



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 36/2008

In the matter between:

**NATIONAL UNION OF MINEWORKERS ON**

**BEHALF OF MEMBERS**

**Applicant**

**and**

**WANLI STONE BELFAST (PTY) LTD**

**Respondent**

**Heard: 14 November 2011**

**Delivered: 10 April 2013**

**Summary: Dismissal for participation in an unprotected strike action. Dismissal is fair particularly where strikers wilfully ignored an earlier Court Order interdicting the unprotected strike.**

---

JUDGMENT

---

BASSON, J

Introduction

- [1] The applicant in this matter is the National Union of Mineworkers (“NUM”) on behalf of its individual members (“individual applicants”). (I will refer to the applicants jointly as “the applicants” except where the

context requires otherwise.) The respondent is Wanlistone Belfast (Pty) Ltd (“the respondent”).

- [2] This matter deals with the fairness of the dismissal of the individual applicants pursuant to an unprotected strike which took place at the respondent’s premises on 6 and 7 August 2007.
- [3] The respondent carries out its business in the granite industry. In brief, it involves the processing of granite into finished consumer products for the local and international markets. The respondent and the NUM entered into an agreement in terms of which NUM was afforded the right of access and the right to union dues.
- [4] When the matter commenced, the case for the applicant was that the strike was protected and that the dismissal of its members was automatically unfair alternatively that, if the strike was found to be unprotected, that the dismissal of the individual members was procedurally and substantively unfair in respect of the legality of the strike. The respondent raised a special plea of *res iudicata* in view of an earlier determination by the Labour Court that the strike was unprotected. This determination was made in interdict proceedings at the commencement of the strike in 2007. The Labour Court declared the strike to be unprotected and granted the respondent an interdict. This Order still stands. This Court, therefore, upheld the special plea and the matter proceeded on the basis that the strike was unprotected. I should also add that the evidence in any event supported the conclusion that the strike was unprotected
- [5] It should also be pointed out that when the evidence was concluded, counsel for the applicant further conceded that the dismissal of the applicants was procedurally fair and indicated that the applicant limited its case to the claim that the dismissal was substantively unfair on the following basis: (i) that, at all times, the dismissed employees and their representative (Mr Mnisi of NUM) held the *bona fide* belief that the strike was protected and that their conduct, therefore, did not constitute misconduct; (ii) the strike was peaceful and no acts of misconduct

were committed during the strike; and (iii) the strike only lasted one day with little harm to the respondent.

- [6] In arriving at a conclusion regarding the fairness of the dismissal, the Court particularly took into consideration the fact that the individual applicants had wilfully ignored a previous Court Order interdicting the strike. The Court also took into account that not a single witness on behalf of the applicant testified about the state of mind of the individual applicants at the time of the strike and whether they genuinely believed that the strike was protected. Lastly, in arriving at a conclusion, I also had regard to the credibility of Mr Mnisi who was the only witness to testify on behalf of the applicants. As will be pointed out hereinbelow, his evidence was wholly unacceptable and the Court cannot attach any weight to his evidence: He was an evasive, argumentative and obstructive witness to such an extent that this Court can attach no weight to his evidence. I will return herein below to his evidence.
- [7] It was common cause on the facts that the applicant was at all times aware that the dispute concerned a refusal to bargain. The applicant was also aware that where the dispute concerns a refusal to bargain, it is essential for the CCMA to issue an advisory award prior to the issuing of a strike notice.

What gave rise to the strike?

- [8] It was common cause that NUM had submitted wage demands to the respondent. These wage demands are contained in a letter dated 9 March 2007. A meeting was held between representatives of NUM (including Mr Mnisi) and representatives of the respondent (including Ms Modlin). The meeting was held on 29 March 2007. At the meeting, Modlin informed the applicant that the respondent was not prepared to discuss wages and that the reason was that the respondent had already implemented wage increases for the year 2007 with effect from January 2007.
- [9] On 30 March 2007, Mnisi referred a dispute to the CCMA. He described the dispute as "the refusal of the company to negotiate wages with the

representative union". Mnisi, further, recorded that the result of the conciliation should be "that the company must negotiate with the representative union." In a further letter to the CCMA dated 23 July 2007, Mnisi further advised the CCMA that 'we hereby notify you that the company refused to negotiate with the representatives from the TradeUnion at plant level, hence an application to the CCMA'. Modlin unchallenged evidence in this regard was that she repeatedly advised Mnisi that the dispute concerned a refusal to bargain. In fact, Mnisi conceded during cross examination that the company refused to negotiate and that that was why a dispute was referred to the CCMA so 'that the company would now negotiate wages'.

- [10] Despite the fact that no advisory award had been issued by the CCMA, NUM issued a strike notice on 1 August 2007. In fact, the strike notice was issued on the very same day that the parties met for conciliation at the CCMA. Due to the fact that conciliation only took place on 1 August 2007, it is reasonable to accept that the employees must have already decided prior to the conciliation meeting that they wished to embark on strike action.
- [11] On 3 August 2007, just after 8h00, the respondent delivered a letter to the applicant advising them that the strike was unprotected and that should the strike not be called off, the Labour Court would be approached for an interdict.
- [12] It is common cause that shortly before 16h00 on the same day, the respondent delivered a notice of motion and the founding affidavit in the urgent application to NUM. As already pointed out, the Court granted the interdict. Part of the Order declared the strike unprotected because the dispute concerned a refusal to bargain and no advisory award has been issued in respect of the dispute. The Order was confirmed on the return date.

Witnesses on behalf of the respondent

- [13] Various witnesses testified on behalf of the respondent. I only intend to deal briefly with the evidence of some of these witnesses. Both Ms Rebecca Msimango and Mr Joseph Mabena were called to confirm the delivery of notices and documents during the strike as well as the serving of the ultimatum and the Court Order. In essence, their evidence was that they had delivered correspondence and documents to NUM. More in particular, Msimango confirmed that she personally served the copy of the Court Order on NUM. Their evidence was not contested and therefore stands.
- [14] Mr Johannes du Plooy testified that he was responsible for industrial relations at the respondent. He, further, confirmed that he was present during the strike. He confirmed that he issued an instruction to the workers to return to work at 8h00. He also confirmed that no representations were made to him. He confirmed that he left copies of the ultimatum on the ground. During the course of the day, he also verbally gave instruction to the individual applicants to return to work. The individual applicants ignored him and continued to dance and sing. Du Plooy also confirmed that he requested Msimango and Lorraine Esterhuizen to go to Rustenburg to the trade union's offices to serve the Court Order. Du Plooy also confirmed that he issued an ultimatum at the same time when he served the copies of the Court Order. He also confirmed that he placed copies on the ground when the individual applicants refused to take the Court Order and the ultimatum. The strikers continued to refuse to return to work. The final ultimatum was issued at about 15h30. The ultimatum was read out. Copies of the ultimatum were also placed on the ground. Still no employee returned to work and no employee made any representations to the respondent. Du Plooy emphatically testified that he did not see any Union representative at the premises during the strike.
- [15] Ms Dyonne Modlin confirmed that she had discussions with Mnisi and that she had conveyed to him that the respondent refuses to negotiate with NUM because wages have already been dealt with for the year 2007. Modlin confirmed that she had asked that the Court Order

beserved on NUM and that she had instructed Lorraine Esterhuizen to serve notices and the Court Order on NUM at its offices. She explained that the respondent did not lightly take the decision to dismiss the employees because they were highly skilled and were sent to China for training. Modlin also testified that the respondent has had strikes in the past but that this was the first time that the workers had disobeyed a Court Order.

- [16] Mnisi testified on behalf of NUM. I am in agreement with the submission on behalf of the respondent that his evidence should be disregarded. He was a particularly evasive and recalcitrant witness and repeatedly failed to answer specific question put to him. Mnisi also changed his version repeatedly. I am in agreement with the respondent that the impression was created that Mnisi developed his evidence to suit the case for the applicant.

#### Brief exposition of the law

- [17] It is trite that participation in a strike that is not in compliance with the Labour Relations Act<sup>1</sup> ("LRA") constitutes misconduct although participation in an unprotected strike will not necessarily result in a fair reason to dismiss. In deciding whether it was fair to dismiss, the Court must take into consideration various facts, including but not limited to the seriousness of the contravention of the LRA, attempts to comply with the LRA and whether or not the strike was in response to unjustified conduct by the employer. In evaluating these considerations, the Court must also consider the primary objects of the LRA which is to advance labour peace and, to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution (which recognises the right to strike for purposes of collective bargaining); to promote orderly collective bargaining and to promote the effective resolution of labour disputes. Careful attention should also be given to the seriousness of the contravention of the provisions of the LRA and whether the conduct of the strikers had the effect of subverting the primary purpose or object of

---

<sup>1</sup> Act 66 of 1995.

the LRA. It is also important to consider whether the employees who participated in an unprotected strike participated in the unprotected strike knowing that their conduct constituted a contravention of the LRA and therefore constituted an unprotected strike.

- [18] Section 64(2) read with section 135(3)(c) of the LRA provides for certain additional steps to be followed when attempting to resolve disputes about the refusal to bargain. Before employees can embark on a protected strike over a refusal to bargain, they must, after conciliation has failed to resolve the dispute, first obtain an advisory award. The obtaining of an advisory award constitutes an additional procedural step to the normal process whereby the employees may merely give the required notice after a certificate of non-resolution has been obtained.
- [19] There are sound reasons for requiring parties locked in a recognition dispute to submit to a further process namely to obtain an advisory award. One reason is that a strike or lock-out in the early stages of a recognition dispute can potentially have devastating consequences and cause significant harm to the relationship between the employees (and/or their union) and the employer and may also subvert one of the primary objects of the LRA which is to promote orderly collective bargaining.
- [20] In respect of the seriousness of a contravention of the LRA (in the case of an unprotected strike), it is important to consider whether the conduct constituting the contravention of the LRA had the effect of subverting a primary purpose or object of the LRA and whether those who engaged in conduct constituting a contravention of the LRA did so with knowledge of the contravention. Of importance would also be the consideration whether there were attempts made by the strikers to comply with the LRA. Where, for example, parties wilfully fail to wait for the outcome of an advisory award (the additional procedural step), this could be regarded as a serious contravention of the LRA as parties are required to

seriously consider the advisory award before deciding whether to embark on a strike.<sup>2</sup>

- [21] The Court will also take into account the fact that strikers disobeyed a Court Order interdicting a strike. This fact may well be regarded as an important factor justifying an employer to dismiss. See in this regard: *National Union Of Metalworkers of SA and Others v Jumbo Products CC*,<sup>3</sup> where it was held:

'The court cannot lose sight of the fact that the individual applicants could easily have avoided being dismissed had they returned to work immediately after management had drawn their attention to the interdict which the respondent had obtained in the industrial court earlier on the morning of 1 November 1989. They chose to ignore the court order...after a member of management had read out the court order and also had it put on the notice-board for all to see. In a sense the individual applicants engineered their own dismissals and this court cannot be expected now to come to their assistance to rescue them from their own foolhardiness.'

See also *Modise and Others v Steve's Spar Blackheath*,<sup>4</sup> where it was held as follows:

'[120] It is becoming distressingly obvious that court orders are, by employers and employees alike, not invariably treated with the respect they ought to command. It is a worrying tendency, one which can only be effectively combated by the courts' displaying a marked reluctance to condone non-compliance. Obedience to a court order is foundational to a state based on the rule of law. The courts should by a strict approach ensure that it remains that way. I do not perceive any good reason why the appellants should not be penalized for their non-compliance. They cannot plead ignorance. Their union was closely involved. As we have

<sup>2</sup>See: *Food and General Workers Union and Others v Minister Of Safety and Security and Others* (1999) 20 ILJ 1258 (LC): '[25] It is clear that the legislature intends to impose an additional procedural requirement in the case of intended strikes involving a 'refusal to bargain' as defined. This is that an advisory award be issued. Only once this has been done can the notice prescribed by s 64(1)(b) be served. This additional requirement applies only to disputes involving refusals to bargain.'

<sup>3</sup>(1991) 12 ILJ 1048 (IC) at 1056H-J.

<sup>4</sup>(2000) 21 ILJ 519 (LAC) at para 120.

seen, a SACCAWU official was on the scene that very morning, and although his testimony was that the strikers had already been dismissed when he arrived, that evidence, as I shall presently show, falls to be rejected. There is little, then, that can be said in favour of exercising discretion in favour of the appellants and I do not consider that they are, taking the above factors together, entitled to this court's assistance.'

See also *North West Star (Pty) Ltd (Under Judicial Management) v Serobatse and Another*,<sup>5</sup> where it was held:

---

<sup>5</sup>(2005) 26 ILJ 56 (LAC). See also: *Mbashe Local Municipality and Others v Nyubuse* (2008) 29 ILJ 2147 (E) where the Court held that, although it is not an absolute rule, the Court may refuse to hear a party until such party has purged itself of its contempt of an earlier court order:

'[19] The general rule that orders of court must be obeyed is a long standing one and its rationale self evident. In *Di Bona* Rose Innes J articulated the position thus:

"It is a strong thing for a Court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a Court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing a compliance. Applying this principle I am of the opinion that the fact that a party to a cause has disobeyed an order of Court is not itself a bar to his being heard, but if his disobedience is such that so long as it continues it impedes the course of justice in the cause by making it more difficult for the Court to ascertain the truth or to enforce the orders which it may make then the Court may, in its discretion, refuse to hear him until the impediment is removed or good cause shown why it should not be removed."

The learned judge emphasized however, with reference to the judgments of Romer LJ and Denning LJ in *Hadkinson* that the rule that a person in contempt will not be heard is not an absolute one. In *Hadkinson* Romer LJ referred with approval to the judgments of Vaughan Williams LJ and Cozens-Hardy LJ in *Gordon* where the learned judges expressed themselves as follows:

"Taking it generally it has not been disputed in the discussion before us that this rule, that a person who is in contempt cannot be heard, prima facie applies to voluntary applications on his part - when he comes and asks for something, and not to cases in which all that he is seeking is to be heard in respect of matters of defence. I do not for one moment suggest that every matter of defence entitles a person in contempt to be heard; for instance, if an order has been made in the exercise of the discretion of the court, and someone who is oppressed, or thinks himself oppressed, by that order appeals, saying that the court has exercised its discretion wrongly, that person if he is in contempt cannot be heard to say anything of the kind until he has purged his contempt."

Cozen-Hardy LJ, in concurring said (reference omitted):

"... I desire expressly to limit my judgment to a case in which the [party in contempt] is saying that the order complained of is outside the jurisdiction of the court, as distinguished from the case of an order

'[18] The respondents' failure first to obtain the leave of the High Court before they could refer the dismissal dispute to the CCMA and before they could bring the application to make the award an order of court did not invalidate the award or the order and was no valid reason for the appellant not to comply with the order. Upholding the submission made by counsel for the appellant would make a mockery of the Constitution and the rule of law that forms part of the foundations of our constitutional democracy. It would be a licence for people to disregard orders of courts simply because they do not agree with the court that such orders should have been issued. A society that would allow such would in no time be a society of chaos and lawlessness. To do so would sow in society a culture in terms of which people felt free to obey only those court orders with which they agreed or to obey only those laws which they like and to disregard those laws they do not like. I have no doubt in my mind that such a principle has no place in our legal system. The correct principle is that, if a court has issued an order against you and you are unhappy with it, you must take that decision to a court higher than the one that issued such order and which has competent appellate or review jurisdiction and seek to have such order set aside. If there is no such court, for example, where there is no appeal or review available against that court or against such order or if the court which issued the order is the court of final jurisdiction in such matters or is the highest court in the land, then you have no choice but must simply comply with the order. A person cannot say: **"I don't like this court order; it is wrong; therefore I will not comply with it."** If we want to deepen our democracy, promote the rule of law, discourage self-help and encourage those who have disputes to take them to the courts of the land and not to seek to resolve them through physical fights or violence, the whole society must frown upon anyone who disobeys an order of court or who, either by word or deed, encourages or incites another or others to disobey an order of court.'

---

which, although it is within the jurisdiction of the court, ought not, it is said, to have been made."

[22] It is, in my view, clear from the foregoing that where an employer obtains an interdict and strikers (who are on an unprotected strike) simply ignore it, the Labour Court will be less sympathetic to come to their assistance once they have been dismissed. It is unfortunate that dismissed employees often turn for assistance to the very court they have defied through their conduct. In this regard, I am particularly in agreement with the sentiments expressed by the Labour Appeal Court in *Modise*<sup>6</sup> to the effect that obedience to a Court Order is foundational to a State based on the Rule of Law.

[23] The onus to establish that a failure to comply with a Court Order was neither wilful nor *mala fide* lies with those who have failed to comply with such order. The applicants in this matter placed no evidence whatsoever before this Court to explain why they failed to adhere to the court order. They therefore failed to establish that their failure to comply with the court order was neither wilful nor *mala fide*.<sup>7</sup> There is also no proper explanation before this Court as to why NUM when it received the court order did not intervene and attempt to put an end to the unprotected strike.<sup>8</sup> I am satisfied on the evidence that the court order was not only properly served on NUM but also on the individual applicants.

---

<sup>6</sup>*Supra*

<sup>7</sup>*National Union of Mineworkers and Others v H and S Oprigters GK and Another* (2010) 31 ILJ 2970 (LC) at para 6: 'In terms of the decision of the Supreme Court of Appeal in *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), once it is established that a court order exists, which has been served on the alleged contemtor, and it has not been complied with, then an evidentiary burden, but not an overall evidentiary onus, falls on the accused to establish a reasonable doubt that the failure to comply was neither wilful nor *mala fide*. Given that the first three elements had been met in *casu*, only the last two issues need to be addressed.'

<sup>8</sup>*Mangaung Local Municipality v SA Municipal Workers Union* (2003) 24 ILJ 405 (LC) at para 46-48:

[46] The respondent was made aware of the strike on 15 January 2002 and was specifically requested to get the striking employees to return to work. In its response in the letter dated 16 January, the respondent did not dispute the fact that its members were taking part in an unprotected strike, nor did it claim that it was not obliged to take steps to bring the strike to an end. It merely stated that it could not respond earlier and that its shop stewards were available for a meeting. The respondent itself did not send a union official to speak to the striking employees. It was content to leave the resolution of the strike to the shop stewards. It did not send a union official to attend the meeting of 16 January. It did not give the undertaking sought by the applicant that it would take steps to end the strike or advise its members to end the strike. The strike only came to an end after the applicant obtained an interdict from this court.

[47] I am of the view that where a trade union has a collective bargaining relationship with an employer, and its members embark on unprotected strike union and the trade union becomes aware of such unprotected strike and is

- [24] It is further clear from the evidence that the individual applicants were afforded an adequate and reasonable opportunity to return to work. They have, however, failed to do so. In these circumstances (also taking into account the applicants' wilful disregard of a court order), I am of the view that it would not be unfair to impose a sanction of dismissal for participation in an unprotected strike.
- [25] Counsel on behalf of the applicants conceded that the dismissal was procedurally fair. Although the procedural fairness of the dismissal was not placed in dispute, I should point out that the failure to hold disciplinary hearings will not necessarily result in an unfair dismissal in circumstances where the employer had engaged the employees and their Union and gave them a fair opportunity to make representations as to why they should not be dismissed.<sup>9</sup>
- [26] Furthermore, it is common cause that the applicants have waived their right to appeal even after they have been advised of their right to appeal.
- [27] I have also considered the submission that the strike was not of a long duration. I am in agreement with the respondent that the fact that the strike only lasted for one day is not necessarily determinative and that

---

requested to intervene but fails to do so without just cause, such trade union is liable in terms of s 68(1)(b) of the Act to compensate the employer who suffers losses due to such an unprotected strike. Similarly, if a trade union elects to delegate the responsibility to resolve the strike to its shop stewards employed by the employer facing an unprotected strike, and such shop stewards fail to discharge the same obligation that the trade union has, the trade union is also liable to compensate the employer for any losses that it has suffered as a result of such strike. The obligation arises because the trade union, as a party to a collective bargaining relationship with the employer, has a duty to ensure that its members comply with the provisions of the Act in relation to such an employer when they seek to exercise their collective power by way of strike action.

- [48] In arriving at the above conclusion, I have also had regard, for comparative purposes, to the provisions of item 6 of schedule 8, relating to the dismissal of employees engaged in an unprotected strike. The guidelines there provide for the employer to solicit the assistance of a trade union official to discuss the course of action that the employer intends to adopt, clearly, with a view that the union official should intervene and prevent dismissals, if that is what the employer contemplates doing, by securing a return to work by the striking employees. This guideline indicates that a trade union shoulders some responsibility with regard to participation by its members in an unprotected strike. This responsibility extends to liability to compensate an employer where the trade union fails to discharge its duty of intervening during unprotected strikes by at least attempting to secure a return to work by its members.'

<sup>9</sup>*SACTWU and Others v Yartex (Pty) Ltd t/a Bertrand Group* (2010) 31 ILJ 2986 (LC).

the length of the strike is only but one of the factors to be considered in deciding whether it was fair to dismiss.<sup>10</sup> What the Court cannot disregard is the fact that the applicants have blatantly disregarded a Court Order. What the Court also cannot disregard is the fact that after the applicants had received the papers in the interdict application detailing the reasons why the strike will be unprotected, the applicants nonetheless continued with their strike action. In addition hereto, the applicants, during the first day of the strike, received various documents advising them that their strike is unprotected and advising them to return to work. These documents were handed to the applicants and read out to them and copies were left on the ground for them to read: At 8H00 a written instruction was handed to the individual applicants to return to work. The same instruction was also delivered to NUM at approximately 10h44. NUM was also advised that the respondent had obtained an Interdict against the strike. NUM received this letter at 12h29. NUM was also invited to make representations to the respondent before 14h00. The court order and an ultimatum were also handed to NUM at approximately 14h00. The ultimatum and the court order were served on the individual members at approximately 14h30. No evidence was placed before this Court as no individual member testified to this effect to refute the evidence that the individual members had received these documents. Du Plooy's evidence in this regard was that he explained the content of the ultimatum to the individual members. Not one of the individual applicants came forward to testify that they did not understand the

---

<sup>10</sup>*National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd* (1997) 18 ILJ 439 (SCA). (headnote) 'The court reaffirmed the decision in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others* 1996 (4) SA 577 (A); (1996) 17 ILJ 455 (A) that a striking employee may not be dismissed merely for striking, for otherwise the right to strike would have no content and collective bargaining as an instrument of industrial peace would be largely undermined. Even when parties negotiate in good faith and their conduct cannot be faulted, there comes a time when the process of negotiation and powerplay, which is the essence of strike action, must be acknowledged as having failed to resolve the negotiating impasse between the two sides. The delivery of an ultimatum and, in the absence of compliance, termination of the employer-employee relationship will then be justified. Whether this stage has been reached or not depends on a consideration of the facts of the particular case with the ultimate determinant being fairness to both the employer and the employee. The inquiry is not whether one or other course may have been more successful in resolving the dispute or whether the employer could have endured the strike for longer, the inquiry is whether in all the circumstances, including the duration of the strike and the extent of the measures actually taken by the parties to resolve the dispute, the dismissal can be said to have been unfair.' (Quoted from the headnote.)

content of the ultimatum. The final ultimatum was read and explained to the individual applicants at approximately 15H30. It was explained to them that they have failed to make use of the opportunities presented to them and to make representations regarding their possible dismissal. The final ultimatum afforded the individual members a further and final opportunity to return to work the following day. They were also informed that no further ultimatum would be issued to them. Still they refused to return to work.

- [28] I am, therefore, in agreement with the submissions on behalf of the respondent that there is no evidence whatsoever before the Court to support the claim that the individual applicants held the *bona fide* belief that the strike was protected. Furthermore, the evidence on behalf of the respondent strongly supports the probabilities that the individual applicants knew that the strike was unprotected. Furthermore, there is no evidence before the Court to suggest that NUM tried to diffuse the situation. Mnisi himself made no effort to approach the respondent to explain the belief that the strike was protected. Furthermore, Du Plooy's evidence was clear on this point namely that he had consistently advised the individual applicants that the strike was unprotected and that they had to return to work. There is no evidence before the Court that they did not understand Du Plooy nor that they did not believe him. I am, lastly, also in agreement with the submission that an adverse inference should be drawn from the conduct of the individual applicants who were present in Court during the trial but failed to testify and explain to the Court exactly what they believed or did not at the time of the strike.
- [29] I should also point out that it emerged for the first time at the trial that Mnisi was allegedly present at the respondent's premises between 15H00 and 17h00. If that was so, surely it is then probable that Mnisi also received the two ultimatums and the court order all of which were issued to the individual members during this time (except for the first ultimatum that was served a bit earlier). On the probabilities, I am also prepared to accept that the members would, in any event, have shown these documents to Mnisi.

- [30] Lastly, I have already pointed out that Mnisi was a particularly obstructive and evasive witness and that the Court has difficulty attaching any credibility whatsoever to his evidence. His evidence, furthermore, constantly changed and the impression was that he changed his version every time he was unable to answer or explain a question. Furthermore, his one version, namely that he (Mnisi) was at the premises of the respondent during the time of the strike, is not even incorporated in the applicants' statement of claim. This is a critical fact (if it was true) and it is highly improbable that this version would not have been incorporated in the statement of claim. A number of Mnisi's contentions were also not put to witnesses of the respondent such as, for example, the fact that the individual applicants were physically locked out of the premises behind a locked gate and that Du Plooy had refused to permit Mnisi to enter the respondent's premises.
- [31] It is also of concern to this Court that NUM (and more particularly Mnisi) was so inactive during the strike and that nothing was done to protect the individual applicants. None of NUM's officials, including Mnisi, communicated with the respondent until after the dismissal. I am of the view that, at the very least, NUM and more in particular Mnisi should bear some of the blame for the ultimate dismissal of the individual applicants. Why did NUM and Mnisi not communicate with the respondent during the strike? Also, why did Mnisi not approach the respondent on the day of the strike in an attempt to clarify the legal status of the strike. Also, Mnisi made no attempt to explain to the Court what he had discussed with the individual applicants when he (allegedly) was at the premises during the strike. At no stage did Mnisi tell the Court that he had advised the members to comply with the ultimatum and the court order and return to work. He was also particularly evasive about having received the court order. Lastly, it is common cause that the individual applicants did not exhaust their internal remedies and appeal against their dismissal.

[32] I am, therefore, satisfied that the dismissal of the individual applicants was substantively (and procedurally) fair.<sup>11</sup> The individual applicants were engaged in an unprotected strike and steadfastly refused to return to work. They flagrantly disregarded a court order. They steadfastly ignored ultimatums and refused to co-operate and make representations before a decision was taken by the respondent to dismiss them. The conduct of the applicants was not functional to collective bargaining and there is nothing before this Court to persuade me that they were justified in continuing with their strike after the Court interdict was issued. I must also point out that I am not persuaded by the submission on behalf of the applicants that there were attempts to comply with the LRA and that the strike was functional to collective bargaining. After the issuing of the court order, there could not have been any doubt in the minds of the individual applicants and NUM that the strike was unprotected. Moreover, as already stated, not one single individual applicant testified and told the Court that they were under the *bona fide* belief that the strike was protected. I am also not persuaded that any attempts were made to comply with the LRA. As already pointed out, at the time when the court order was served on the individual applicants and NUM, they ought to have ceased their illegal action. In the stead, they continued.

[33] In respect of costs, I am satisfied that this is one of those instances where considerations of fairness should not interfere with a decision to

---

<sup>11</sup>The Code of Good Practice provides as follows in item 6:

- (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 the Act;
  - (b) attempts made to comply with the 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."

order the applicants to pay the costs of these proceedings. I, however, order that NUM to pay the costs.

[34] In the event, the following order is made.

32.1 The dismissal of the applicants was substantively and procedurally fair.

32.2 The claim is dismissed

32.3 The National Union of Mineworkers is ordered to pay the costs.

---

AC BASSON, J

Judge of the Labour Court

APPEARANCES:

For the Applicant: Advocate C Orr

Instructed by: Cheadle Thompson and Haysom Attorneys

For the Respondent: D van der Westhuizen

Instructed by: Kramer and Wesemann

LABOUR COURT