

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Reportable

Case No: JS 215/2010

In the matter between:

CHEMICAL ENERGY PAPER PRINTING

AND ALLIED WORKERS UNION

First Applicant

KEETSO & 211 OTHERS

Further Applicants

and

CTP LIMITED

Respondent

JUDGMENT

LAGRANGE, J

Introduction

1] This is a condonation application for the late filing of a statement of case. Judgement in this matter was handed down on 7 June 2011, with a summary of my reasons, which read as follows:

"In summary, I find that the delay is significant and the explanation for the union and its legal representatives' dilatoriness is weak. Nonetheless, the applicants seem to have reasonable prospects of success and the case raises legal questions of some importance. The prejudice to the parties is evenly balanced, and such prejudice the employer has suffered through delays in the matter which are not of its making, can for the most part be rectified in any remedy afforded to the applicants, should they ultimately succeed."

2] I then made the following order, coupled with a direction to the parties:

"a. The applicants' late referral of their statement of case is condoned.

b. No order is made as to costs.

Further, the parties are directed to hold a pre-trial meeting within 14 calendar days of the full reasons for the judgment being filed."

My full reasons for the judgement are set out below.

3] The test for granting condonation is well known, but worth repeating. In ***Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A)***, the following was said about the factors that will be taken into account when considering a condonation application:

*'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked.'*¹

The period of delay

4] By early June 2009 the respondent and what appears to be an associated company, Thuthuka Packaging (Pty) Ltd, had dismissed 212 of the union's members following their participation in a so-called 'secondary' strike, which began on 13 May 2009. A number of separate referrals in respect of the alleged unfair dismissal of the members were made to the statutory council for

¹ At 532B-E

the Printing Newspaper and Packaging Industry ('the statutory council'). On 1 July 2009 these disputes were jointly conciliated without success. From that date, the applicants had 90 days to refer the dispute to the labour court. The referral ought to have been made by 30 September 2009, but was only made over five months later on 11 on March 2010. This is a significant period of delay.

The reasons for the delay

- 5] The applicants claim that, because of the large number of employees involved, consultations between union officials, the members and legal representatives took place on a number of different occasions. The number of employees involved also meant that the expected cost of litigation would be high and it was necessary for the union structures to meet and decide "on the best approach to deal with this matter". A vague reference is made to a meeting of the "union hierarchy" which was convened in August 2009 and which led to the union instructing its attorneys of record on 26 August to deal with the matter.
- 6] The respondent rightly criticises the lack of detail about the number and nature of the meetings and consultations which took place. It must be emphasised that evidence on affidavit should not be presented in the style of broad and somewhat imprecise pleadings when evidence of material issues is narrated. Affidavits drafted in the style of pleadings generally do not contain

sufficient specificity to sustain the claims they make, and their generality also makes them difficult to reply to, either at all, or in sufficient detail.

- 7] The respondent also makes the point that if the union had set about drafting its referral at the end of August it still had ample time to finalise this by the end of September.
- 8] The union's Durban based attorney was apparently appointed because she had previously dealt with another of the union's matters relating to the respondent. She set up a consultation with some of the affected employees and union officials to coincide with another business trip she had to make to Johannesburg on 22 to 23 September 2009. On the second day she provided the union with her opinion on the matter. Her opinion apparently discouraged litigation in favour of negotiating a settlement supposedly because of the number of employees involved. Although the attorney appears to have acted promptly once she had taken instructions in issuing an opinion, it appears to have been poor judgment on her part and the union's to have left the matter until she was due to come to Johannesburg on other business, even if that might have saved some incidental travel costs.
- 9] The union legal officer says that on 25 September 2009 he took steps to initiate discussions between a union delegation, including national office bearers, and the company to discuss a settlement of the matter. A union letter to the company of 26 September 2009 does request a meeting with the company. However, inexplicably it refers to an "urgent meeting for short time"

to be convened with national office bearers on one of three dates in early November. At the time the legal officer was aware that the referral was due shortly, but it was only on 11 October 2009 that he contacted the organiser who had written the letter to the respondent to find out what progress had been made. On 21 October he advised the attorney that the union had instructed its Wits region to try and set up a meeting with the company which would be attended by national office bearers of the union in an effort to avoid expensive and lengthy litigation. It was only on 28 October 2009 that he phoned the responsible union official to urge him to follow up on the letter requesting a meeting and to impress on the company the urgency of the matter. On 3 November 2009, a few days later, the union official sent another letter to the company requesting a meeting to discuss the subject of mass dismissals and confirming that dates had previously been requested from the company on 3, 4 and 5 November to which no response had been received.

^{10]} The respondent rightly criticises the gaps from 23 September 2009 onwards in the union's fitful attempts to settle the matter, and points out that such efforts did not preclude the union from filing a statement of case in the meantime. It seems the union felt that if it might be able to settle the matter, the costs of litigation would be avoided, and provided it continued to take some steps, albeit slowly, that was sufficient to address any problem with a late referral.

^{11]} It must also be said that the respondent's conduct was not irreproachable. The respondent's replying affidavit makes it clear that once the 90 day period

for a timeous referral had expired it started to engage permanent replacements for the applicants. Thus, when the union did make approaches to the company in October 2009 about prospective settlement discussions, the respondent could have advised the union then that it was wasting its time. The respondent does not provide any explanation for its own failure to respond to any of the union's communications. While it is theoretically true that settlement negotiations might have been pursued by the union after having filed a statement of case, the company could also have conveyed the futility of even contemplating such discussions well before January in a letter of one or two lines. It would have cost it little in time and effort to express that it had no interest in pursuing settlement discussions with the applicant rather than waiting until mid-January 2010. Instead it preferred to 'play possum' until then.

^{12]} After the futile efforts to elicit the respondent's interest in a meeting, the union only instructed its attorney in early December to deal with the matter. The attorney phoned her counterpart at the respondent's attorneys, again raising the prospect of settling the matter. She was advised that another attorney was dealing with the matter and a message would be left for him to return her call, but he did not. Two days later on 10 December 2009, she wrote to him suggesting a meeting at which settlement could be discussed. On 18 December 2009, having receive no response, like the union before her, she phoned him again. In a letter confirming their conversation, the union's

attorney confirms that they agreed that she would not refer the matter to court until he had a chance to confirm instructions with his client. The body of that letter reads:

"I confirmed being informed by you that those instructing you are currently on leave until early January 2010 and that it is impossible to obtain instructions on settlement before then.

I also confirm our agreement that my offices will hold off drafting our clients' pleadings until you have received those instructions. Your client may still want to oppose a condonation application my clients may have to bring.

I will write again to you in mid January 2010 to see whether the entire matter or aspects of it can be settled."

^{13]} The respondent's attorney did not dispute the contents of this letter, but also did not respond to her until she again contacted him on 18 January 2010. On 20 January 2010, he finally did respond. He confirmed that he now had been given an opportunity to take instructions. In the light of the considerable time period which had lapsed since the dismissal of the workers and since that no referral had been made he was instructed that his clients had employed alternative personnel and were not in a position to entertain any settlement of the matter. In fact, as I have noted above, this is something the respondent appears to have embarked on from the end of September 2009 and was not a recently decided course of action.

^{14]} The day after receiving this unequivocal rebuff, the union's attorney instructed counsel to draft the statement of case. The further delay of over a month whilst the matter lay in counsel's hands was explained by referring to "the exigencies of counsel's practice and the amount of documentation he had to familiarise himself with". The applicant contends that even though the matter was not technically complicated it was factually detailed and entailed consideration of considerable documentation.

^{15]} The applicant's attempt to explain the last period of delay on account of the alleged 'exigencies' of counsel's practice is not acceptable. If such an explanation is offered, it should at least be supported with some evidence of the particular exigencies which prevented the statement of case being drafted within a shorter period. Attorneys operating under deadlines or where matters are overdue should ascertain counsel's ability to act with the required degree of celerity before issuing them with a brief.²

^{16]} In considering the faltering steps taken by the union and its legal representatives, it is apparent that they were not seized with the necessary sense of urgency that the situation required, and progress in filing the statement was unjustifiably slow. However, given that the company had effectively taken a decision to replace the strikers by the end of September when the 90 day period expired, it must be said that it could have conveyed

² See *Allround Tooling (Pty) Ltd v NUMSA & Others* [1998] 8 BLLR 847 (LAC) at par [10]

this to the union in October or at the least by early November 2009. Although the respondent clearly advised the union's attorney on 18 December 2009 that his clients right to oppose a condonation application was reserved, it is arguable that there was some understanding that the union would not be expected to file its statement until it had received the company's response, and that the company would not take great exception to the delay between 18 December 2009 and 20 January 2010.

^{17]} In summary, the union and its representatives took steps, but did so too slowly. As such, there is an explanation for the delay but it is a weak one, because it does not really get to grips with explaining the lethargic pace of their efforts and is lacking in the necessary detail in places, even if some allowance is made for the unresponsive attitude of the respondent to their approaches to open discussions on a settlement of the matter.

^{18]} The respondent's argument was that in view of the unsatisfactory nature of the explanation and the length of delay this is one of those cases in which it was not necessary for the court to even consider the other factors mentioned by the court in *Melane's* case. In an earlier judgment I reviewed what I considered to be the main authorities on this principle and concluded as follows:

"...(i)n the light of current jurisprudence, it seems that in condonation applications where the explanation for one or more significant periods of delay is

*absent or completely inadequate this may constitute a sufficient reason for refusing condonation, but even in such instances, adjudicators in exercising their discretion are not precluded from still considering the prospects of success.”*³

19] In this instance the explanation for the entire whole period of delay is patchy and in parts quite unacceptable, but an explanation is not wholly lacking. Taken together with a consideration of the other relevant factors, I concluded that condonation was justified in this instance and should not be dismissed despite the weakness of the explanation and the long delay.

Prospects of success

20] It is for the applicants to establish that there is ‘sufficient cause’ excusing their non-compliance with the 90 day time limit.⁴ Neither party dealt with the prospects of success in any detail if at all in the affidavits supporting and opposing the condonation application. The applicants merely alluded to their statement of case and the respondent makes no mention of the prospects of success at all, but in argument relied also on what is set out in its statement of case. The tentative evaluation of the prospects of success for the purposes of this application is therefore reliant on what was stated in the applicants’ statement of case and the answering statement of the respondent. It is useful

3 See **Carter v Commission for Conciliation, Mediation & Arbitration & others** (2010) 31 ILJ 2876 (LC) at 2881-2883, paras [21] – [29] and more particularly at 2883, par [29]

4 See **Saloojee and another, NNO v Minister of Community Development** 1965 (2) SA 135 (A) at 138E-F.

to outline the course of events briefly as it emerges from those pleadings.

21] As previously mentioned, the respondent is one of two separate companies being CTP Ltd and Thuthuka Packaging (Pty) Ltd, each have two of the four operating divisions, namely CTP Web Offset and Gravure and CTP Packaging, and CTP Gravure and Thuthuka Packaging, respectively. Although Thuthuka Packaging (Pty) Ltd was not cited in its own right as a respondent, its two divisions were operating entities in which striking members were engaged and which, in turn, set in motion the hearings which resulted in their dismissals. Since the conciliation of the dismissal disputes the dismissals at Thuthuka Packaging (Pty) Ltd have been part and parcel of the same dispute, and the parties have treated them as such. The number of union members dismissed by the respective divisions are as follows:

- a. CTP Packaging – 95
- b. CTP Web Offset and Gravure – 164
- c. CTP Gravure – 15
- d. Thuthuka Packaging – 38

22] On 23 April 2009 a protected strike was initiated at another division of CTP Ltd known as CTP Stationery. The respondent claims that one of the central demands which cause the union members at CTP Stationery to start their primary strike related to the conversion of the Statutory Council for Newspaper Printing and Packaging Industry to a bargaining Council in order to enable collective bargaining to be undertaken in that forum.

23] On 5 May 2009, the union served a notice on all the divisions, except for CTP Packaging, advising them that the union would be embarking on a secondary strike commencing on 13 May 2009 in support of the strike at CTP stationery. CTP Packaging apparently only received the strike notice on 12 May 2009, the day before the secondary strike was due to commence. A number of the interdicts were launched by the respondent in an attempt to restrain the allegedly violent intimidatory conduct of the applicants members were on strike. However, the lawfulness of the primary strike action at CTP Stationery and the ostensible secondary strike action at the four divisions was not challenged in court by the respondent at any stage prior to the dismissals. Initially, the respoondent was acting in the belief that both the primary and secondary strike action was lawful, except possibly in the case of CTP Packaging.

24] In the respondent's answering statement it claims that it was only later, after receiving legal advice on the matter that it became aware that the strike action might be unlawful, not only at CTP Packaging. The secondary strike at the CTP Packaging division commenced within a day of the strike notice being issued, whereas section 66 (2) (b) of the LRA provides that the employer of employees participating in the secondary strike must have received written notice of the proposed secondary strike at least seven days prior to its commencement. At the time of approaching the labour court for an interdict on 14 May 2009, it appears that the respondent was of the view that it was only

strikers at CTP Packaging that were engaged in unprotected strike action, because of the short notice of the strike.

^{25]} Later, around 18 May 2009, the respondent formed the view that the calling of a secondary strike in terms of section 66 of the LRA was "improper" at all divisions because the secondary strikers had a primary interest in the matter and the dispute and the outcome of the dispute would affect them too, if the demand was met. The apparent basis for this submission is that each of the business interests of the respective divisions, like those of CTP Stationery, also fall within the registered scope sector and area of the statutory council. Consequently, any conversion of that body to a bargaining council would benefit all the strikers. This was first expressed in a letter issued by CTP Web Offset and Gravure, which was written in response to a letter from the union concerning a strike ultimatum issued by the respondent. The union also called for a meeting to be held on 18 May 2009 to discuss the matter. It appears that the division in question did not express any interest in holding a meeting with the union. Instead it confirmed that it would persist in taking disciplinary measures against strikers, and responded with a further letter in which it invited union representatives to the disciplinary hearing scheduled for 21 May 2009, to provide reasons why its members had embarked on strike action in which they had a direct interest. A similar letter was sent to the union by CTP Gravure and Thuthuka Packaging, with the added proviso that the hearing would proceed in the absence of the employee representatives identified by the employer, if they did not attend. From the union's account of events, it

would appear that no notice of the hearing was received in respect of the employees at CTP Packaging: the union only received notice of the outcome of the hearing.

26] The union called on CTP Web Offset and Gravure to suspend the disciplinary enquiries until the "legal strike" was resolved, but the respondent said it was unable to do this because of operational requirements and advised that the matter would proceed whether or not union representatives attended. CTP Web Offset and Gravure then approached the labour court for further relief to prevent the strikers coming within 500 metres of the premises. Even though it contended that the strike was unprotected, the respondent did not seek any specific relief in that regard, such as an interim declaration to that effect. Simultaneously, CTP Packaging notified the union of the outcome of the disciplinary hearing, namely that the enquiry chairperson had recommended the dismissal of all the union's members employed in that division.

27] The union takes issue with a number of aspects of the chairperson's report which it believes are deficient in one respect or another and so rendered the dismissals unfair, even if the strike had not been protected. Some of the factors identified by the union were that: the individual employees were not summoned to the enquiry; the apparent failure of the chairperson's to consider whether or not the secondary strike was protected; their failure to consider the fairness of the company's identification of the permitted representatives of the employees who could attend the enquiry; whether or not the refusal to

postpone the enquiry until the strike was over was fair. Moreover, the union queries whether any regard was had to aggravating and mitigating factors, or to the state of the trust relationship between individual strikers and the company in deciding that dismissal was the appropriate sanction. Similar criticisms are made of the finding in the enquiry at CTP gravure in which the chairperson had recommended a final written warning subject to a return to work as a sanction.

28] The strike was only called off with effect from Monday, 8 June 2009, supposedly after the settlement of all outstanding issues. The same day that the union notified the various divisions that the strike was ending that day, the divisions confirmed the dismissal of their members and its willingness to entertain any settlement negotiations. All the divisions except for CTP Web Offset and Gravure agreed to meet on 10 June 2009 in an attempt to resolve the matter. Obviously, if any meeting took place (neither party confirmed that it did) it was unsuccessful in achieving that goal.

29] The third basis for the respondent's claim that the strike was unprotected is that the strike demands referred, in effect, to a dispute over a "refusal to bargain" in terms of section 64 (2) of the LRA. Under that provision an advisory award must have been given before notice of strike action is issued.

The subsection deems a refusal to bargain to include, among other things:

"(a) a refusal

- (i) to recognise a trade union has a collective bargaining agent; all*
- (ii) to agree to establish a bargaining Council;*
- (b) a with straw of recognition of a collective bargaining agent;*
- (c) a resignation of the party from a bargaining Council;*
- (d) a dispute about -*
 - (i) appropriate bargaining units;*
 - (ii) appropriate bargaining levels; or*
 - (iii) bargaining subjects."*

On the face of it, it appears that the dispute as described might well fall within the purview of either, or both, of sub-sections (a)(ii) or (d)(i).

30] The respondent claims that it called upon the union to intervene and to ensure that its members return to work, but the union was of the view that the strike was protected and did not heed the calls made and ultimatums issued by the divisions. The union said as much in some of its letters. The respondent claims that it was in response to the union's stance that a hearing was convened at each of the divisions "... to enable the first applicant make any representations may have wished and to appreciate the employer's submissions in this regard". The respondent states that, apart from a brief attendance by the union representatives at the hearing at CTP Packaging, which was followed by a union walkout, invitations to attend hearings were ignored and the strike continued. It should be mentioned that the union

requested a postponement of the hearings pending the resolution of the primary strike.

31] The hearing conducted at CTP Gravure by Advocate A. Cook resulted in a recommendation being made by him that the strikers be issued with a final written warning and an ultimatum to return to work. However the ultimatum was not heeded and a further hearing was convened, which the union did not attend, following which the strikers at that division were also dismissed.

32] In summary therefore, the merits of the respondents case as set out in its answering statement is that: the 'secondary' strike at the four divisions was unlawful; the union and its members were given ample opportunity to make representations at separately convened hearings in each division, and the conduct of the individual applicants was exacerbated by various forms of violent and intimidatory conduct during the strike. To bolster its own view of the unprotected character of the strike, the respondent argues that if the union had believed the strike was protected it would have sought to halt the disciplinary enquiries by means of an urgent interdict.

33] A major bone of contention between the parties is the fact that during the whole course of the strike the labour court had not been called upon to make an order on the protected character of the strike action in any of the affected divisions. The union is of the view that before dismissing its members the respondent ought to have obtained a declaratory to this effect. In part it seems

to say this because Advocate Cook apparently expressed a view along these lines in his findings. Although no obligation rested on either party to approach the court for interim or final relief on the legal character of the strike, undoubtably it would probably have clarified matters for the parties at the time given that both sides were of the view that their respective actions were either wholly, or at least partly, justified by the legal character of the strike.

34] Depending on the protected character of the strike the fairness of the dismissals will be determined by different criteria. If the strike was protected the dismissal of the employees merely on account of participating in strike action would be automatically unfair. To the extent of that specific consideration was given to individual acts of misconduct committed in the course of the strike entailing violence or intimidation the fairness of some or all of the dismissals might still be sustained. There is insufficient detail before the court to suggest such conduct was relied upon in dismissing any the strikers.

35] In the event that the strike was unprotected then the appropriateness of dismissal as a sanction will depend on a number of factors. Among the factors which must be considered of those set out in item 6 of schedule 8 to the LRA which states:

"(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal

in these circumstances must be determined in the light of the facts of the case, including—

(a) the seriousness of the contravention of this Act;

(b) attempts made to comply with this Act; and

(c) whether or not the strike was in response to unjustified conduct by the employer.

2) Prior to dismissal the employer should, at the earliest opportunity, contact a 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 respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them."

^{36]} A difficulty in evaluating the prospects of success, given what was before the court at this stage of proceedings, is that the parties have not yet had a pre-trial meeting in which the areas of dispute had been narrowed down. Importantly, in a condonation application of this nature, the court does not have the benefit of an earlier award or judgment which has already grappled with the merits of the dispute, as a court has when dealing with condonation

for late filing of review applications or applications for leave to appeal. If the union is correct that the workers in the four divisions were engaged in secondary strike action then it appears that, in at least in three of the divisions, their action might well have been protected. In so far as the action in respect of CTP Packaging is concerned the union contends that they were dismissed for one day's absence from work and accordingly even if their strike action had not been protected their dismissal was not warranted, especially if they had participated in the strike action in a *bona fide* belief that it was lawful. It is also true the respondent expressed its view on the lawfulness of that strike in view of the short notice. But if, as the respondent contends, the strike the workers were engaged in was in truth a primary one, then what are the implications of this for the notice that was appropriate, given that the workers at CTP Packaging were employed by the same entity that employed workers at CTP Stationery? For example, there is established authority that employees of the same employer who join a protected strike would not have to make a separate referral for conciliation in order to enjoy the same protected status for their participation in the strike.⁵

37] If, on the other hand, the company is correct that the secondary strike was unprotected, the fact that this was not apparent to the company and until a few days into the strike, could mean that the union's interpretation of its protected status and its advice to its members on that basis was not

⁵ See, e.g., ***Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & Others* (2004) 25 ILJ 2135 (LAC)** at 2154, par [47].

necessarily unreasonable at the time. Where there is scope for a *bona fide* disagreement over the legal character of the strike this might well affect the fairness of any dismissals if it is ultimately found that the strike was unprotected. Obviously, if the strike's status had been subject matter of an interim order of this court, the scope for reasonable disagreement on the question would have been all but eliminated, at least pending the return day.

38] Even if the strike action was not protected, it might well be the case that there are a number of important mitigating factors which could result in the dismissals being found to be unfair, such as: the union and the strikers belief about the protected status of the strike; the fact that the employer was not unequivocal in its an interpretation of the strike's status and appeared hesitant to ask the courts to confirm its view; whether or not the employer unfairly identified employee representatives who could attend the hearings, and whether or not the individual chairpersons considered the prospects that the legal status of the strike was a matter of dispute.

39] In relation to the other ground relied upon by the respondent for claiming that the strike action was unprotected is that an advisory award in respect of a dispute over a refusal to bargain had not been issued prior to the strike commencing. However, this submission is at odds with its own concession that the original strike at CTP stationery was protected. If indeed that dispute to convert a statutory Council to a bargaining Council was one of the demands in that disputes and that this demand can be construed as one relating to a

refusal to bargain, it is difficult to understand why the primary strike quite was also not unprotected in that event. Also, if the respondent is correct that in fact the applicants were engaged in a primary strike, because they also stood to benefit from the outcome of the dispute if the demand relating to the conversion of the statutory Council was attained, then the question arises what the significance of the notice to the respondents four divisions of the secondary strike was.

40] In summary, it seems that it is by no means certain that the dismissals in question were procedurally and substantively fair. The indeterminate status of the strike from a legal perspective certainly suggests that the applicants' prospects of success are not unreasonable, whether their action was primary or secondary in character.

Importance of the issue

41] It is true that the prospects of success can only be evaluated on the basis of rather broadly stated facts in the pleadings which makes an assessment on the probabilities difficult. However, even given those difficulties, it is apparent that there are some serious issues of legal principle that need to be determined in the dispute in particular, the effect of a union party misconstruing the secondary all primary character of industrial action in circumstances where it gives the employer notice of the action which is well in

excess of the notice period required for a protected primary strike. Secondly if, as the respondent contends, the original strike at CTP Stationery was protected, and a primary object of the strike was one concerning a refusal to bargain, the question of whether or not protected secondary action in support of that demand was subject to obtaining an advisory award would need to be determined, if it was indeed secondary action.

^{42]} I believe that the circumstances of this case may raise a number of novel issues in law and it is important not only for the parties but for other employers and employees for this matter to be determined. It is also true that a large number of employees are affected, though that is generally the case in strike dismissals and on its own this would not normally be a decisive factor normally in determining the importance of the matter. In the circumstances of this case however, where serious legal issues are raised and the number of persons affected by the determination of such issues is significant, the case does appear to me to be of some general importance.

Prejudice

^{43]} The employer took the decision at the end of the 90 day period to replace the striking workforce. It did not advise the union that this was its stance until mid January. Some of the delay in doing so might have been attributable to communication gaps between the respondent's attorney and itself, but the company's silence in the face of the unions efforts to engage with it over the dismissals only exacerbated the situation. At a time when it was already

certain of its course of action, it stayed mum. In any event, it is not uncommon for employers to find it necessary to take remedial action to restore operations to normal pending the outcome of that dispute.

4.4.] If the employer were compelled to reinstate the employees in question, in any subsequent retrenchment of those it had recruited in place of the strikers it would be in a position to defend such retrenchment in view of the court's order. Moreover, it would be entitled in the event of any adverse order against it, following a finding of unfair dismissal to ask the court to take into consideration the delays in the proceedings which were not of its making in fashioning an appropriate remedy. On the other hand, one has to balance the interests of the dismissed employees. Should it turned out that either they were engaged in unprotected strike action, or that their dismissals were nonetheless unfair even though they participated in unprotected strike action, they would have been denied the opportunity of an independent forum determining the fairness of their dismissal. As mentioned above, this is a factor which should, in my view, weigh more heavily with the court in condonation applications not involving a prior adjudication on the merits of the dispute.

Conclusion

4.5.] On a conspectus of all the above considerations I reached the conclusion summarised in paragraph [1] above.



ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing: 17 February 2011

Date of judgment: 7 June 2011

Reasons filed: 22 June 2011

Appearances:

For the applicants: T Seery instructed by Shanta Reddy Attorneys

For the respondent: G Fourie instructed by Fluxmans Inc.