



REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case no: PA07/10

Reportable

In the matter between:

SOUTH AFRICAN CLOTHING

TEXTILE WORKERS UNION (SACTWU)

First Appellant

NS MAVAMA AND OTHERS

Second and Further Appellants

and

YARNTEX (PTY) LTD

t/a BERTRAND GROUP

Respondent

Heard:

Delivered: 28 February 2013

Summary: Employees dismissed from employment on account of having participated in a strike at plant level contrary to the provisions of the constitution of the National Textile Bargaining Council. Employees had previously been involved in an unlawful strike action in respect of which they were given final written warnings. Before dismissal employer issued an ultimatum to each shift to recommence work by a certain time. The employees ignored the ultimatum in spite of advice from their union to the contrary. Held that the dismissal of the employees was both procedurally and substantively fair.

JUDGMENT

SANDI, AJA

- [1] This is an appeal against the judgment of the Labour Court (Bhoola J) dismissing the second and further appellants' claim that they were victims of an automatically unfair dismissal on account of participation in a lawful strike. The Labour Court rejected the appellants' claim for reinstatement with costs, holding that the strike was unprotected and therefore unlawful.
- [2] In the alternative, the appellants appeal the conclusion of the Labour Court that their dismissal on account of their participation in the strike action was both procedurally and substantively fair.
- [3] This appeal is before us with the leave of the Court *a quo*.
- [4] The first appellant is the South African Clothing and Textile Workers Union (SACTWU) and the second and further appellants are its members and employees of YarnTex (Pty) Ltd t/a Bertrand Group (Bertrand), who is the respondent in this appeal.
- [5] Bertrand was engaged in the textile industry and operated its business in the former Ciskei within the Province of the Eastern Cape. Bertrand fell under the jurisdiction of the National Textile Bargaining Council (NTBC).
- [6] Another company, Derlon, operated its textile business in KwaZulu-Natal and also fell under the jurisdiction of the NTBC. Though Derlon does not take part in these proceedings, its relevance to the matter will become apparent later on in this judgment.
- [7] The NTBC, formed in or about 2003, is an amalgamation of a number of earlier bargaining councils. It has its own constitution¹ which was formulated

¹ The provisions of the Constitution relevant to this matter are the following:

- 13.7. The rights, powers and functions of *sub-sector* chambers are to conclude collective agreements within each *sub-sector* and *section(s)* on:
- 13.7.1 wages and conditions of employment
- 13.8. The issues set out in sub-clauses 13.7.1 to 13.7.3 will only be negotiated:

and agreed to by the employers' organisations, on the one hand, and SACTWU, on the other.

- [8] In terms of the constitution of the NTBC, the textile industry is divided into different sub-sectors. One such sub-sector is the Wool and Mohair and Worsted Products with which we are concerned in this case. This sub-sector is divided into two sections. The first is the Wool and Mohair section. The

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- 13.8.1 at the *sub-sector* or section level; and
 - 13.8.2 within any *sub-sector* or *section* to which they apply, subject to the provisions of the National Textile Bargaining Council Transitional Agreement, signed on 25 June 2003.
 - 13.9. Other matter of mutual interest, not set out in clause 13.7 will be negotiated and managed at *Council* or plant level, including frame work agreements which will be negotiated at *Council* level and are intended to apply to the *industry*.
 - 13.10 In the event of a dispute arising as to the level at which such matters of mutual interest are negotiated the provisions of clause 18.8 apply
 - 18.8 In the event of a dispute arising as to the level at which a matter of mutual interest is negotiated, which is not expressly referred to in clause 13.7, the dispute over the issue must be referred to the Executive Committee to determine where the issue should be negotiated. In the absence of a decision in the Executive Committee, any party of the Bargaining Council may take such further steps as may be available to it under this Constitution or in terms of any law."
- Clauses of the Constitution relevant to collective agreement are the following:
- 18.1 Any part to the Bargaining council may introduce proposals for the conclusion of a collective agreement in terms of the provisions and procedures outlined in this *constitution*.
 - 18.2 A collective agreement may be concluded in a *sub-sector* chamber or *section* to apply to a *sub-sector* or *section(s)* in a *sub-sector*.
 - 18.9 The parties to negotiation must hold at least three (3) meetings within forty five (45) days of submission of the proposals contemplated in sub-clause 18.4 and 18.5 to negotiate on the proposals presented to it for consideration unless a collective agreement has already been concluded.
 - 18.10 If either a collective agreement is not concluded at the second or third meeting contemplated in sub-clause 18.9, or any subsequent agreed meeting, or alternatively a period of forty five (45) *days* has elapsed:
 - 18.10.1 any part may declare a dispute by submitting a written notice to this effect to the *Secretary* and the other affected parties to the Bargaining *Council* engaged in the dispute; and
 - 18.10.1.1 the parties to the dispute may agree to refer the dispute to arbitration;
 - or
 - 18.10.1.2 any party to the dispute may;
 - 18.10.1.2.1 resort to strike or a lock out in accordance with section 64 of the Act across the *industry*, if the proposals for the conclusion of a collective agreement were made in the *Council*; or
 - 18.10.1.2.2 resort to strike or lock out in accordance with *section* 64 of the Act in the sub-sector in which the proposals for the conclusion of a collective agreement were made; or
 - 18.10.1.2.3 resort to strike or a lock out in accordance with section 64 of the Act in that section of the sub-sector in which the proposals for the conclusion of a collective agreement were made; and
 - 18.10.1.2.4 the provisions of 18.10.1.1 to 18.10.1.2.3 do not preclude a strike action in terms of section 66 of the Act or the remaining provisions of Chapter IV of the Act and shall be interpreted in accordance with Schedule 3.
 - 18.10.1.3 refer the dispute or arbitration if the Act requires that the dispute be referred to arbitration.'

second is the Worsted section. The Worsted section is further divided into two sub-sections, namely, the Spinners and the Verticals. Under each of these sub-sections, two employers are involved at plant level. These employers are Bertrand, Derlon and SA Fine and Hextex. Bertrand and Derlon fall under the Spinners' sub-section while Hextex and SA Fine fall under the Verticals' sub-section.

- [9] The founding parties to the NTBC are stated in the constitution to be the employers' organisations and SACTWU. The employers' organisation involved in this sub-sector of the bargaining council is the National Association of Worsted Textile Manufacturers (NAWTM). It represents the employers in the NTBC, namely, Bertrand, Derlon, Hextex and SA Fine. SACTWU represents the employees.
- [10] One of the objectives of the NTBC as set out in clause 3 of the constitution is 'to regulate collective bargaining and industrial action in the industry, in the sub-sectors and in any sections'.
- [11] The constitution provides that the structures of the NTBC, amongst others, are '[s]ub-sector chambers and sections.'²
- [12] It was an accepted practice at the NTBC that, after proposals were made by SACTWU for substantive negotiations on wage rates, the Verticals' and the Spinners' sub-sections of the Worsted section would negotiate with SACTWU in separate chambers of the NTBC in order to determine the terms and conditions applicable to them. Such negotiations would take place under the auspices of the NTBC. Bertrand and Derlon acted as representatives of the Spinners' sub-section while SA Fine and Hextex represented the Verticals.

² 6. The Structures of the Bargaining Council

- 6.1 The Bargaining council structures include the following:
 - 6.1.1 the Council;
 - 6.1.2 an Executive Committee;
 - 6.1.3 Sub-sector chambers and sections;
 - 6.1.4 an exemptions committee; and
 - 6.1.5 other committees as decided from time to time by the Council and as required by this constitution.
- 6.2 The powers and functions of these structures are set out in this Constitution provided that the Council may delegate specific powers and functions that it may have, to any structure provided for in its own constitution.
- 6.3 Any representative to any of the structures of the Bargaining council may vote by proxy.

Agreements reached in these two chambers would be incorporated into one document which would be signed by NAWTM and SACTWU. This agreement would be binding on the employers and employees involved in the Worsteds sub-section of the Wool and Mohair and Worsteds products sub-sector.

- [13] Because Bertrand and Derlon had conducted their businesses in disadvantaged areas, they were granted a concession to pay 80% of the gazetted wage rates. This arrangement commenced operating before the establishment of the NTBC.
- [14] In 2003, Derlon entered into an agreement with SACTWU in terms of which it was agreed that Derlon would pay 80% of the gazetted wage rates for a period of eight years subject to payment of a fixed annual increase. In 2004, Derlon approached the NTBC and sought exemption from the terms of this agreement, which was refused. On appeal to the Independent Exemptions Board, Derlon was granted an exemption of five years which would expire in 2009. This determination was made by the Independent Exemptions Board on 06 September 2004.
- [15] As provided for in the constitution SACTWU submitted its proposal for wage negotiations in respect of the 2008/2009 year. A uniform wage increase of R70-00 per week was proposed in respect of the Worsteds sub-sector. Three rounds of wage negotiations were held in Cape Town. Wages and terms of conditions of employment were agreed in respect of the Verticals' sub-section but not in respect of the Spinners' sub-section.
- [16] SACTWU sought to change the agreement that Bertrand and Derlon pay 80% of the gazetted wage rates and, instead, demanded payment of 100% thereof.
- [17] On 03 July 2008, a draft collective agreement with the Spinners' sub-section was signed for and on behalf of NAWTM. SACTWU refused to sign it and advised that it had not been mandated to sign an agreement that covers the Bertrand Group.
- [18] On or about 9 July 2008, SACTWU addressed a memorandum (headed: wage negotiation settlement for the Spinners sub-sector) to Bertrand and Derlon. The memorandum was signed by one Kannemeyer on behalf of

SACTWU and records that substantive wage negotiations in the Spinners sub-sector have been finalised and that a 9.5% increase had been agreed upon. On the memorandum provision was made for Bertrand and Derlon to sign the agreement. The memorandum records the following:

“The Worsted Sector agreement is in the process of being finalised by the parties. This agreement will contain the improvements to conditions of employment for the entire Worsteds sector as the new minimum wage rates for 2008/2009.”

- [19] Bertrand was satisfied with the memorandum as it reflected the terms of the agreement reached with SACTWU. However, Bertrand did not sign it because Bertrand had no authority to do so on behalf of NAWTM. According to Bertrand, it was NAWTM and SACTWU that had to enter into the agreement at national level. NAWTM and SACTWU had to sign the agreement and not Bertrand and Derlon. Besides, the memorandum did not incorporate an agreement with the Verticals. However, Derlon signed the memorandum thereby entering into an agreement with SACTWU. Thereafter, Derlon implemented the terms of the agreement. According to Bertrand, the effect of this was that SACTWU entered into a separate agreement with Derlon at plant level to the exclusion of Bertrand. Bertrand entertained the view that the agreement with Derlon undermined the principles of the bargaining council.
- [20] On 17, 21 and 22 July 2008, Bertrand's employees embarked on a wildcat strike in an attempt to coerce Bertrand to enter into a separate agreement with them. No strike was directed at Derlon. I should mention that in February 2008 some of the employees were issued with final written warnings for having taken part in an unprotected strike.
- [21] At negotiations held on 22 July 2008, SACTWU tabled a demand to Bertrand for payment of 100% of the gazetted wage rates. Negotiations could not resolve the matter.
- [22] On 25 July 2008, SACTWU addressed a letter to Bertrand advising that, because Bertrand had rejected SACTWU's proposal they would formally declare a dispute in terms of the constitution.

- [23] On 30 July 2008, SACTWU addressed a further letter to Bertrand withdrawing their memorandum of 9 July 2008 and advising that:

“... Subsequent to the draft settlement agreement sent to your Patrick Arnold on 9 July 2008, we regrettably inform you that we have been mandated not to conclude an agreement that will cover the Bertrand Group.”

The letter stated that the draft settlement agreement was withdrawn. It reiterated that the increase of 9.5% should be calculated on the gazetted rate of the Spinners' wages. The letter was not forwarded to Derlon. In this regard the evidence tendered on behalf of Bertrand was that: had they acceded to this demand, they would have been required to pay substantially more wages than what was being paid by Derlon.

- [24] In a letter to SACTWU dated 4 August 2008, Bertrand's attorneys registered Bertrand's dissatisfaction with the fact that SACTWU was making additional demands on Bertrand only and not on Derlon. The letter went on to state that the dispute between the parties had to be dealt with at national level and not at plant level.

- [25] On 11 August 2008, SACTWU wrote to Bertrand advising that it was withdrawing the dispute “declared at plant level” and that it would process a fresh dispute in accordance with the constitution of the NTBC. The withdrawal of the dispute at plant level seems to indicate that SACTWU appreciated and accepted that the dispute had to be declared against the employers' organisation, NAWTM.

- [26] Indeed, on 11 August 2008, SACTWU addressed a letter to NAWTM and the secretary of the NTBC declaring a dispute with the “Spinners sector”. The letter is couched in the following terms:

“DECLARATION OF DISPUTE: 2008/2009 SPINNERS SECTOR OF WORSTED SUB-SECTOR

We advise that no settlement has been concluded in the substantive negotiations for the period 2008/2009 for the spinning compound of the Worsted sub-sector of the National Textile Bargaining Council.

We further advise that we are formally in dispute with employers in the spinning sector of the Worsted sub-sector.

We refer you to section 18 of the Council's constitution with reference to sub-sections 18.9 and 18.10.1.

The dispute will be referred to the Council for processing in terms of the Council's constitution."

It is to be noted that the letter refers to "employers" in the Spinning sector.

- [27] Thereafter, on 25 August 2008, mediation took place before the NTBC which did not resolve the dispute and a certificate to that effect was issued.
- [28] SACTWU conducted a strike ballot with Bertrand's employees but not those employed by Derlon. In an e-mail dated 8 September 2008, Bertrand reminded SACTWU that '... this is sectorial and not plant level bargaining.'

The e-mail further recorded the following:

"Why are Bertrand the only recipients of a strike ballot which indicates we are not Bargaining at sub-sector levels which is clear in the constitution. The question has to be asked why Bertrand alone is been (*sic*) targeted."

- [29] Notice to commence a strike on 17 September 2008 was issued by SACTWU on 11 September 2008. It stated that the strike was being called because 'wage negotiations for 2008/2009 Spinners sector of Worsted sub-section have not yet been settled.'
- [30] On 17 September 2008, the strike commenced at Bertrand's premises.
- [31] While the strike was in progress, the attorneys representing SACTWU and Bertrand had a telephonic discussion concerning the strike, during which an undertaking was made. The following is a written confirmation of that undertaking:

"We refer to the above matter as well as to our telephone conversations therein.

We confirm that:

1. Our client shall suspend its strike action pending further negotiations between the parties.
2. Our client's members shall return to work on Monday morning the 22nd September 2008.
3. Our client undertakes to provide your client with at least 48 hours notice of any further strike."

We confirm that the above is without any admission on the part of our client or its members that the strike action is unprotected.'

[32] In response to the strike notice, Bertrand wrote to SACTWU pointing out that it did not comply with the constitution because the "Spinners sector" referred to in the notice was not a party to the NTBC. This statement obviously referred to clause 5 of the constitution, wherein the parties are defined as registered employers' organisations and SACTWU.

[33] At 15h30, on 17 September 2008, strike action commenced at Bertrand's premises. On that day, Bertrand issued the first ultimatum calling upon the striking employees to resume their normal duties the following day. The notice advised the employees that the strike was unprotected. On the same date, a letter was addressed to SACTWU, stating the reasons why Bertrand was of the view that the strike was unprotected. The letter was also addressed to the employees and was attached to the ultimatum. Acts of intimidation committed by strikers against other employees were mentioned in the ultimatum and the employees were reminded that they were on final written warnings for having participated in an unprotected strike action in the past. It was stated that if they did not comply with the ultimatum, disciplinary action taken against them could result in their dismissal. It urged them to seek advice from SACTWU. The final written warnings referred to in the ultimatum are in respect of the unprotected strike held on 17, 21 and 28 July 2008.

[34] The letter attached to the ultimatum was, as stated above, also addressed to SACTWU. Therein Bertrand's attorneys gave a comprehensive analysis of the constitution in support of the view that the strike was unprotected. I shall refer

to the relevant provisions of the constitution later on in this judgment. In the said letter Bertrand's attorneys make the following observation:

'It is apparent from your fax of 17 September 2008 that you have misunderstood our client's letter (of 16 September 2008) and are misreading the Constitution of the National Bargaining Council (the constitution).'

- [35] Again, on 17 September 2008, Bertrand's attorneys wrote to SACWTU seeking their 'urgent response to this matter before decisions are taken by our client regarding commencement of discipline against your members.'
- [36] The following day, SACTWU acknowledged receipt of the comprehensive letter addressed to it by Bertrand's attorneys and advised that they had considered it carefully and were seeking legal advice.
- [37] On two occasions, on the 18 September 2008, the employees stormed Bertrand's premises and threats of violence were made against monthly- paid employees. Written notices to vacate the premises were issued in which the employees were advised that disciplinary action could be taken against them which could result in their dismissal.
- [38] Bertrand's attorneys discussed the employees' behaviour referred to above with an official of SACTWU as well as SACTWU's attorneys. A letter confirming the discussions was addressed to SACTWU in which they were advised that disciplinary action against the employees was likely to be instituted.
- [39] In a telephonic discussion held on 19 September 2008, SACTWU's attorneys agreed to attend to the matter on an urgent basis. At about 12h18, on the same day, SACTWU's attorneys wrote to Bertrand's attorneys advising that the strike action would be suspended pending further negotiations. An undertaking was made that the employees would return to work on the morning of Monday, 22 September 2008 and that SACTWU would give Bertrand 48-hours notice of any intended strike action.
- [40] On the morning of 22 September 2008, officials of SACTWU addressed the employees at Bertrand's premises. They addressed them in an endeavour to

persuade them to return to work. The employees refused to stop the strike and to return to work.

- [41] That same morning Bertrand's attorneys had a telephonic discussion with SACTWU's attorneys wherein SACTWU's attorneys expressed their appreciation of the seriousness of the situation and advised that they were endeavouring to persuade the workers to return to work.
- [42] In a telephonic discussion between an official of SACTWU and Bertrand's attorneys SACTWU advised that the employees refused to comply with the ultimatum and that SACTWU had done all it could to persuade the employees to return to work. SACTWU then pulled out of the whole scenario in frustration.
- [43] Thereafter Bertrand issued a final ultimatum at 09h10 on 22 September 2008. This was after the employees had been addressed by the officials of SACTWU between 06h00 and 07h00. It was three hours from the normal starting time.
- [44] Those employees who were working on the morning shift were given a final ultimatum to commence their duties at 10h00. They were advised that if they failed to do so it was management's intention to have serious regard to dismissing those who do not start work in accordance with that ultimatum. Those who do not commence duties in accordance with that ultimatum were invited to elect representatives to make submissions to management.
- [45] No representations were made by or on behalf of the employees.
- [46] At 11h15, the morning shift employees were dismissed from employment. Day shift employees were dismissed at 12h00 after they had been given an ultimatum in the same terms. The difference in the ultimatums was the time each shift was requested to commence its duties. The later shift employees were dismissed at 16h00 after having been issued with an ultimatum at 10h04 instructing them to return to work at 11h00.
- [47] The employees did not make representations before their dismissals and did not lodge appeals.

[48] In its judgment, the Labour Court reasoned that in terms of the constitution of the NTBC wage negotiations take place only at sub-sector and sub-section level and not at plant level as SACTWU sought to do in this case. It was for this reason that the Court *a quo* held that the appellants had embarked on an unprotected strike and held that the dismissals were substantively and procedurally fair.

[49] The issues before us are the following:

- (a) Whether the strike was unprotected on any of the following grounds:
 - (i) Alleged breach by the appellants of a written undertaking ;
 - (ii) Breach of the provisions of the constitution of the NTBC which prohibit strike action;
 - (iii) Whether the constitution of the NTBC is a collective agreement.
- (b) If it is found that the strike was unprotected; then
- (c) Whether dismissal was, in the circumstances of this matter, unfair on any of the grounds alleged by the appellants; and
- (d) The remedy.

The appellant has abandoned any reliance on (a)(i) above.

[50] Relevant to the determination of the issues set out above are the constitution of the NTBC, ss 65(1)(a) and 65(3)(a)(i) of the Labour Relations Act³ (the LRA).

[51] The constitution of the NTBC deals *inter alia* with the its legal Status (clause 1), registered scope (clause 2), objectives (clause 3), powers (clause 4), parties to the Bargaining council (clause 5), its structures (clause 6), sub-sector chambers (clause 13) and collective agreements (clause 18).

[52] It is clear from the constitution as a whole that it is the product of bargaining between NAWTM and SACTWU. A perusal of the constitution also reveals

³ Act no 66 of 1995.

that it was the intention of the founding parties to the NTBC to produce an all-embracing document which not only caters for the constitution but also “to advance the interests of the industry”; “to regulate collective bargaining and industrial action in the industry, in the sub-sectors and in any sections; to promote cohesion of representation from among employees; and avoid fragmentation of centralised bargaining.”

[53] The constitution sets out comprehensively, in the manner prescribed by s 30 of the LRA, all the terms required for the establishment of a bargaining council in the Mohair and Wool industry. The constitution goes further than that and it prescribes the procedure to be followed in achieving these ends and deals specifically with collective agreements in the terms set out in ss 23 and 24 of the LRA. Of note, the provisions of the constitution are similar to those of ss 64 and 65 of the LRA.

[54] I turn to the argument advanced by Mr Freund SC on behalf of the appellant. Counsel submitted that the strike embarked upon by the appellants was a protected strike. He submitted with reference to s 65(1)(a) of the LRA that the constitution of the NTBC does not prohibit a strike. He further submitted that unless there is a clause in the constitution which prohibits a strike, the strike in question is not a prohibited strike.

[55] Section 65(1)(a) of the LRA provides:

‘Limitations on right to strike or recourse to lock-out

(1) No person may take part in a *strike* or a *lock-out* or in any conduct in contemplation or furtherance of a *strike* or a *lock-out* if –

(a) that person is bound by a *collective agreement* that prohibits a *strike* or *lock-out* in respect of the *issue in dispute*.’

[56] The constitution of the NTBC prescribes that the rights, powers and functions of sub-sector chambers are to conclude collective agreements within each sub-sector and section(s) on wages and conditions of employment. The

constitution states further that wages and conditions of employment will only be negotiated: (my emphasis)

- (a) at sub-sector and section level; and
- (b) within any sub-sector or section to which they apply.

[57] The submissions made by Mr Freund regarding the absence of a specific provision in the constitution prohibiting a strike, such as the one embarked upon by the appellants is correct. However, I do not agree with the further submission he made that the non-existence of such a provision specifically prohibiting the strike in question renders the strike immune from being declared unlawful and therefore unprotected. If it were so, chaos would reign in the industry. The resultant effect of which would be the selective crippling of those plants which did not conduct their affairs with SACTWU in the fashion adopted by Derlon in this case, i.e. entering into negotiations and concluding private agreements with SACTWU on the determination of wage levels to the exclusion of other role players, such as Bertrand.

[58] The constitution is premised on centralised bargaining between NAWTM and SACTWU, the main purpose of which is to create and maintain uniformity in the determination of wage levels so as to ensure that all employers in a given sub-sector or section level in this industry are treated in an equitable fashion. Employers and employees in these sub-sectors should enjoy the same treatment to ensure that employers compete with their counterparts in a fair manner in order to sustain the industry and to prevent job losses.

[59] Any contrary interpretation of the relevant provisions of the Act and the constitution would result in catastrophic circumstances which would be inimical to the operation of the industry in question. Clearly the overarching purpose of the constitution was to avoid fragmentation of the bargaining process. This interpretation of the constitution is in accord with the intentions of the drafters thereof to outlaw plant level bargaining.

[60] My interpretation of the constitution therefore is that the strike in question is not protected by the provisions of the constitution. Neither is it protected by the LRA.

- [61] In the circumstances, I find that the strike in question was not a protected strike.
- [62] In the alternative, Mr Freund submitted that the constitution of the NTBC is not a collective agreement.
- [63] Section 213 of the LRA defines a collective agreement as “a written agreement concerning terms and conditions of employment, or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand:-
- (a) one or more employees;
 - (b) one or more registered employers’ organisations; or
 - (c) one or more employers and one or more registered employers’ organisations.”
- [64] In my view, the constitution is a collective agreement as defined by s 213 of the LRA. There is merit in allowing employers and employees to form bargaining councils. Often after protracted deliberations they reach agreement as to how their affairs are to be resolved. They do this by fashioning constitutions which establish bargaining councils which are to govern them.
- [65] In this case the parties to the NTBC agreed, among other things, to set out in one document, the constitution, the level at which they would bargain with each other and the manner of resolving disputes that arise between them. I refer, in particular, to that part of the document which deals with collective agreements.
- [66] While establishing their constitution, they also consciously and deliberately decided to incorporate into that document the laws that govern the day to day running of the NTBC, the creation of collective agreements and the resolution of disputes arising between the parties to the NTBC. In so doing, they were alive to the provisions of the LRA. They prescribed the level of the council which would have jurisdiction to resolve certain issues. For instance, they agreed that wage negotiations would occur at sub-sector or sub-section levels

and not at plant level. Plant level negotiations would entail among other things that in the event of disagreement SACTWU would take industrial action against one employer only to the exclusion of the others. Such action would undermine the very existence of the NTBC.

[67] Section 31 of the Labour Relations Act provides as follows:

'Binding nature of collective agreement concluded in bargaining council

Subject to the provisions of section 32 and the constitution of the *bargaining council*, a *collective agreement* concluded in a *bargaining council* binds-

- (a) the parties to the *bargaining council* who are also parties to the *collective agreement*;
- (b) each party to the *collective agreement* and the members of every other party to the *collective agreement* in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and
- (c) the members of a registered *trade union* that is a party to the *collective agreement* and the employers who are members of a registered *employers' organisation* that is such a party, if the *collective agreement* regulates-
 - (i) terms and conditions of employment; or
 - (ii) the conduct of the employers in relation to their *employees* or the conduct of the *employees* in relation to their employers.'

See also section 23 of the LRA which deals with the legal effect of a collective agreement.

[68] In my view, the constitution of the NTBC is a collective agreement as set out in s 213 of the LRA.

[69] From what is stated above it follows that the employees embarked upon an unprotected strike action contrary to the provisions of the LRA and the

constitution. In the circumstances, I hold that the finding of the Labour Court that the dismissal of the employees was substantively fair is correct.

- [70] Regarding whether the dismissals were procedurally fair, account has to be taken of the following factors: on 17, 21 and 22 July 2008 the employees were involved in a wildcat strike in respect of which they received final written warnings. After they had been advised by Bertrand's attorneys that plant level demands were not permitted by the constitution, SACTWU withdrew the dispute declared at plant level and lodged a dispute against NAWTM. However, the employees commenced unprotected strike action against Bertrand in spite of the fact that there was acknowledgement that plant level disputes were not allowed.
- [71] The fact that the employees were initially advised by SACTWU to participate in the unprotected strike is of no assistance to them. They participated in the strike with full knowledge of its consequences. Ultimatums given to them which provided them with sufficient time to reflect on their conduct were ignored. There is evidence too that the premises of Bertrand were invaded by them and they were involved in the intimidation of a number of workers who had disassociated themselves from the strike. In light of the above, I find that the Labour Court was correct in concluding that the dismissal of the second to further appellants was procedurally fair. The Labour Court was also correct in rejecting the reinstatement claim by the appellants. Their conduct was clearly wanton and brazen and ignored advice by Bertrand and its lawyers as well as their own union SACTWU to desist from same.
- [72] Insofar as costs are concerned, I am of the view that these should follow the result. I am, however, of the view that the matter was not of such complexity that it justified the employment of two counsel. This is a matter that revolved around the facts and the interpretation of the constitution of the NTBC.
- [73] In the result, the appeal is dismissed with costs.

SANDI, AJA

Acting Judge of the Labour Appeal Court

Mlambo JP and Mocumie AJA concur in the judgment of Sandi AJA

Appearances

For the Appellant: Advocate Fruend, SC

Instructed by: Cheadle Thompson and Haysom Inc.

For the Respondent: Advocate Myburgh, SC and Adv Wade, SC

Instructed by: Kirchmanns Inc.