REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 359/11

In the matter between:

TRANSPORT AND ALLIED WORKERS UNION OF SOUTH AFRICA (TAWUSA)	**First Applicant**
W. NGEDLE AND 302 OTHERS	**Second and Further Applicants**

and

UNITRANS FUEL AND CHEMICAL (PTY) LTD	**Respondent**

Heard: **13 August and 31 October 2012**

Delivered: **13 December 2012**

Summary: Claim based on automatically unfair dismissal – whether strike demanding wage increase in contravention of bargainingcouncil agreement unprotected– held demands for increase not negotiable at plant level – strike unprotected and dismissals fair

JUDGMENT

BHOOLA J

Introduction

[1] The second to further applicants ("the employees"), were dismissed by the respondent following their participation in a strike conducted from 28 October to 2 November 2010. They are all members of the first applicant ("the union"). They claim that their dismissals were automatically unfair in terms of section 187(1) (a), alternatively procedurally and substantively unfair in contravention of sections 185 and 188 of the Labour Relations Act 66 of 1995 ("the Act").

Background facts

[2] The respondent conducts business in the haulage of petroleum, gas and oxygen in bulk on behalf of clients and has numerous branches and depots throughout the country.Its five-year contract with the Shell Petroleum Company ("the Shell contract") terminated in February 2009, and approximately 110drivers became redundant. Most obtained employment on new contracts but 31 drivers were absorbed into the respondent's business on other haulage contracts. Their salaries however were reduced and 24 of them signed their new contracts accepting the lower rate of pay. However, seven (the 'Shell 7') of these drivers refused to sign their new contracts but continued to work at the lower rate of pay and the respondent implemented the reduction in respect of them as well.Allegations were made that the drivers who had signed had done so under threat of dismissal, but the union never declared a formal dispute in this regard and it is common cause that no steps were taken during 2009 and 2010 to resolve the dispute.The respondent formed the view that the Shell 7 had acquiesced in the reduction of pay and it had never been informed that the othercontracts had been signed under duress. The employees were at that stage members of South African Transport and Allied Workers Union ('SATAWU'), and allege that they joined TAWUSA because nothing was done to further the dispute.

[3] On 15 March 2010,TAWUSA appeared on the scene and its official, Vuyani Madolo set out various concerns in a letter to the Human Resources Manager of the respondent (Titus Sekano), and proposed a meeting to address these. The concerns were as follows:

> ‘1 Allocation of long distance work especially outside the country.
>
> 2 Registration of employees especially Dulux contract and the others.
>
> 3 Wage discrepancies.
>
> 4 Wage cut.
>
> 5 Coupling Five Hundred Rand (R500-) per week.
>
> 6 Clarification of NBCRFI benefits
>
> i. Leave pay/shift
>
> ii.13 cheque
>
> iii.Sick fund
>
> 7 Provident Trustees, and transparency relating in death cover.
>
> 8 Report back meetings at working time.’

[4] The parties met on 11 May and on 14 May 2010. Subsequent to these meetings, the respondent sent a letter to the union recording the issues discussed. It stated the following in respect of the “wage discrepancies/cut” issue:

> ‘In 2009 the company lost the Shell contract, and the company had to source alternative employment within for all those employees who were affected by the closure of the contract. Employees were consulted and they were placed onto different contracts at the contract going rate at that time, to avoid retrenchment. If an employee wants to transfer from a high rated contract to a lower rate [he] will be paid according to that contract not what he was paid, only when the company transfers a person on its own then he will move with his rate but if there was a

> possible retrenchment he will have to assume that contract rate. All the transferred employees ex Shell to Airliquide were offered the Airliquide rate and none of them still earns Shell rate. If there is anyone who is still earning that rate, it will be deemed as a mistake (sic) it has to be corrected, because the signed letter does indicate the new rate'.

[5] The letter also recorded, in respect of demand for a coupling allowance, that the respondent 'does not negotiate any remuneration at company level; any increase to production remuneration has to be made at the NBCRFI negotiations'.This was a reference to the National Bargaining Council for the Road Freight Industry ("the bargaining council"), where wages were negotiated centrally in terms of the Main Collective Agreement for the Road Freight Industry ("the collective agreement").It is common cause that at all material time the respondent paid its employees in excess of the minimum wages set at the bargaining council.

[6] The applicants then referred three disputesand on 29 July 2010 following a conciliation meeting conducted by the bargaining council a certificate of outcome in respect of the dispute referred on 6 July 2010 was issued. The certificate characterised the dispute as relating to "unilateral terms and conditions of employment changes".

[7] On 30 July 2010, the respondent wrote to the union stating that it was concerned at the allegations that there had been unilateral changes in terms and conditions and requested the following information :

> 'a) Details of the unilateral changesof terms and conditions of your members as alleged by you; and
>
> b) Details of the status of terms and conditions prior to the unilateral changes according to you.'

[8] No reply was forthcoming and following a telephone conversation between Sekano and Madolo, the respondent sent a further letter on 2 August 2010 (which the applicants deny receiving) and thereafter another on 5 August 2010 requesting a response.

[9] The union's response was in the form of notice of its intention to strike issued on 6 August 2010.The notice did not list the demands but simply attached an Annexure A stating the following :

> '1. The under listed demands were presented to you on the 15th March 2010, and have been threshed (sic) out in various meetings without the resolve (sic).
>
> 2.The demand referred to in our letter were further motivated in an attempt to resolve them before Senior Commissioner Adv R. Braid on the 29th July 2010.
>
> 2.1 Wage discrepancies
>
> 2.2 Wage cut
>
> 2.3 Coupling – R500 p.w
>
> 2.4 Unilateral change of the administration of the fund from the Bargaining Council to your in-house fund.'

[10] The respondent responded with an urgent application on 11 August 2010 to interdict the strike. The Labour Court (per Van Niekerk J) dismissed the application and the strike was suspended pending discussions between the parties. Further meetings followed on 21 and 25 August 2010 in order to establish the nature of the demands that were being made.

[11] On 9 September 2010,the union gave notice that the strike would commence on 16 September 2010. The abovementioned Annexure was again attached to the strike notice with the demands expanded as follows:

> '1. Wage discrepancies – there must be no wage discrepancy between employees who perform work but on a different contract.
>
> 2. Wage cut – former Shell contract employees must earn what they used to earn under Shell contract plus annual increases.
>
> 3. Coupling – R500 p.w.

> 4. Unilateral change of the administration of the fund from the Bargaining Council to your in-house fund – the process to be reversed to accommodate Tawusa fund not Council fund.'

[12] An urgent application for leave to appeal to the Labour Appeal Court("LAC") against the order of Van Niekerk J was grantedand on 23 September 2010, the LAC set aside the Labour Court order and substituted it with the following order:

> '(i) The application is dismissed with respect to the demands relating to 'wage cuts' and 'wage discrepancies'.
>
> (i) The first respondent and its members are prohibited from promoting, encouraging, supporting, participating in or otherwise furthering any strike in support of its demands fashioned as 'coupling R500 p.w' and 'unilateral change of the administration of the fund from the Bargaining Council to your in-house fund'.[1]

[13] On the same day, the unionissued a strike notice notifying the respondent that its members would embark on the strike on 13 October 2010 in respect of the following two demands :

> '2.1 Wage discrepancies – there must be no wage discrepancy between employees who perform work but on different contract.
>
> 2.2 Wage cut – former Shell employees must earn what they used to earn under Shell contract plus increases.'

[14] Unclear as what exactly was in issue, on 28 September 2010,the respondent requested information in order to establish the exact nature of the demands that were being made. In correspondence to the union it referred to the current demands i.e. "wage cuts" and "wage parity for drivers" and requested urgent proposals regarding the wage parity demand as well as suggesting a meeting on 30 September 2010 to discuss such proposals.

[1] *Unitrans Fuel & Chemical (Pty) Ltd v Transport & Allied Workers' Union of SA and Another* (2010) 31 *ILJ* 2854 (LAC) at para 28.

[15] In a further letter dated 8 October 2010 the respondent noted that attempts had been made to meet with the union without success and referring to telephone conversations with the union. The respondent suggested a further meeting on 21 October 2010 to discuss the issue and suggested that the strike should be suspended. The parties then met on 21 October at which point the strike had been suspended. The minutes record that the two issued to be discussed relate to "wage cut" and "wage parity"but that the union said there were other underlying issues than those ruled upon by the LAC. The union reiterated that the issues raised in its letter of 15 March 2010 were still in dispute and the parties proceeded to discuss all the issues raised therein. The union confirmed that its demand in respect of wage discrepancies or wage parity related to the following :

> 'All employees who are doing the same work or duties should be paid the same rate of pay irrespective of their category EG. if a driver earns R20.00 and the other is on R60.00, those who are on a lower rate should be lifted to the higher rate so as (sic) they can be equal.
>
> The discrepancies are on all the categories including the non-bargaining unit. The union is expecting that the company should provide rate information. The discrepancies should apply to all employees, not only the number that was mentioned in the court ruling'.

[16] In regard to the wage cut item the minutes record that the demand was as follows:

> '4. Wage cut.
>
> All employees, whose wages has (sic) been cut, irrespective of whether it was an alternative employment, transfer, signed the employment contracts or any other reason needs to be corrected, including back pay, and that is from February 2009 onwards.'

[17] A further meeting was arranged for 25 October 2010 at which the respondent again sought to clarify the union's demands. The minutes record that the question of what the union demanded was posed four times and the standing answer was that 'all employees who are on a

lower rate in any category including the administrators should be paid at the highest rate in the company'. The union explained that it wanted 'all employees to go from a lower rate to a higher rate. For example all code 14 licensed drivers should earn the same nationally. There are employees in Cape Town who are earning R47.00 per hour and those in Gauteng earning R27.00, it is the union demand that all should be equal in terms of rate. It is not only those employees on (sic) the court ruling but nationally'. The minutes reflect that management asked why employees on a higher rate could not be reduced to the lower rate, and the union explained that 'it will disadvantage those employees because they rely on that money and that as soon as that money is taken away they will be worse off'. The union reiterated that 'lower paid employees' rates of pay should be raised to be equal with those who are paid on the highest rate'. In relation to the wage cut, the union made it clear that its demand went beyond the unilateral alternation of the remuneration of the Shell 7 and related to all employees who had been affected by the wage cut. Its demand was that their wages should be adjusted and that back pay should in addition be paid.

[18] In a letter dated 26 October 2010, the respondent issued a notice in terms of section 68(2) of the Act confirming that during the meetings held on 21 and 25 October it had been stated by the union that :

> '6.1. the demand in respect of 'wage discrepancies' is a demand for an across the board increase for all drivers, general workers and administrative staff, to the rate atwhich highest paid staff are currently paid;
>
> 6.2 the demand in respect of 'wage cuts' is a demand in respect of all staff who, since 2009, have been transferred to contracts that pay less than their previous contracts; and
>
> 6.3 that the demand is also in respect of drivers who signed employment contracts on the new contracts, on the alleged basis that the drivers signed the contracts under duress.'

[19] The letter indicated that these demands are substantive demands for wage increases which are required to be negotiated at the bargaining council and that the strike was therefore prohibitedin terms of section 65 of the Act. The union responded that it was opposing the interdict and stated that these issues had been dealt with by the Labour Court and LAC. It confirmed that its demands remain those articulated in thestrike notice of 23 September 2010.

[20] On 27 October 2010, the respondent brought a second application for an interdict which was granted by Basson J. The court understood the strike to be in respect of new demands and not those identified by the LAC and further dismissed the application for leave to appeal. The union advised the respondent in a letter the same day that the strike would commence at 14:30 on 28 October since Basson J had confirmed that they could proceed provided they did not introduce new issues and remained within the ambit of the LAC judgment. The notice stated that the strike would be in respect of "the very same demands, as were during Labour Appeal Court Judgment", and confirmed the demands as described in annexure A to the initial strike notice.

[21] The respondent's attorneys wrote to the union on 28 October 2010 following the order of Basson J, stating that the only issue the union could legitimately strike on was the issue of the Shell 7 wage cut and not in respect of all employees as it sought to do. The letter stated further :

> '2.4 With regard to the demand on alleged wage discrepancies – the effect of the Court order granted yesterday is to make it clear that you may not strike in support of an <u>increase</u> to wages across the board to match the highest level of wages currently paid to a particular grade of driver. You may only strike in support of a claim for parity – which may well mean that current pay rates be adjusted (either upward or downward) to the weighted average'.

[22] The letter further warned the union that to avoid contempt of court proceedings it was incumbent upon it to properly inform members of the demands they could strike on since it had been informing members that

they were striking for an increase in wages to the highest levels, which was misleading and a strike in accordance with such demands would be unlawful. The respondent reserved its rights to claim damages arising from any unlawful conduct and to dismiss any union members who embarked on such an unprotected strike. A further meeting was suggested and took place later that day, at which the union confirmed that ‘all employees should be paid all at a higher rate, and no employee’s wages has to be reduced or cut’, and also that ‘they are not calling for a wage increase but for wage parity, and it will be best if the company does that to avoid further damages’.

[23] A further meeting was held on 29 October 2010 at which the union is again recorded as proposing that ‘all employees must be paid the same’. Management was prepared to discuss the Shell 7 employees in order to find an amicable solution, but the union insisted that they be provided with payroll information and the issue included the 24 other Shell employees. The minutes reflect that Zack Mankge, the union’s General Secretary arrived during the meeting and was briefed on the discussions after which management indicated it was amenable to dealing with parity in the long term. The union indicated that it did not want to discuss the Shell 7 and that they were not talking about a “wage increase”but about a “wage adjustment”.

[24] The strike commencedon 29 October 2010. The respondent advised the union that the strike was unprotected except in relation to the demand relating to the Shell 7. In its reply of 30 October the union stated that ‘our demands are nothing other than adjustment to the employees and for your ease of reference we attach copies of our letters dated 27 October 2010’.

[25] Thereafter a letter was sent to the union confirming the telephone conversation between Sekano and Madolo relating to unlawful conduct committed by union members in *inter alia*intimidation, blockading the entrance to the Alrode depot, preventing vehicles from leaving and

severely disrupting operations, which included the delivery of oxygen to hospitals.

The ultimatums

[26] The respondent issued a first ultimatum at 08:00 on 29 October 2010. It stated as follows:

> 1. The industrial action in which you are currently participating is unprocedural and unprotected. The current TAWUSA demands relating to "wage discrepancies" and "wage cut" render your current strike action illegal.
>
> 2. Kindly note that the Labour Court has ruled that any demand for additional money is unlawful. We understand that your "wage discrepancies" demand requires that the wages of Drivers on lower rates of pay be increased to the highest wage paid by the Company for the respective Driver categories. The Labour Court on 27th October 2010 confirmed that this demand is unlawful and to strike on this demand will be illegal.
>
> 3. Your demand regarding 'wage cut'is that all Drivers from the former Shell contract that ended in February 2009 be paid according to their rates valid at that time. This also involves that adjustments as a result of increases be determined according to the former rates and back pay be paid. Kindly note that this demand is not lawful, as, in terms of previous court rulings, only 7 employees can be affected by this demand. Your strike action relating to this demand is therefore unlawful.

[27] The employees were urged to return to work by 10:00 AM failing which disciplinary action could be taken which might result in their dismissal.

[28] The second ultimatum was issued at 15:30 requiring a return to work by 17:00 that day. It reiterated that the strike was unlawful and informed employees that if they did not return to work the respondent would institute disciplinary action for which a sanction of dismissal might follow, and invited them to provide reasons why their strike was lawful and why they should not be dismissed.

[29] A third ultimatum was issued at 07:30 AM on 1 November 2010, a copy of which was forwarded to the union. This was a reiteration of the first and second ultimatums and requested employees to resume normal duties by 14:00. It also indicated that meeting between the union and the respondent was scheduled for 8:30 AM that day in a last endeavour to resolve the matters in dispute. Later that day a letter was issued to the union informing it that its members had not complied with three ultimatums and that a final ultimatum had been issued requiring them to resume their duties by no later than 06:00 AM the following day. The final ultimatum, issued at 14:05, reiterated the terms of the previous ultimatums and also recorded that the respondent had acceded to the demand relating to the Shell 7. It required employees to resume work by 6:00 AM on 2 November and made it clear this ultimatum would not be repeated and that employees who did not comply would be dismissed.

[30] There was no communication from the applicants and on 2 November 2010, notices of dismissal were issued and the union was notified accordingly.

The law

[31] It is trite that an employer may not dismiss an employee for participating in a protected strike.. However, participation in unprotected strike does not *per s*e justify dismissal. Section 68(5) of the Act provides as follows :

> 'Participation in a strike that does not comply with the provisions of the Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account'

[32] The Code of Good practice specifies a number of considerations that must be taken into account in dismissing unlawful strikers. Item 6(1) provides in this regard as follows:

> '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 dismissals 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;

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

The pleadings

[33] The main issue for determination is whether the strike was protected. If so, the dismissals would be rendered automatically unfair. If the court finds they are not automatically unfair the applicants plead that :

33.1 The respondent did not conduct pre-dismissal hearings or hold discussions with the first applicant prior to dismissing the employees, rendering the dismissals procedurally unfair; and

33.2 The dismissals were substantively unfair and in this regard the court is required to determine :

33.2.1 whether the strike related to issues permitted for strike action by the Labour Appeal Court;

33.2.2 whether the dismissals were in accordance with the Code of Good Practice : Dismissal; and

33.2.3 whether dismissal was an appropriate sanction for the alleged misconduct.

Analysis

Was the strike protected?

[34] In deciding on the lawfulness of the strike, I should have regard to the LAC's decision in this same matter referred to above. The LAC[2]noted the reliance by the appellant (the respondent *in casu*) on the limitation of the right to strike encompassed in section 65(1) (a) and 3(a)(i) of the Act. This section provides that:

> '(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 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…
>
> (3) Subject to a collective agreement, no person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or lock-out –
>
> (a) if that person is bound by –
>
> (i) any arbitration award or collective agreement that regulates the issue in dispute.'

[35] The Court then referred to the three collective agreements relied upon by the respondent i.e. the main agreement, the dispute resolution agreement and the provident fund agreement. The main agreement provides in clause 50 (1) and (3) that :

> '(1) The forum for the negotiation and conclusion of substantive agreements on wages, benefits and other conditions of employment between the employers and employers' organisations on the one hand and trade unions on the other hand, shall be the council…
>
> (3) No trade union or employers' organisation shall attempt to induce or compel, or be induced or compelled by, any natural or juristic person or organisation, by any form of strike or lock-out to negotiate the issues referred to in subclause (1) above at any level other than the council.'

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[2]*Unitrans Fuel & Chemical (Pty) Ltd v Transport & Allied Workers' Union of SA and Another* (2010) 31 *ILJ* 2854 (LAC) at para 17.

[36] The Court, per Waglay DJP (with Mlambo JP and Tlaletsi JA concurring) held[3] that it is clear in terms of this clause that 'all and any negotiations in relation to wages and substantive issues must be negotiated[4]at the council and that neither party may resort to industrial action (strike or a lock-out) concerning these issues'.The Court then had regard to the definition of "substantive issues" in the main agreement as being "all issues involving costs and affecting the wage packets of employees". The Court accepted, in dealing with the appellants' argument that the demands related to "wage discrepancies", "wage reduction" and "coupling R500 pw" are all "substantive issues" as they affect wages,andwhere the demand is 'for an increase in remuneration or for remuneration to be paid in relation to a particular aspect of employment such demand relates to wages and are substantive issues'. However, the Court continued 'If the demands as we have them here are about wages and substantive issues then, as the appellant has properly argued, the first respondent is prohibited from calling on its members to embark on a strike in respect of those issues'.[5]

[37] However, in relation to the wage discrepancies and wage cut demands the LAC held that these were not demands which relate to an increase in wages. The *ratio* is as follows :

> '…Seen in the context of what transpired at the appellant's workplace it is clear that the aforementioned demands relate to the fact that the appellant unilaterally decided to reduce the wages of those of its employees who previously serviced the Shell contract for the appellant. When the appellant's contract with Shell came to an end it did not seek an agreement (at least not with the seven employees referred to earlier) with those employees who decided to remain in the appellant's employ but reduced their wages. The seven employees were simply paid a lesser salary. This reinforces the first respondent's averment that the appellant unilaterally reduced the wages of its employees. Appellant's

[3] *Unitrans Fuel & Chemical (Pty) Ltd v Transport & Allied Workers' Union of SA and Another* at para 17.
[4] My emphasis.
[5] *Unitrans Fuel & Chemical (Pty) Ltd v Transport & Allied Workers' Union of SA and Another*at para 18.

> response is that the Shell contract was of a greater value than the present contracts on which these ex-Shell drivers were now placed. This may be so, but this does not mean that the appellant is entitled unilaterally to enforce a reduction in salary without concluding an agreement with the employees. The employees are entitled to demand that the appellant shall not apply wage discrepancies and wage reductions unilaterally and such demand is not a demand that seeks to increase their wages but to undo the appellant's unilateral implementation of a change in wage rates and reduction in wages'.[6]

[38] The LAC took cognisance of the argument by the union's counsel that the 'demand for wage parity is not a demand for an amount of money but requires the appellant to adjust wages so as to arrive at a uniform level of remuneration for employees performing the same work albeit on different contracts'[7]. On this basis it held that the demands of "wage discrepancy" and "wage cut" do not fall within the purview of clause 50 (1) and/or (3) of the collective agreement and do not therefore constitute issues in respect of which the union is prohibited from calling upon its members to strike.

[39] Turning to the coupling demand,the LAC found that since it was a demand for payment of an extra R500 per week for performing coupling tasks, which they had always performed, it was an issue which fell within the ambit of clause 50(1) and (3) as it is 'an issue that is connected and related to substantive issues because it involves costs and affects the employees' wage packets'. This demand was therefore hit by the prohibition in section 65(1) of the Act. The provident fund demand was disposed of by finding that it was factually incorrect that the respondent had acted unilaterally,[8] and the court held that the strike would be protected if the demands related to coupling and the provident fund were severed from the other two demands.

[40] The LAC's conclusion on the other two demands was as follows:

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[6] *Unitrans Fuel & Chemical (Pty) Ltd v Transport & Allied Workers' Union of SA and Another*at para 19.

[7] *Unitrans Fuel & Chemical (Pty) Ltd v Transport & Allied Workers' Union of SA and Another* at para 20.

[8] *Unitrans Fuel & Chemical (Pty) Ltd v Transport & Allied Workers' Union of SA and Another* at para 24.

> ‘In the circumstances I am of the view that the first respondent’s demands that the appellant implement a system of wage parity for the drivers irrespective of which contract they service and that there be no reduction in salary without there being an agreement to that effect are demands which fall outside the ambit of clause 50(1) and (3) of the main collective agreement and as such the first respondent is not prohibited in terms of s 65(1) (a) and (3) (a) (i) of the LRA from calling upon its members to strike in respect of those demands’.[9]

[41] The LAC clearly understood both the wage discrepancy and wage cut demand to relate to the restoration of the position of wages of the Shell 7 prior to the unilateral alteration. It did not consider this to fall within the prohibition in clauses 50(1) and (3) as these were not demands for an actual increase but for an adjustment of wages to achieve parity among drivers on different client contracts and a prevention of further unilateral reduction of wages as with the Shell 7. The strike in relation to these two demands therefore, seen as demands relating to implementing a system of wage parity and no further unilateral reductions in salary, was therefore permissible.

[42] Given the clear conclusion and reasoning of the LAC I cannot agree with applicants’ counsel that what the LAC did was to afford a purposive interpretation to the “wage cut” and “wage discrepancy” demands in the context of the collective agreement, and that it is one which gives effect to the fundament right to strike entrenched in the Constitution, which was reinforced recently by the Constitutional Court in *South African Transport and Allied Workers’ Union (SATAWU) obo Dumisani Jama and 62 others v Lebogang Michael Moloto N.O and Jerry Sekete Koka N.O* (CCT 128/11 [2012] ZACC 19) (*SATAWU)*. The LAC judgment, he submitted, similarly gave effect to the right to strike and amounted to effectively disallowing ‘an island of managerial prerogative in a sea of collective bargaining’.

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[9] *Unitrans Fuel & Chemical (Pty) Ltd v Transport & Allied Workers’ Union of SA and Another*at para 25.

[43] In this regard, Mr Wilke submitted that it is apparent that what the LAC did was to determine the primary purpose of the strike demand and conclude that weighed in its proper context it constituted a legitimate demand. There is no doubt therefore, counsel submitted, that the LAC understood the primary purpose of the wage cut demand as being to undo the respondent's unilateral conduct in respect of the Shell 7. It was not to procure an increase for the Shell 7 although the LAC understood that the wage cut of the Shell 7 had compounded wage discrepancies as it had introduced yet another element of disparity. He submitted that it was clear that the LAC did not view the two demands as relating to the same dispute, but clearly viewed them as discrete demands relating to separate and distinct disputes and hence concluded that they were severable. The LAC therefore envisaged, in relation to the wage discrepancy demand, that although the purpose of the demand was not to procure a wage increase for the union's members, it would of necessity have required an agreement at plant level at the conclusion of a successful strike that would have 'involved costs and affected the wage packets of employees'. This submission envisages that the LAC contemplated that the collective agreement clauses would then be rendered redundant. He argued that the court thus left the meaning to the term "adjust" to be determined by the industrial power play between the parties. In this context, counsel submitted that the evidence of Nico Badenhorst that the respondent was unable to achieve wage parity because of the constraints of the collective agreement was contrary to the LAC judgment.

[44] Mr Wilke submitted that *in casu* it was common cause that the respondent paid most of its employees in excess of bargaining council minimum wage rates, and did so unilaterally. It was furthermore Badenhorst's evidence that the wage disparity was a direct result of this conduct as the respondent determined wages on each of its contracts and that these were not negotiated at the bargaining council and were in excess of the bargaining council minimums. It therefore t took the view that the main agreement (and Chapter IV of Act) should be interpreted so as to exclude actual wages from collective bargaining and from the right

to strike. He submitted that the respondent's contention therefore that the strike was unprotected because it concerned issues that were not negotiated at plant level in terms of the main agreement flies in the face of the Constitutional Court's re-endorsement of the protection of the right to strike.

[45] As submitted by Mr Redding however, the Constitutional Court decision in *SATAWU* (*supra*) is distinguishable on the facts from this matter in that it relates to the issue of whether the provisions of section 64(1)(b) of the Act obliges every employee who intends to embark on a strike to notify his or her employer of that intention personally or through a representative for that strike action to be protected, in circumstances where the individual is not a member of the union which had given notice on behalf of its members. The Court held (per Maya AJ) that a single notice by the union was competent, and that 'to hold otherwise would place a greater restriction on the right to strike of non-unionised employees and minority union employees.'[10] I agree with Mr Redding that the significance of this decision is somewhat limited in the present context, where the parties have voluntarily agreed on a limitation on the right to strike. This is an acceptable and self-imposed limitation made freely in collective bargaining, which asserts the primacy of bargaining on substantive issues that affect wages at sectoral level. It is trite that such an arrangement is a legitimate constraint on the right to strike and has been accepted as such by the Labour Court.

[46] This was the clear import of Badenhorst's evidence moreover. He testified that the concept of single-tier centralised sectoral bargaining, which was the rationale for clause 50, was decided upon by unions and employers in 1996. Badenhorst was involved in establishing the NBCRFI and has represented the Road Freight Employers Association for over 12 years. The decision was to prevent two-tier bargaining and specifically to prohibit bargaining at plant level on wages and terms and conditions of employment, i.e. substantive issues. This policy decision was approved by the then Minister of Labour, Mr Tito Mboweni and incorporated into

[10] *SATAWU* at para 92.

the bargaining council constitution and main agreement. Badenhorst also pointed out that unlike other industries (example Steel and Engineering, Furniture Manufacturing), the NBCRFI was able to negotiate on minimum wages and actual wage increases, as well as on wage parity.

[47] Even though counsel may disagree on the principles of whether an agreement to bargaining collectively on wages constitutes a justified limitation on the right to strike, this is not the issue before this Court. It is necessary to determine the nature of the demands that eventually featured when the strike commenced as this is central to determining its status.It is common cause that although there were initially four demands the eventual strike was in support of two issues - the “wage cut”and “wage discrepancies”.In the meetings of 21 and 25 August2010 (subsequent to the LAC judgment) the union reiterated in respect of the “wage cut” issue that those employees who had their wages changed since February 2009 should have their wages restored irrespective of whether this had been occasioned by a unilateral change to their terms and conditions of employment. In regard to the “wage discrepancy” issue the demand was that there should be no discrepancies in the wages of employees on different contracts and that this should be achieved by bringing those employees on a lower rate of pay up to the highest rate. The respondent, correctly in my view, formed the view that these demands differed substantially from the demands as understood by the LAC and therefore sought the second interdict which was granted by Basson J.

[48] The respondent again sought clarity in its letter of 28 October 2010 which informed the first applicant that the strike was only legal in relation to the Shell 7 wage cut demand as well as “weighted average wages” in terms of the LACjudgment. The respondent made it clear in the 28 October meeting that the only basis on which an adjustment could take place that did not increase actual costs was that certain employees would have to take a wage cut. It is clear that the union was opposed to any wages being reduced and its demand was that all employees should be moved

up to the higher rate.This was made clear in the 29 October meeting when Mankge is recorded as having made the following statements :

48.1 ‘It is illegal that the Company reduce employee’s rates without any reasons’;

48.2 ‘In essence there should not be any reduction on rates’.

48.3 ‘In wage discrepancies, e.g. 20-40 [everyone should be paid equally]’.

[49] It was made clear to the union that this formulation of the demands rendered the strike illegal. Badenhorst testified that at this meeting the union was adamant that there would be no reduction in wages but that wages should be equal for all employees on the same contracts. The respondent’s representatives indicated that it would be impossible to achieve wage parity which did not have an additional cost to the respondent unless some employees agreed to a cut in wages.

[50] Badenhorst testified that at the meetings with the union the respondent struggled to establish what the demands were and how they could be accommodated in the context of the prohibition on plant level bargaining. Insofar as the union made it clear its’ method for eliminating disparities was that the lower paid employees should be paid the same as higher paid employees, the respondent suggested that this could be agreed as a phased in process but this was rejected as being too prolonged. The union’s proposals involved an increase either way which involved and on-cost and was therefore prohibited at plant level. Badenhorst said that they specifically tried to discuss a way to achieve parity without involving an on-cost to the respondent, for example through establishing a mean wage and increasing the bottom end earners to that mean and reducing the higher rates as well.. However, the union made it clear at the meeting of 29 October that they would not accept a reduction in any employee’s wage as this would be illegal and would cause economic hardship to those already on a higher rate.

[51] It was put to Badenhorst in cross-examination that at a meeting between the parties on 1 November 2010 the demand was for all the drivers to be put on a wage of R38.00 per hour. His evidence was that this proposal “rings a bell” but that he had pointed out to the union that it was still a proposal for an increase and meant an on-cost for the respondent and had an effect on wage packages and should therefore be made at the bargaining council. The only witness for the union, the second applicant Wellington Ngedle, agreed that the demand was for a minimum of R38.00 and conceded in cross–examination that this would have involved an on-cost for the respondent but testified that since it had created the inequality in the first place it had to bear the costs of remedying it.

[52] Badenhorst agreed that there were historical discrepancies in the industry. He testified that the parties had been engaged in a process of negotiating the elimination of wage disparities in the industry. His evidence was that the elimination of wage disparities was not capable of being determined at company level.The main agreement prevents any negotiation on “costs and wage packets” at company level, and for this reason the issue of parity at company level was incapable of being a lawful and valid demand. The union understood this very well as Madolo had been party to the parity discussions on behalf of SATAWU as well as the establishment of the bargaining council in 1995 and 1996. His evidence to this effect was not disputed by the union and although Madolo was present throughout the proceedings he did not testify.

[53] The respondent’sattitude, reiterated in the ultimatums issued, that the union’s formulation of its demand for wage discrepancies and wage cuts constituted a demand for a wage increase which could only be made by the bargaining council through centralised collective bargaining, was therefore correct.

[54] Mr Wilke submitted however that the evidence of Ngedle was clearly that at all times the union had demanded an “adjustment” not an increase in order to eradicate the discrepancies in remuneration paid to the Shell 7

and that this complied with the LAC order. He testified that the union did not dispute the minutes of the meetings but that the union's demands during the meetings was always to "sort out" the wage cut and discrepancies in relation to the Shell 7. Furthermore, Ngedle testified that the respondent made no suggestions for resolving the issues that gave rise to the strike. The union had suggested a compromise at the 1 November meeting in terms of which some wages would have been raised and others reduced in order to achieve parity at a rate of R38.00, but that the respondent rejected this as it would cost more money. This however does not appear to be a correct reflection of the minutes recording the union's demands, and it was made clear that the union would not countenance any wage reductions to achieve parity.

[55] I agree therefore with Mr Redding's submission that notwithstanding the LAC judgment and the second Labour Court interdict, the union's demand was for an effective wage increase and that this was a substantive issue reserved for sectoral bargaining through the bargaining council. This is apparent from all the evidence including the minutes of the meetings in October, the evidence of the 1 November meeting and the fact that the union at no stage denied the statements in the ultimatums that it was striking in support of a demand for a wage increase.The applicants' witness however disingenuously sought to suggest that the demand was for wage parity by way of adjustment to a fixed ratewhich would encompass both reductions and increases in wages.It is clear from the documentary evidence and the respondent's evidence that this was not the case. The union was clearly not articulating a demand that wage parity as a principle should be adopted or that it should involve bringing all employees up or down to a single rate, it was making a real demand that wage parity should be achieved by increasing the wages of the lowest paid employees to the highest paid rates. This was a clear demand for a wageincrease.It was clearly expressed in the demand in the 1 November meeting that the wages of drivers should be increased to R38.00 per hour. Therefore, notwithstanding the attempt to portray the demand as being ostensibly for an adjustment, when the issue was pursued with the union it became

clear that it was a demand for an actual wage increase for all employees. This is also apparent from the fact thatdespite the respondent’s capitulation to the demand in respect of the unilateral reduction of the Shell 7 salaries, the union persisted with its demand. This is on its own an indication that the demands as understood by the LAC became extended to include actual parity through wage increases.

[56] For these reasons the strikewas unprotected and the dismissals were not automatically unfair in terms of section 187(1) (a).

Were the dismissals procedurally and substantively unfair?

[57] Mr Wilkes submitted that in the event the strike is found to have been unprotected, then the applicants submit that the dismissals were unfair in terms of section 188 for the following reasons :

57.1 The LAC made it clear that the strike was in response to unjustified conduct by the respondent which resulted in wage disparity and unilateral wage reductions in respect of the Shell 7;

57.2 The applicants had no obligation to make representations in response to the respondent’s invitation to do so, and the employees had in fact not read the ultimatums as was confirmed by the evidence of Ngedle;

57.3 The respondent was required to conduct disciplinary enquiries but failed to do so;

57.4 Dismissal was not an appropriate sanction for the alleged misconduct in that Badenhorst testified that the primary purpose of the dismissal was toend the strike. The strike did not damage the relationship of trust as a number of employees were re-employed. Also the applicants believed that the strike was protected in view of the LAC decision.

[58] Mr Redding submitted that it is clear from the submissions dealt with above that the strike was a serious contravention of the Act and had

serious consequences for the respondent. The applicants could have been under no misapprehension, after the LAC decision, that they could not make a demand in relation to wage parity or discrepancies which had cost implications for the respondent. Nevertheless the union was intransigent in its demand and I accept the evidence of the respondent that impasse was reached with no realistic prospect of resolution. The strike lasted almost six days, the respondent issued four ultimatums and the evidence of Badenhorst that the respondent sustained a loss of over R3 million as well as reputational damage was not disputed. The respondent was left with no reasonable alternative other than to dismiss. Its invitation to the union and employees to make representations as to reasons why they should not be dismissed was ignored.

[59] In regard to the attempts made to comply with the Act there is no issue about the union's compliance with the procedural formalities for a protected strike. Mr Redding submitted that it failed to recognise the terms of the main agreement and accordingly made itself guilty of infringing section 65 of the Act. He submitted further that the respondent complied with all the requirements in the Code – it contacted the union; issued ultimatums in clear and unambiguous terms and allowed more than sufficient time for employees to reflect and respond. The final ultimatum made it clear that dismissal could follow as a consequence of continued strike action. It provided an opportunity to the union and the employees to make representations as to why dismissals would not be appropriate. Mr Redding correctly submitted that the respondent was required to do no more than this to comply with *audi alteram partem* following the *ratio decidendi* of *Mzeku and Others v Volkswagen (Pty) Ltd and Others*[11] and *Modise and Others v Steve's Spar, Blackheath.*[12]

[60] There was on the evidence, as Mr Redding submitted no unjustified conduct by the respondent which led to the strike. I agree with his submission that on the contrary, the respondent showed remarkable forbearance not only in repeatedly meeting with the union to determine

[11] 2001 (4) SA 1009 (LAC).
[12] 2001 (2) SA 406 (LAC).

the demand but furthermore in issuing four ultimatums, holding extensive meetings with the union and waiting for a period of six days before resorting to dismissals.

[61] As Mr Redding submitted, the difficulty was that there was a standoff when the respondent sought to enforce the main agreement to prevent the collective bargaining process from being undermined and the applicants were equally adamant that they were entitled to strike. After six days when impasse was reached it was clear that there was no prospect of resolution and given that the respondent's interpretation was manifestly correct it had no reasonable alternative other than to dismiss. It had suffered extensive losses at this stage. The dismissals were therefore justified in that the employees participated in an unlawful and unprotected strike for a period of six days without any reasonable prospect of the dispute being resolved through negotiation with the first applicant.

<u>Order</u>

[62] In the premises, I make the following order :

The applicants' claim is dismissed with costs.

Bhoola J

Judge of the Labour Court of South Africa

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