reiterated that upon her return to base at 15h00, Tshabalala had informed her and her partner that all the employees had left, and that the other available ambulances did not have drivers. He had also informed them that one of the managers had said that if the employees did not feel safe for whatever reason, the SAPS should be contacted. Bosielo's contention however was that she did not understand why the manager was concerned about their safety as they had no reason to.

[76] Ms Lisa Mabunda's testimony on behalf of the Employer largely corroborated Bosielo's version. She added that the contents of the *'Informus'* were discussed by all the employees on the shift, and it was left to individuals to make choices. She further confirmed Bosielo's version that they went out to answer a call and when they came back to base, they only found the supervisor, the late Mr Tshabalala, as the other employees had left early. She also confirmed that there was no threats made to them or the whole crew, nor did they experience any intimidation from any source throughout the shift

[77] Ms Violet Mabokela's testimony on behalf of the other individual applicants deployed at Themba was that;

77.1 She was on the 07h00 – 19h00 shift on 2 November 2014, and partnered with J.T. Mogomotsi. Upon reporting for her shift, the employees on the previous shift told her about the *'Informus'* from PSA which she did not see.

77.2 She had attended to her calls during her shift and came back at about 14h00. Just before 15h00, the crew had 'overheard' the late Tshabalala responding to a threatening call on his cell phone. Tshabalala had called them and informed them of unknown threatening telephone calls he had received, and informed them that they should leave if they did not feel safe.

77.3 At the same time, there were other threatening calls to her coming from other sites enquiring about whether the crew was going to stay until 19h00. As a result of these threats, all the crew members except Bosielo and Mabunda who had at the time responded to a call, were then asked by Tshabalala to hand over ambulance keys if they felt unsafe . They then left at about 15h30 after handing over the ambulance keys to Tshabalala.

77.4 She and the other employees did not however immediately go home. They went to a hospital adjacent to their base where they could feel safe whilst waiting for calls on their cell phones. No calls came through and they had left at 17h45 and went home.

77.5 Under cross-examination, Mabokela could not explain the reason the evidence of Bosielo that all the crew members had left at 15h00 was not challenged, nor the reason her version that the employees had received threatening calls and that the late Mr Tshabalala had given them permission to leave early, was not put to the Employer's witnesses.

77.6 She confirmed that she did not tell Tshabalala about the personal threatening calls she had also received. Furthermore, despite making an allegation that she had also received threatening calls from other bases, she could not state how she knew that those calls were from other bases.

77.7 Mabokela could further not explain the reason why Bosielo and Mabunda had not felt threatened after the alleged threatening calls were received, nor could she explain the reason why despite having stayed at the hospital for safety, calls were not answered, nor why she and others allegedly left the hospital at 17h45.

[78] Mr Jan Tidimalo Mogomotsi was partnered with Mabokela, and his testimony was that at about 15h00, the employees had gathered to discuss the *'Informus'*. Following the discussions, he was 'scared', 'confused' and 'fearful' as he did not know what would happen to them.

[79] Under cross-examination, he testified that the alleged threats came about as a result of the telephone calls Tshabalala had received, and how the latter had spoken to the individuals who made the threatening calls. He contended that it was only thereafter that they were told to leave if they did not feel safe. According to Mogomotsi, all the employees then handed over the ambulance keys to Tshabalala and went to the nearby hospital where they waited to receive calls as they felt it was safer. In his view, despite leaving the workplace, he considered himself to still have been on duty as he could receive calls, which he did not. He left the hospital premises and went home at 18h00, as he used public transport and was concerned about his safety.

[80] Following the above evidence, the parties agreed to file a stated case in respect of the remainder of all the individual applicants, who had made common cause with the evidence of Mabokela and Mohomotsi.

Evaluation *(Re: Themba Base)*

[81] As was the case with Cullinan, the individual applicants at Themba sought to rely on the alleged permission of a deceased person (Tshabalala) to leave the workplace before the shift ended. The evidence led on behalf of all the individual applicants at Themba by Mabokela and Mogomotsi however does not make any sense. As with Cullinan, the versions put up in respect of Themba are equally manufactured with the sole purpose of misleading the Court, and ought to be rejected for the following reasons;

81.1 On the individual applicants' version, the shift went smoothly until just about 15h00 when they 'overheard' threatening telephone calls made to the late Tshabalala, and his responses to the unknown persons making those calls. In the light of the PSA's stance in the *'Informus'*, clearly the timing of the so-called threatening calls to Tshabalala and the latter's permission for the employees to leave early appears to convenient.

81.2 It is not known who had called Tshabalala nor the nature of the calls beyond that they were threatening. As to how the whole crew could have conveniently overheard the telephone calls to Tshabalala and suddenly got scared, fearful and confused is perplexing. By some strange coincidence, Mabokela also received similar threatening phone calls from unknown persons. As to the reason she failed to advise Tshabalala that she got similar threatening calls or how she knew that those calls were from other sites as she alleged is unknown.

81.3 As was the case with the individual applicants at Cullinan, the version of Mabokela and Mohomotsi was neither pleaded nor put to the Employer's witnesses. Bosielo and Mabunda's testimony was that upon their return to base at about 15h00, the base was deserted other than Tshabalala who was by himself, and who had informed them to attend to all the calls. Surely if Tshabalala had reason to be concerned about the safety of the crew, there was no reason for him to nonetheless keep Mabunda and Bosielo on duty.

81.4 The other individual applicants' case at Cullinan got even more ridiculous with their assertion that out of concern for their safety, they went to seek refuge at the nearby hospital premises, where they had waited for the calls. This makes their evidence that they were concerned about their safety even more ludicrous, as it is inexplicable as to how they would still have under the circumstances, responded to the calls off the base. Responding to calls meant having to go back to the base to fetch the ambulance and all the necessary equipment to carry out their tasks. How they could have done that when they were concerned about their safety remained unexplained.

[82] In the end, the evidence led on behalf of the individual applicants based at Themba by Mabokela and Mahomotsi as to the reason they did not complete their shift on 2 November 2014 lacks credibility, is so conjured up and lacking any semblance of truth that it ought to be rejected. As was the case in Cullinan, the individual applicants were opportunistic, and sought to take advantage of the demise of Tshabalala, by making allegations that he gave them permission to leave early. However their own version of events lack any credibility. In the circumstances, the Employer has indeed discharged the onus placed on it to demonstrate that the individual applicants at Themba abandoned their shift on 2 November 2014.

(iv) The evidence in respect of CTC/Prinshof Base.

[83] The following individual applicants were at Prinshoff Base, *viz*, Khensani Marylene Mboweni, T.M. Dlamini, P. Katane, X.Z.P. Nkosi, B.E. Mkhondo, S.L Ledwaba, C. Ngwetjana and S.T. Mokgosana.

[84] Ms Patricia Kekana, who was also based at Prinshoff as Supervisor on the 06h45 – 18h45 on 2 and 3 November 2014 shifts, testified that;

84.1 There were 16 employees who were under her supervision. When she knocked off at 18h45, all the members of the shift were still present at the workplace.

84.2 Even though the employees were present throughout the shift on 2 November 2014, they had however refused to take calls after 15h00. She knew of this because the Despatcher from Control Room had called her to complain about calls not being responded to after 15h00.

84.3 As a result of the employees on duty refusing to respond to calls, another base, the City of Tshwane, was called in to assist in attending to the calls. In the end, all the calls that would ordinarily have been responded to by the crew at Prinshof were diverted to the City of Tshwane site after 15h00.

84.4 On 4 November 2014, letters of dismissal were then issued to the individuals who had refused to answer calls after 15h00. She further confirmed that all the employees at the base that had participated in the unprotected strike were issued with warnings.

[85] Ms Mboweni's testimony on behalf of the other individual applicants was that;

85.1 She and her partner, T.M. Dlamini were on the 07h00 – 19h00 shift on 2 November 2014 and had attended to their calls throughout the day, until they came back to base at 15h20. They found the supervisor, Sibande issuing out letters of warning to the employees. Mboweni had refused to accept a copy of the final written warning as she did not take part in the industrial action of 13 – 17 October 2014.

85.2 Under cross-examination, Mboweni insisted that contrary to Kekana's version, she had worked her whole shift on 2 November 2014 despite having heard rumours of threats made to the employees. She also heard rumours about the *'Informus'*, but testified that since she did not see it.

[86] Ms Priscilla Katane was also based at Prinshof. The other individual applicants based at Prinshof formed common cause with her evidence which was that;

86.1 She had reported for duty on 2 November 2014 on the 07h00 – 19h00 shift and was partnered with Xolisile Nkosi. Upon their return from responding to calls, they were issued with copies of written final warnings by Sibande. She had accepted a copy of the warning without signing acknowledgement of receipt. Although she was dismissed on 4 November 2014, she had continued to report for work until 6 November 2014.

86.2 She denied that she and Nkosi and others did not work their full shift, or that they had refused to respond to calls after 15h00. She testified that since they came back from their last call, they did not receive any further calls, and were later advised by Kekana that the control room had advised that all calls should no longer be directed to Prinshof. She denied when it was put to her in cross-examination that she had worked

lesser hours because of the *'Informus'*, and contended that she knew nothing about it.

[87] Mr Lesetja Ledwaba's testimony was similar to that of Katane. After attending to his last call, he did not receive any further calls and he had stayed until 19h00. He confirmed receipt of the final written warning even though he did not sign acknowledgement of its receipt. He denied having seen a copy of the *'Informus'* or the internal memorandum issued by the Employer on 3 November 2014.

Evaluation *(Re: Prinshof)*

[88] To the extent that it was common cause that the individual applicants at Prinshof had stayed at work until 19h00, the only issue is whether they had between 15h00 until the end of shift, responded to the emergency calls (i.e., rendered a service). As Von Benecke had correctly pointed out, it is immaterial whether the employees had stayed at work until the end of their shift if they did not render any service. Thus, where employees are found to have stayed until the end of shift but had nonetheless not answered the emergency calls, their position is no different from those other employees that had left before the end of the shift.

[89] Kekana's version was that the individual applicants did not render any service or respond to calls after 15h00. Von Benecke had referred to the Employer's Automated Report which captured incidents, calls and responses. It was conceded on behalf of the individual applicants that it can be accepted from the Automated Report that some of the electronically captured calls were not attended to.

[90] The Automated Report as explained by Von Benecke reflects that from 15h00 until 20h00 on 2 November 2014, there were about eight calls that were not serviced in Prinshof, Themba, Cullinan and Dewagensdrift, leading to the call centre experiencing a backlog.

[91] Von Benecke as already pointed out could not identify any individuals who were responsible for not responding to the calls. However, to the extent that not much

challenge was posed to the contents and details of the Automated Report, this evidence is assessed against Kekana's version that other than the fact that the individual applicants had failed to respond to answer the calls after 15h00, the despatcher had confirmed that calls were not being attended to, necessitating that such calls be diverted to other bases.

[92] Katane had confirmed that Kekana had advised her that calls were being diverted to other bases. Inexplicably, she did not seek an explanation from Kekana as to why calls were being diverted. Clearly the answer to that would have been obvious. In the light of the Automated Report and the fact that Kekana had confirmed that calls were being diverted to other bases, it follows that the only reason that calls were being diverted was that despite the individual applicants being on duty, they were not rendering any services and responding to emergency calls.

[93] The individual applicants' refusal to respond to calls was in line with the PSA's stance in the *'Informus'*, which they all denied knowledge of. To this end, the individual applicant's contentions that they had worked the full shift is found to be improbable, and to that end, the Employer discharged the onus of proving that indeed they had abandoned their shift between 15h00 and 19h00 on 2 November 2014, despite having been at their base until 19h00.

The appropriateness of the sanction of dismissal:

[94] From an evaluation of the evidence presented per base, it has been concluded that the Employer did not discharge the evidentiary burden placed on it to demonstrate that Morris Tshikhudu and Morris Matika from the Dewagensdrift Base, and Richard Nkosi, Brian Mabiletja and Sylvia Mmeti from Cullinan Base, had not completed their shifts or answered emergency calls after 15h00 on 2 November 2014.

[95] To the extent that it was found that the other individual applicants from various bases were correctly found to have abandoned their shifts between 15h00 and 19h00 on 2 November 2014, a further issue to be considered is whether the sanction of dismissal was appropriate.

[96] It was submitted on the individual applicants' behalf that having regard to the facts and circumstances of this case, the sanction was not appropriate. It is however my view that the facts and circumstances of this case indicate that the dismissal was the most appropriate sanction in the light of the following considerations;

96.1 The conduct of the individual applicants in not completing their shifts, or at most, being at work but not attending to the emergency calls was clearly in breach of their contracts of employment, and at worst, conduct that constituted a strike as defined in section 213 of the LRA.

96.2 There was no evidence to suggest that the strike or conduct of the individual applicants as triggered by the *'Informus'* was justified or provoked by any form of conduct on the part of the Employer. On the contrary, the individual applicants' conduct was deliberate and calculated. That conduct was preceded by another unprotected one that took place between 13 and 17 October 2014, which was interdicted. To this end, it cannot be doubted that the individual applicants and the PSA were fully aware that any action in pursuance of the overtime claim was unlawful.

96.3 It was further not in dispute that the individual applicants rendered essential services, and that they were bound by their terms and conditions of employment and most importantly the code applicable to health workers in general. Bosielo was aware that all employees as essential service were prohibited from taking part in strikes, or that they had committed themselves to the HPSHA rules of conduct. She was further aware of the consequences of breach of those rules, which included a dismissal. She had further testified that it was wrong for employees to abandon their duties and obligations. In these circumstances, I fail to appreciate how the other individual applicants could on the other hand, not have been aware of these basic rules and standards they were expected to adhere to.

96.4 The essential nature of the services rendered and the importance in ensuring that emergency situations were promptly attended to cannot be emphasised, and this was clearly obvious to the individual applicants. The Employer did not even have to present any evidence beyond proving that indeed shifts were abandoned, and emergency calls were not attended to demonstrate the net effect of the impugned conduct. The individual applicants were therefore completely aware of the consequences of their conduct on communities they served, especially on the vulnerable ones, which entirely depended on their service.

96.5 The PSA, contrary to its assertion that there was an agreement resulting from the multilateral meeting of 28 October 2014, had issued the *'Informus'*, which despite the individual applicants' denials, they had nonetheless acted upon. This was despite the fact that at that meeting, and on the evidence of Papo and Nkomo, the Employer had specifically warned that disciplinary action would follow should any further unprotected action be embarked upon by the employees. In one way or the other, the PSA through the *'Informus'*, dared the Employer.

96.6 What makes the sanction of dismissal even more appropriate is that other than the daring and gross nature of the individual applicants' conduct, none of them (*i.e*., those correctly found to have abandoned their shift or refused to take emergency calls), had shown any contrition or owned up to the consequences of their actions.

96.7 In my view, a measure of sympathy would have been shown towards the individual applicants' case, had they simply owned up for their actions and aligned themselves with the PSA's explanation that their conduct was in line with the *'Informus'*. Instead, they chose either to disavow or deny the existence of the *'Informus'*, and unnecessarily over a period 13 trial days, took this Court through a wild goose chase, beset by fabricated tales.

96.8 What is even more disconcerting and utterly unconscionable is that in the process of presenting concocted versions, the individual applicants

sought to implicate and blame deceased persons for their conduct, with the expectation that those versions would stick in the absence of any other evidence. This approach or strategy was shameless in the extreme.

96.9 In the end, an overall assessment of the competing versions led to an inescapable conclusion that the applicants' version were so lacking in credibility and reliability, that it ought to be rejected. Furthermore, the individual applicants through their conduct appeared to have forgotten why they were employed in the first place. If it was so easy for them to abandon their shifts and thereafter lie to seek justification for their conduct, clearly there is merit in the Employer's contentions that it would be unreasonable to expect it to have a sustainable employment relationship with them, which relationship is based not only trust, but also on a firm commitment to service communities and citizens in distress.

Procedural fairness of the dismissal:

[97] Item 6(2) of the Code of Good Conduct provides that prior to a dismissal for participation in unprotected strike action:

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

[98] Flowing from the provisions of the Code as above, and further in line with the principles set out in *Modise & others v Steve's Spar Blackheath*[13], the main intention of an ultimatum is to "give the workers an opportunity to reflect on their

[13] [2000] 5 BLLR 496 (LAC)

conduct, digest issues and, if need be, seek advice before making a decision whether to heed the ultimatum or not"[14].

[99] The Labour Appeal Court had accepted that there were exceptions where the *audi* principle may be dispensed with. In this regard, it was held that;

> "The only situation which I am able to envisage where it can be said that an employer's failure to give a hearing may be justified on the basis that a hearing would have been pointless or utterly useless is where either the workers have expressly rejected an invitation to be heard or where it can, objectively, be said that by their conduct they have said to the employer: We are not interested in making representations on why we should not be dismissed. The latter is not a conclusion that a court should arrive at lightly unless it is very clear that that is, indeed, the case. However, in my view, the latter scenario falls within the ambit of a waiver. Accordingly, the normal requirements of a waiver must be present. What I say in this judgement about the **"***pointless***"** approach and the **"***utterly useless"* approach must be understood subject to what I have just said. There is no justification for creating an additional exception to the *audi* rule in order to escape the normal consequences attendant upon a failure to meet the requirements of established exceptions to the *audi* rule e.g. waiver I can see no difference between this **"***pointless***"** approach and the **"***no difference***"** approach. Cameron rejected the **"***no difference***"** approach in the same article. The **"***pointless***"** approach seems to be the same approach as the **"***utterly useless***"** approach. Sometimes the pointless or utterly useless approach is applied where it is thought that the employer was in possession of, information relating to, or, knew, why the employees were striking (see *McCall J in Plascon Ink & Packaging Coating (Pty) Ltd V Ngcobo & others* (1997) 18 ILJ 327 (LAC) at 339I - 340G**).** The utterly pointless useless approach is one where it is said that, an employer is not obliged to afford workers the benefit of being heard where a hearing would have been utterly useless. I think the reasoning adopted by the Appellate Division in rejecting the no difference approach would justify the rejection of the **"***pointless***"** or **"***utterly useless***"** approach."[15]

[14] *Ibid* at para 73
[15] At para 53

[100] It was submitted on behalf of the individual applicants that their dismissal was procedurally unfair as no charges were brought against them; that no disciplinary hearings were held, and/or that some of them were dismissed in absentia.

[101] It is common cause that the individual applicants were summarily dismissed on 4 November 2014. The evidence on behalf of the Employer through Lebethe was that the dismissals followed upon previous warnings and ultimatums having been ignored. Malotana on the other hand had confirmed that he had issued a memorandum on 14 October 2014 to all personnel, advising that the strike in an essential service was unprotected, and that any staff member participating in the action faced disciplinary action. That memorandum was followed by final written warnings issued to employees on 31 October 2014. Mr Selwin Nkomo conceded that some of the dismissed employees may not have received letters of final written warning prior to the dismissal. He however contended that it did not imply that those warnings were not issued.

[102] Mr Gerald Papo's evidence however is even more telling. Other than also contending that final written warnings were issued to the employees, he had justified the summary dismissals on the basis that convening disciplinary hearings would not have made a difference, as not only would such processes have taken long, but also that there was a breakdown of a working relationship with the employees.

[103] The Court should accept that flowing from the unprotected industrial action of 13 – 17 October 2014, memoranda warning the employees against similar conduct were issued, and that at the multilateral meeting of 28 October 2014, the unions were again warned that should any further unprotected action take place, consequences would follow.

[104] To the extent that the Employer had alleged that final written warnings were issued to the 600 employees that took part in the unprotected industrial action, the Court is further prepared to accept that such warnings were issued, *albeit* haphazardly. Some of the individual applicants had conceded having been issued with these warnings even though they did not sign acknowledgement of

receipt, whilst Papo had confirmed some of the individual applicants' version that some of the final written warnings were handed out to them simultaneously with letters of dismissal.

[105] Whilst it is accepted that the employees were warned against embarking upon similar unprotected industrial action, it is equally accepted that insofar as the events of 2 November 2014 were concerned, the subsequent summary dismissals were not preceded by any ultimatum or disciplinary process. On the Employer's own version, it was able to identify the 36 employees who had abandoned their shift on 2 November 2014. To the extent that it was common cause that these individuals could be identified by their sites and the conduct complained of, surely the contention that holding disciplinary enquiries would have been time consuming or serve no purpose as contended by Papo can hardly be viewed as convincing nor rational basis for dispensing with such a hearing.

[106] It is not clear as to the reason the Employer could not issue an ultimatum in circumstances where the abandonment of the shift took place over a period of four hour across the bases. Be that as it may, even if could have been argued that the circumstances did not permit for the ultimatum to be issued, in the light of the number of identified employees, it was even more appropriate to convene a disciplinary hearing. The contention therefore by Papo that such an exercise would not have made a difference or that it would have been a laborious one, in my view elevated expedience over fairness.

[107] To the extent that in this case it has already been found that there was no basis to dismiss some of the individual applicant, this further demonstrates that a disciplinary process would have served a purpose, and that there were no exceptional circumstances prevailing at the time to dispense of hearings. The aim of due process as stated in *Modise and Others v Steve's Spar Blackheath* is *inter alia*, to afford employees an opportunity to state not only on why they may not be said to have participated in an illegal strike, but also to state why they should not be dismissed if they had indeed participated in such strike[16].

[16] *Supra* at para 96

The individual applicants in this case, were without just cause, denied any form of opportunity to be heard before they were dismissed.

[108] In *Karras t/a Floraline v S.A. Scooter & Transport Allied Workers Union & Others*[17] it was held that exceptions could be made in instances of collective misconduct, in which case the opportunity to state a case will ordinarily be given to the collective, usually the trade union, if one is involved. In this case however, no such opportunity was even afforded to the PSA. The appeals which were lodged by individuals or the PSA on behalf of the collective as per the advice of Lebethe were only considered by the MEC some eight months after the dismissal. Even then they were not considered in the real sense as the MEC had concluded that she had no jurisdiction to do so. Thus, the lodging of appeals turned out to be a futile exercise.

[109] In a nutshell, the individual applicants were dismissed without being afforded any opportunity whatsoever to make any representations in line with the *audi alterem partem rule*. Equally so, the PSA was also not afforded any opportunity to make representations on behalf of its members before their dismissals were confirmed. Ultimately, the dismissals were indeed precipitous, thus making them procedurally unfair.

[110] The only issue that remains in the light of the procedural unfairness as established above is whether the individual applicants are entitled to any form of compensation. The provisions of section 194(1) of the LRA dictates that any compensation to be awarded must be just and equitable in all circumstances. The factors to be considered in awarding compensation are those as set out by the Labour Appeal Court in *Kemp t/a Centralmed v Rawlins*[18]*.* In the end, the

[17] (2000) 21 ILJ 2612 (LAC)

[18] [2009] 11 BLLR 1027 (LAC); (2009) 30 ILJ 2677 (LAC) at para [20] where it was held;

> "There are many factors that are relevant to the question whether the court should or should not order the employer to pay compensation. It would be both impractical as well as undesirable to attempt an exhaustive list of such factors. However, some of the relevant factors may be given. They are:
>
> a) the nature of the reason for dismissal; where the reason for the dismissal is one that renders the dismissal automatically unfair such as race, colour, union membership, that reason would count more in favour of compensation being awarded than would be the case with a reason for dismissal that does not render the dismissal automatically unfair; accordingly, it would be more difficult to interfere with the decision to award compensation in such case than otherwise would be the case;
>
> b) whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of

interests of both parties, the requirements of fairness, and the circumstances of each case would dictate whether compensation ought to be awarded or not.

[111] In this case, a variety of factors are taken into account including the nature of services the individual applicants were required to render, the nature of their gross conduct on 2 November 2014, the impact of their conduct on communities they were meant to serve, and the fact that the conduct in question undermined the operations of the Employer. These factors are also considered within the overall context of the conclusion the nature and extent of the deviation from the procedural requirements by the Employer was equally gross. In the light of these considerations, and further having balanced the interests of both parties, compensation equal to three months' salary to each of the individual applicants as a result of procedural unfairness is deemed to be fair and equitable.

[112] I have further had regard to the requirements of law and fairness in regards to the issue of costs. The first day of the trial proceedings was not fully utilised in view of a postponement being sought on account of the Employer's counsel not being initially available. After the request was declined and following a ruling in that regard, the Court had proceeded to hear the matter in default. By some

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awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or, even lesser, if it is only procedurally unfair;

c) in so far as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the minor the employer's deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation; obviously, the more serious the employer's deviation from what was procedurally required, the stronger the case is for the awarding of compensation;
d) in so far as the reason for dismissal is misconduct, whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal;
e) the consequences to the parties if compensation is awarded and the consequences to the parties if compensation is not awarded;
f) the need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent.
g) in so far as the employee may have done something wrong which gave rise to his dismissal but which has been found not to have been sufficient to warrant dismissal, the impact of such conduct of the employee upon the employer or its operations or business.
h) any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution of disputes."

miracle, Mr Dlamini, counsel for the Employer made an appearance in the course of the hearing of Mr. Matika's evidence. Following discussions in chambers, it was ultimately agreed that the Employer should be afforded an opportunity to oppose the matter, resulting in my earlier ruling on a postponement being rescinded. The day however was not fully utilised, and fairness dictates that the Employer should be burdened with the costs of the first day of the trial proceedings. Other than other costs agreed to or tendered between the parties in the course of the trial proceedings, there is no basis in law or fairness to make any other order in regards to costs.

[113] In the circumstances, the following order is made;

Order:

1. The dismissal of Messrs Vincent Tshikhudu, Morris Matika, Richard Nkosi, Brian Mabiletja, and Ms Sylvia Mmeti was substantively and procedurally unfair.
2. The Respondent is ordered to reinstate the above-mentioned individuals in its employ with retrospective effect, and on terms and conditions no less favourable than those as applicable to their employ on 4 November 2014.
3. The dismissal of the other individual applicants as identified in Annexure 'A' to the Applicants' Statement of Case, was substantively fair but procedurally unfair.
4. The Respondent is ordered to pay to each of the individual applicants as in (3) above, compensation equal to three months' salary calculated at their rate of pay as applicable on 4 November 2014.
5. The Respondent is ordered to pay the costs of the first day of the trial proceedings on 18 February 2019.
6. No further order as to costs is made.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:	Adv. A. R. S Nxumalo, instructed by Thabang Ntshebe Attorneys
For the Respondent:	Adv. M. W Dlamini, instructed by the State Attorney, Johannesburg