REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 742/10

In the matter between:

MODIBEDI AND 205 OTHERS **Applicants**

And

MEDUPI FABRICATION (PTY) LTD **Respondent**

Heard: **26, 27, 28, 29, 30 August 2013;**

2 and 3 September 2013

Delivered on: 6 May 2014

Summary: Employees embarking on unprotected industrial action in pursuance of unreasonable demands:- Dismissal fair where employees ignored final written warnings, undertakings to desist from such conduct, letters of caution, internal policies relating to 'peace obligation', and the general provisions of the LRA.

Substantive fairness: Dismissal substantively fair where employees fail to demonstrate provocation on the part of the employer. Also fair where the employer has demonstrated that employees had a propensity to embark on such unlawful action on the spur of the moment.

Mitigating circumstances: Cannot be pleaded in a vacuum where employees have waived right to be heard. A waiver of such a right extends to right to plead in mitigation

Procedural fairness: Ultimatum; Sufficiency thereof.

Dismissal procedurally fair where employees waive rights to present their case and walk out of disciplinary hearing, or where employees refuse to participate in a pre-dismissal arbitration process as per internal dispute resolution procedures.

JUDGMENT

TLHOTLHALEMAJE AJ

Introduction:

[1] The applicants were dismissed by the respondent on 30 March 2010 following upon their participation in an unprotected industrial action. Following the non-resolution of the dispute at the Metal and Engineering Industries Bargaining Council, the applicants approached the court to challenge the substantive and procedural fairness of their dismissal. They sought retrospective reinstatement, or in the alternative, compensation equivalent to 12 months remuneration in the event that it is found that their dismissal was unfair.

The Medupi project:

[2] Medupi Power Station is a green-field coal-fired power plant project built by Eskom, and is located west of Lephalale in the Limpopo Province. The project began in August 2007, and according to the power utility, Eskom, the power station will be the fourth largest coal plant in the southern hemisphere, and will be the biggest dry-cooled power station in the world. The new power station will comprise of six units with a gross nominal capacity of 800MW each, resulting in a total capacity of 4 800 MW.

[3] When construction activities commenced in 2007, Eskom envisaged that Medupi would join its national grid in July 2012, and that the first of the six units of the power plant would produce the first power by the end of 2014. It is apparent that the completion of this project is crucial for the long term ability of Eskom to continue to supply power to consumers, as it would ease pressure on existing power stations and prevent blackouts, such as those recently experienced. The applicants, as attested to by one of them, Mr. Zwelakhe Nkosi ("Nkosi"), understood the significance of this project. In Nkosi's words, it was their dream to get the project completed, and all the employees involved in the project understood the implications of any form of disruptions that may have occurred during construction.

The role players in the project:

[4] As per the testimony of the respondent's former Financial Director, Mr. Siven Maistry (Maistry), the respondent is a partly owned subsidiary of Energy Fabrications (Pty) Ltd ("EF"), which is wholly owned by Murray and Roberts Projects (Pty) Ltd

("MRP"). EF holds 49% and Elgin Engineering held 51% in the respondent. The respondent provided labour whilst EF was responsible for material management. MRP had concluded a sub-contract with Hitatchi Power Africa (Pty) Ltd ("HPA") to fabricate and install the ducting which forms part of the boiler system during construction of the power station. EF concluded a sub-contract with MRP to build the components for the ducting, and EF in turn sub-contracted the labour to the respondent.

[5] HPA is one of the three main contractors to Eskom. It is responsible for the construction of the mechanical works, including boilers. The second main contractor is Medupi Power Station Joint Venture, which is responsible for the civil works. The third main contractor is Alstom, which is responsible for the Turbine and electrical works.

[6] In terms of the contract between the respondent and EF, the respondent was only entitled to payment for the work it performed upon the production of ducting components, based on tonnages produced. The scope of the project required that 32 000 tonnes of ducting components be produced at a rate of 800 tonnes per month over 40 months. To break even the respondent had to produce 680 to 700 tonnes per month.

[7] The respondent only had the capacity to produce 800 tonnes per month. If it missed a production target in any one particular month, then the period of 40 months within which it had planned to complete the work would have to be extended. The consequences thereof was an increase in its fixed costs and payment in respect of only what was produced, regardless of how long it took it to produce, and the associated expenses it took to complete the project. To this end lost production could not be afforded as it meant if monthly targets were not achieved the respondent could incur losses which it could not make up. Maistry further testified that the respondent did not achieve its monthly targets as a result of a variety of factors and was desperate to increase productivity. It had only achieved its targets in mid 2010 following the dismissal of the applicants.

The Project Labour Agreement:

[8] Given the importance of the project, and in an endeavour to avoid any delays or disruptions in its completion, all the employer organisations alligned to the project and representatives of recognized unions concluded a Project Labour Agreement (The 'PLA"), which was binding on all employers and employees engaged on site. The rationale behind the PLA was to maintain labour peace during the construction of the project and to ensure consistency on site by subjecting all employees under the different contractors to common terms and conditions of employment, rules and policies. Consistency was paramount in that if one part of the contract stalled as a consequence of a labour dispute, this had a knock-on effect on other contracts, which invariably caused disruptions and delays for the entire project.

[9] The PLA formed part of the terms and conditions of employment of all employees. In terms of its provisions, all employees employed on the project had to go through an induction process which focussed on the important aspects of the PLA including the site of construction, health and safety, grievance and discipline, and industrial relations policies and procedures. It contained detailed grievance procedures which were intended to channel grievances for speedy resolution. Discipline was the responsibility of contractors and had to be dealt with expeditiously in terms of the standardized procedures found in Annexure A of the PLA. The PLA also imposed a peace obligation on the parties.

[10] Clause 4.6.3 of the PLA provided that strike action in pursuit of matters of mutual interest already regulated by the PLA was prohibited. As an incentive to avoid any form of industrial action or absenteeism amongst employees, the PLA provided for a project bonus equal to 10 hours' wages for each completed month worked on the project, provided *inter alia,* the employees did not participate in an unprotected strike or refused to work overtime.

The applicants:

[11] The respondent operated fabrication on site. Its facility consists of three fabrication bays where core material was prepared, sandblasted and then cut into required components which were then packed and distributed to bays where the artisans would weld them together. The vast majority of the applicants were employed as artisans (welders, boilermakers, machine operators and riggers). They fell under the category

of core employees and commenced employment at varying times during 2009. They were employed in terms of project and task specific limited duration contracts. Their shift patterns included overtime which was not voluntary. In a normal week, they were required to work a 54 hours, of which 14 constituted overtime. At month end, they worked a shortened 33⅓ hour week. They were provided with single status accommodation in park homes some 17 kilometres away from site, and also with meals three times a day. Two meals were prepared and served at their accommodation site whilst the third was a daily lunch pack provided on the construction site.

The induction:

[12] The respondent's contention was that all employees had attended the compulsory induction programmes which dealt with elements of the PLA including its matters pertaining to industrial relations, peace agreement and dispute resolution procedures. Ms. Shevaughn Guilbride (Guildbride), the respondent's and Murray & Roberts Project/Corporate Manager had testified that every employee undertook mandatory induction which covered issues such as the general construction on site, medical, health and safety, and the terms and conditions of employment as contained in the PLA. She was personally involved in the inductions over time which also dealt with overall conditions of employment, bonuses, and obligations on employers and employees. The induction was in two parts as new recruits arrived. The first part allowed an employee access to the construction site, whilst the second part was contractor site specific.

[13] Guilbride denied under cross-examination when it was put to her that the induction only pertained to health and safety and environment. She insisted that the induction also covered the PLA, and copies in this regard were given to employees during their induction.

[14] The applicants however through the evidence of Nkosi denied that the employees undertook induction in respect of the PLA. His testimony was that the induction he had attended pertained to health, safety and environment. He denied ever having seen a copy of the PLA before as it was not part of the induction programme. He and other employee representatives had only received a copy of the PLA in 2010.

Events preceding the dismissals:

The incident of 17 October 2009.

[15] On 15 October 2009, the respondent called a meeting with the representatives of recognized unions to discuss the need to employ a limited number of expatriate artisans in order to boost production. The employees were assured that these moves would not in any way jeopardise their employment opportunities. On 17 October 2009 the majority of the applicants who were unhappy with these developments refused to commence the day shift, and insisted on being addressed by management. The work stoppage took place for one hour. After the employees went back to work, they were issued with final written warnings. Other than this sanction, the respondent deducted a pro-rata portion of the applicants' bonus and also one hour's pay from their salaries.

[16] Nkosi confirmed that two meetings were held with management before 17 October 2009 with regard to this issue. He and another employee representative, Mr. Eric Kganaga reported to the employees what management's intention was, and the employees were unhappy because they were of the view that this could lead to job losses. Management was given a report back on the employees' attitude towards its intentions, and nevertheless indicated that it would go ahead and employ the expatriates. When Nkosi and Kganaga gave the employees feedback, they demanded that management should address them on the issue in the morning of 17 October 2009.

[17] According to Nkosi, in the morning of 17 Octobr 2009 the employees met Mr. Frank Erasmus, the applicants' supervisor at the entrance to the site. They told him that they wanted to have a meeting with him. Erasmus' response was that he could only meet with the representatives. At some point, Erasmus then agreed to meet with all the employees at a designated venue. He again explained to them the need to employ the expatriates and also reassured them that their jobs were not in danger. Whilst the meeting was in progress, Mr. Buster McDonald, the respondent's director arrived and expressed his unhappiness about employees not being at their workstations. The employees explained to McDonald the reason they were not at their work stations. McDonald again explained to them the reason the expatriates were to be employed.

Nkosi's contention was that upon this explanation, the employees then resumed their duties.

[18] Nkosi denied that employees were issued with final written warnings for being off their workstation for under two hours on 17 October 20109. He further denied that there were any deductions made to employees' salaries as a result of the incident. He attributed the whole incident to a misunderstanding, and further denied that the employees embarked on a work stoppage on that day. He could not however dispute it when it was put to him that employees had refused to sign acknowledgement of the written final warnings after this incident, and not that these warnings were not issued at all.

[19] Mr. Modibedi Beleng also testified on behalf of the applicants and stated that he had not seen a copy of the final written warning before until these proceedings, and was surprised as he was never issued with one. Under cross-examination however, Beleng confirmed that he had heard about deductions that were made to employees' salaries.

[20] Mr. Raymond Phillips also testified on behalf of the applicants and confirmed that he was issued with a copy of the final written warning. He had however refused to sign acknowledgement of it. He further confirmed that there were many other employees who were called to an office where the final written warnings were issued. He also confirmed that he and other employees were told that their project bonus would be affected. He conceded that he was not the only one that received the final written warning.

The incident of 7 - 8 January 2010 and the Peace undertaking:

[21] In December 2009, the respondent instituted disciplinary proceedings against one of the employees, Mr. Mokoena, following allegations of misconduct against him. According to Guilbride, Mokoena had failed to attend a disciplinary enquiry scheduled, and had instead taken his annual leave from 15 December 2009 to 2 January 2010. The Guilbride had testified that as they were unable to contact Mokoena from his home in Kwazulu Natal whilst he was on leave, he saved the trip of travelling back to Limpopo by dismissing him via SMS in the light of his failure to attend the disciplinary enquiry and also in view of the serious allegations against him. This did not go down well with Mokoena's co-workers and they embarked on an

illegal strike on 7 and 8 January 2010, which was also precipitated by other grievances.

[22] Nkosi confirmed the incident and further testified that other than the dismissal of Mokoena, another employee, Mr. Dlamini, was also unfairly suspended whilst two others were issued with unfair warnings. As a result of these disciplinary measures against their co-workers and other concerns pertaining to catering, the employees had lodged a grievance, and when there was no agreement with management on how to resolve those issues, the employees embarked on a work stoppage. The employees according to Nkosi, demanded that management must 'remove' those disciplinary measures against their co-workers.

[23] The strike ended after the NUMSA Regional Official intervened and implored the employees to go back to work. At the time, the applicants were members of NUMSA. After this incident, NUMSA no longer represented the applicants and another union, BCAWU came on board as their representative. Guilbride testified that the employees were unhappy with the NUMSA official who had told them to go back to work failing which if they were to be disciplined, NUMSA would not defend them.

[24] The employees resumed their duties with effect from 11 January 2010 but only after management had insisted that they should sign a peace undertaking. After they resumed their duties, management also furnished the employee representatives with copies of the PLA. In terms of this 'full and final settlement agreement'[1] which was signed by individual employees;

i. They agreed to return to work on 11 January 2010 at 07h00;
ii. They confirmed that the contents of the PLA was known, understood and fully accepted.
iii. They confirmed that they would adhere to the PLA agreement for all future grievances and any deviation "to the procedure" could lead to dismissal.
iv. They committed to conduct themselves in accordance with the code of conduct as defined in the PLA 'Employees Undertaking'.

[1] As contained on p291 of the respondent's bundle

v. They had acknowledged that their services could legally be terminated should they participate in any form of work stoppage, sit down or unprotected strike during the duration of the project.

vi. They understood that the employer would not accept circumstances where the employees do not follow procedures and engage in breaches of their conditions of employment, PLA and the Labour Relations Act.

The disputes surrounding catering:

[25] Amongst the grievances raised by the employees that led to the work stoppage of 7 and 8 January 2010 was the issue of catering. Although this issue was seen by the applicants as crucial, it was curiously listed under "General Grievances" handed to management during that work stoppage. During the meeting held on 11 January 2010, the employees also complained about the standard and quality of food supplied by the contracted caterer, IPS. Amongst the complaints raised was that the cooks appeared not to be trained, meat was served burnt and rotten on occasion.

[26] Nkosi testified to the effect that the issue of catering was ongoing and was initially discussed in weekly meetings held with the respondent's Ronny Hockly, who had handled Human Resources and Industrial Relations matters. Nkosi further testified that when they initially joined the respondent they were given food that they were not used to and were at times served chicken thighs which were 'unusually large'. The menu was changed and for some time they were fed food they were familiar with. However, as the number of employees increased overtime, the standard of food deteriorated, and they were given rotten food and drinks which had passed their expiry dates. This problem was further discussed with management after the signing of peace undertakings, and was nevertheless not resolved.

[27] Maistry confirmed that at the meeting held on 11 January 2010 in order to resolve the work stoppage, other grievances pertaining to catering were also discussed. He and Erasumus had attended that meeting and were tasked by the respondent with dealing with the issue of catering by engaging with IPS which provided catering for the whole site. According to Maistry, a meeting was arranged to be held later in the evening of

11 January 2010 where IPS was invited. The employee representatives, despite having agreed to attend the meeting had failed to do so in the evening.

[28] One of the employees, Beleng, informed Maistry that they were too tired to attend that meeting as they had attended the previous meeting during the course of the day to resolve the work stoppage. Nevertheless, the meeting between management and IPS went ahead without the employees, and was followed by an inspection of the catering facilities. According to Maistry, although the employees had complained about not being served name brand food, and also about the state of the facilities where food was kept, he and Erasmus had discovered that there was no truth in the allegations, and that IPS was providing name brand food.

[29] On 3 February 2010 the employees' representatives showed management a sample of raw meat that was served by IPS, and which they had also alleged was rotten. Erasmus had immediately confronted IPS, and the latter had agreed that poor quality meat could have been supplied by the contracted supplier, which IPS advised it was to be replaced with another supplier. However from 3 to 5 February 2012, the employees, and mainly artisans, had refused to consume lunch packs provided by IPS. The respondent had in the light of the boycott, taken the meals to local communities. In response, the artisans had on 5 February 2010 accepted their lunch packs, but had discarded it into rubbish bins in support of their food boycott.

[30] Both Maistry and Giulbride testified that management personnel including themselves had consumed food prepared by IPS and had found nothing wrong with it. Although most of the artisans had boycotted the lunch packs, they had still continued to consume their breakfast and dinner meals as prepared by IPS. On 5 February 2010, a meeting was held with the employee representatives, with an official from BCAWU, Mr. Masuku in attendance. The employees had *inter alia*, demanded that the contract with IPS be terminated, and that the Camp Manager, Mr. Thompson, be suspended.

[31] The contract with IPS also involved the provision of cleaning services by a number of female employees, and according to Maistry, when the employee representatives were informed that the termination of the IPS contract would affect the employment of the female employees who also provided a service in the kitchen, their response was that they would clean their own accommodation.

[32] The contract with IPS was then suspended on 5 February 2010. The respondent then secured the services of a local, Catering Dave, which was not equipped to cater for large groups. As the arrangement with Catering Dave was obtained at short notice, members of management had to drive to Lephalale to buy and distribute food to employees over the weekend of 6 and 7 February 2010. Since the employees could also not clean their own accommodation, an arrangement was also made with IPS to continue to provide cleaning services.

[33] The respondent had continued to look for a suitable service provider, and had on 10 February 2010, received a proposal from a Cape Town caterer, C3 Food Services. This company had made a presentation to a joint sitting of employees and management. Amongst other things agreed to during the discussion of the C3 presentation was the formation of a "Camp Committee" which was to deal with issues surrounding catering in the camp. C3 was ultimately appointed on 28 February 2010, after Catering Dave had indicated that it was unable to provide further services. In the interim, another caterer, Hainshaven Wildsplaas was also brought in to assist.

[34] A camp committee elected by the employees met with management and C3 representatives to discuss the menus, and the committee had agreed to give C3 a trial for three weeks. On 4 March 2010, the employees complained that the breakfast served by C3 was inadequate. They had also presented management with a sample of the breakfast served. Management had agreed that the quantity was small, but that there was nothing wrong with the quality. To supplement the small rations of breakfast served in that morning, management had then arranged for pies to be bought and supplied to the employees at 10h00.

[35] As a result of this incident, and following upon meetings held with the employee representatives on 4 March 2010, a decision was taken to suspend the services of C3 for a week. In the same meeting, the employees had nevertheless demanded that the services of C3 should be terminated, and that management should buy groceries for the employees who would then co-ordinate their own cooking. Maistry denied that the suggestion of groceries was made by management. Notwithstanding management's concerns surrounding the logistics in regard to such arrangements, the employees had stuck to their demand, and threatened to work only forty hours a week if management did not comply.

[36] Maistry testified that this demand was unreasonable in that the only complaint raised with C3 was the quantity of food. Be that as it may be, the employees were informed that since the demand had financial implications, it was for the respondent's board of directors to make a final decision on the matter. The employees were also requested to compile a grocery list whilst the board considered the matter.

[37] Maistry had testified that IPS provided catering for the whole site and employees on other contracts. It was only the respondent's employees who had problems with IPS. Management had according to Guilbride, decided not to acceed to the proposals by the employees that management must buy them groceries. This was due to the reason that any such arrangements would be contrary to the provisions of the PLA which required that the respondent should provide its employees with meals. Furthermore, the accommodation site did not provide facilities for employees to prepare their own meals, and had this been allowed, it would have created logistical problems for the respondent.

[38] Management had then taken a decision to terminate the services of C3 and to reinstate the contract with IPS. A meeting was convened with the employees and Guilbride gave management feedback on 5 March 2010. The employees were not pleased with management's feedback, and their response was that they would only work forty hours per week with no overtime effective immediately. Management was also informed that employees would henceforth buy and prepare their own food. The employees stopped working on that day at 15h30 and clocked out. On the Saturday of 6 March 2010 the employees failed to report for the 07h00 to 14h00 shift. Nkosi's contention was that this was due to the reason that employees had to go to the shops to buy their own groceries and food as the shops closed early. He gave the same explanation in respect of the events of 8 and 9 March 2010 when the employees left work at 15h30 instead at the normal time of 17h30.

[39] Another meeting was held with employees on 8 March 2010 which was also attended by the respondent's Managing Director, Mr. Simon Mordecai-Jones. The employees insisted on being granted grocery vouchers in the amount of between R1000.00 and R2000.00 per week. Masuku of BCAWU had then requested to have a caucus with the employees and when they reconvened with management, ten 'non-negotiable' demands were made. These were;

i. "Bring back C3 as Service provider for provision of meals immediately.

ii. A full time monitoring of kitchen at C3 kitchens on a rotation basis (members from camp committee to monitor quality and quantity).

iii. Breakfast to be prepared in the park homes by the ladies appointed to clean and cook in the park homes.

iv. Communication between camp committee, C3 and management to continue on an ongoing basis.

v. Any delays to be communicated to camp committee in advance.

vi. C3 to stick to Menus and any changes to menu to be agreed to by camp committee before changes are implemented

vii. All food to be brand names.

viii. Energy supplements to be provided on a regular basis.

ix. Working hours for artisans to change from 15h30 (8 hours shift) and local to 17h00 (9.5 hour shift).

x. The letter of confirmation by the Managing Director of the Respondent clearly outlining that should C3 default in any aspect of quality and quantity that meal vouchers in the form of monetary vouchers be provided by the company".

[40] Management acceded to eight of the ten demands. It could not however agree on the changing of working hours, nor give an undertaking that if C3 defaulted, employees would be issued with meal vouchers. Its contention was that acceding to the two demands would have been in conflict with the provisions of the PLA. Furthermore, complying with these two demands would have created logistical problems, which would have impacted on the whole site as targets would not have been met. When management refused to agree to these two demands, the employees had knocked off at 15h30 instead of 17h00 on 8 March 2010. They also refused to work the full shift on 9 and 10 March 2010.

The disciplinary proceedings:

[41] Following a meeting held by Medupi Execution Team (Consisting of M&R, Eskom and Hitachi) in regards the continuous work stoppage the respondent, on 10 March

2010, issued letters of caution to the employees. The letters (dated 9 March 2010) read as follows;

> *"**Letter of caution: Illegal industrial Action***
>
> *On the 8th of March and 9 March you unlawfully left the job by leaving the work premises at 15h30 which is in direct contravention of the Labour relations Act and the Project Labour Agreement and your contract of employment. This is an unlawful illegal action on your side*.(Sic)
>
> *You currently have a final written warning on file for illegal work stoppage you also have signed a peace agreement which states your full understanding of your action and the consequences should you repeat this action* (Sic)
>
> *You are cautioned that should you continue to take this action going forward with illegal industrial action; the Employer will engage its right to take immediate action. The consequences to yourself will be severe and will result in your dismissal*."(Sic)

[42] On 11 March 2010, the respondent had in view of the events of the past three days, not provided the employees with the usual transport from their accommodation site, and had instead issued them with letters of suspension. It had also on the same date issued notices to attend disciplinary enquiries to answer to the following allegations;

> *"You participated in an illegal work stoppage on Saturday 6 March 2010, Monday March 2010 and Tuesday 9 March 2010 and Wednesday 10 March 2010, in that you left the site at 15h30 on Monday. Tuesday and Wednesday and did not report for work on Saturday. You are in violation of your signed peace agreement, your employment contract, the Labour Relations Act and the Project Labour Agreement"*

[43] The respondent had also written letters to NUMSA, BCAWU and Solidarity informing them that disciplinary processes were to be invoked against the employees who had embarked on industrial action since 5 March 2010. Masuku, who had not been seen by management since 8 March 2010 appeared on the scene on 11 March 2010 and sought to give management assurances that the applicants would be

implored to go back to work. The respondent would however have none of it and informed him that the disciplinary enquiries would proceed as scheduled. The respondent had intended the enquiries to proceed on 15 and 16 March 2010, with different chairpersons dealing with a group of up to 15 employees at a time.

[44] On 12 March 2010, BCAWU had declared a dispute in terms of the provisions of the PLA by completing a Con-Arb referral form. It further proposed that the dispute be dealt with prior to the disciplinary enquiries being held. BCAWU was of the view that the employees had been provoked by being provided with *'rotten food'*. The respondent's response was that it was entitled to proceed with the disciplinary enquiries in terms of the provisions of the PLA, and that the resolution of the dispute as referred should run parallel with the disciplinary enquiry, and that the chairpersons of the enquiries will withhold their findings pending the determination of the dispute referred.

[45] The disciplinary enquires commenced as scheduled on 15 March 2010. Masuku represented the employees and requested a postponement. His view was that there should be one collective disciplinary enquiry to proceed on 16 March 2010. This request was granted. On 16 March 2010 however, Masuku did not make an appearance. He was according to Nkosi, replaced by another official, named Tony. The enquiry commenced with Maistry acting as the initiator. The employees raised certain objections at the commencement and during the disciplinary hearing. Some of the objections were valid according to Maistry, and were dealt with by the chairperson. Maistry's testimony was however that the employees were generally disruptive and noisy, and amidst these objections and disruptions, he had presented the respondent's case.

[46] After Maistry had presented the respondent's case, the applicants declined to present their case despite being afforded an opportunity to do so. They walked out of the process. Maistry had then urged the chairperson of the enquiry, Ms. Greyvenstein, to consider a dismissal of the employees. His reasoning was that there was now a breakdown of a relationship between the applicants and the respondent, and that the respondent had done everything it could to deal with issues and grievances raised the applicants. Greyvenstein had then closed the proceedings and did not immediately issued her outcome in view of the dispute referred.

The arbitration proceedings:

[47] The issue whether the applicants should have been subjected to a disciplinary enquiry or pre-dismissal arbitration was on 12 March 2010, referred by BCAWU to the Centre for Dispute Resolution of the MEIBC in terms of the PLA. The matter was heard under the auspices of TOKISO by Patrick Deale on 17 and 19 March 2010. The issues for determination were;

a) Disciplinary Enquiry: When is it appropriate for a disciplinary enquiry to be conducted in terms of the PLA?
b) Work Stoppage: Whether the employees' refusal to work between 15h30 and 17h00 on 5, 8, 9 & 10 March 2010 and between 07h00 and 14h00 0n 6 March 2010 constituted unprocedural work stoppages.
c) Provocation: Whether the employees' actions on the dates above were provoked by the company's conduct in serving rotten food to the employees concerned.

[48] In his carefully crafted and detailed award, Patrick Deale determined that firstly, disciplinary enquiries (Level 5 cases), which may result in a dismissal must be referred to an external disciplinary arbitration process as per Annexure A Clause 5.6.1[2]. In this regard, the pre-dismissal procedures in the PLA were to apply. Secondly, the employees' refusal to work between 15h00 and 17h00 on 5, 8, 9 & 10 March and between 07h00 and 14h00 on 6 March 2010 constituted unprocedural work stoppage. Thirdly, it was determined that the company's conduct did not provoke the employees' action on the dates in question.

The pre-dismissal arbitration and the dismissal of the applicants:

[49] Upon receipt of Patrick Deale's award the respondent requested a pre-dismissal arbitration on 24 March 2010. The matter was set-down for 26 March 2010 by TOKISO by way of notices issued on 25 March 2010. On 25 March 2010 Masuku of

[2] 5.6 Level Five- Formal Disciplinary Enquiry/Arbitration
5.6.1 If subsequent to issuing a written warning, the supervisor is still not satisfied with the performance or behavior of the employee, or the employee commits a further offence within the prescribed period of twelve months, or if an employee commits an offence which could render him/her liable for a possible dismissal, then the supervisor shall request a formal disciplinary /arbitration hearing or if the employee agrees to a pre-dismissal Arbitration

BCAWU, by way of e-mail to Guilbride, objected to the pre-dismissal arbitration proceedings, and indicated that they were still waiting for the outcome of the disciplinary hearing conducted on 16 March 2010.

[50] On 26 March 2010, the applicants and BCAWU failed to attend the pre-dismissal arbitration as scheduled. The appointed arbitrator, Mr. Ebrahim Patelia did not proceed in the absence of the applicants in view of the provision in clause 5.6.1 that there must be consent from the employees. Guilbride's contention was that since the employees had failed to subject themselves to the pre-dismissal process as per the Deale arbitration award, management was left with no option but to request Greyvenstein to issue the outcome of the disciplinary enquiry held on 16 March 2010. The outcome was released on 29 March 2010 and the chairperson had recommended the dismissal of the applicants. Management then informed the applicants of their dismissal on 30 March 2010.

Issues for determination:

[51] Amongst the issues agreed upon by the parties in the signed pre-trial minute is that the conduct of the applicants, i.e refusal to work the full shift on 5, 8, 9 and 10 March 2010, and to work at all on the Saturday of 6 March 2010 amounted to a strike which was unprotected. The issues for determination before the court are firstly, whether the dismissal of the applicants by the respondent was substantively unfair, and if so, the relief to which the applicants are entitled. Secondly, whether the dismissal of the applicants by the respondent was procedurally unfair, and if so, the relief to which the applicants are entitled. The applicants sought relief either in the form of retrospective reinstatement, or in the alternative, maximum compensation. The nature of the relief sought was raised as an issue of dispute on its own, but this shall be dealt with at a later stage when it is deemed appropriate to grant any form of relief.

<u>The legal framework and discussion:</u>

Substantive fairness of the dismissal:

[52] Employees who participate in an unprotected strike may be dismissed in terms of section 68(5) of the Labour Relations Act, which provides that;

> "Participation in a *strike* that does not comply with the provision 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."

[53] The fact that a strike is unprotected does not automatically call for a dismissal[3]. A dismissal should in all circumstances, be used as a sanction of the last resort[4]. There should therefore be a careful consideration of surrounding circumstances prior to dismissal, including those as contemplated in item 6(1) of the Code of Good Practice, which provides that;

> 'Participation in a strike that does not comply with the provisions of Chapter VI 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."

[54] Since participation in an unprotected strike ordinarily constitutes misconduct, there are other general provisions in Schedule 8 which should also be taken into account. These are those in item 3(4), which provides that;

> "Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable".

Item 3(5) which provide that;

> "When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself".

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[3] NUM obo Employees v CCMA [2012] 1 BLLR 22 (LAC)
[4] WG Doney (Pty) Ltd v National Union of Mineworkers (1999) 20 ILJ 2017 (SCA)

Item 3(6) which provide that;

> "The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same or other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration"

[55] In *NUMSA & others v CBI Electric African Cables*[5], the LAC recently confirmed that in determining the fairness of the dismissal effected on the ground of employees' participation in an illegal strike, the court should consider not only item 6 of the Code but also item 7[6]. In this regard, the LAC per Zondi AJA held that;

> "In my view the determination of substantive fairness of the strike-related dismissal must take place in two stages, first under item 6 when the strike related enquiry takes place and secondly, under item 7 when the nature of the rule which an employee is alleged to have contravened, is considered. It follows that a strike-related dismissal which passes muster under item 6 may nevertheless fail to pass substantive fairness requirements under item 7. This is so because the illegality of the strike is not *"a magic wand which when raised renders the dismissal of strikers fair"* (National Union of Mineworkers of SA v VRN Steel (1991) 12 ILJ 577 (LAC)). The employer still bears the onus to prove that the dismissal is fair"[7].

[56] In view of the common cause fact that the work stoppage was illegal, the first issue to dispose of is whether there is any merit in the applicant's contention that they did not know of the provisions and procedures set out in the PLA. Other than the provisions of section 64 of the Labour Relations Act, if the employees were aggrieved about some issue and intended on embarking on industrial action, the provisions of the PLA were also applicable. Clause 12.1 of the PLA made provision for "Peace Obligation", and parties were prohibited from sanctioning, promoting or participating in industrial

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[5] Case number: JA51/11 at para 27

[6] Guidelines in cases of dismissal for misconduct ;

"Any person who is determining whether dismissal for misconduct is unfair should consider –

(a) Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) If a rule or standard was contravened, whether or not –

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard."

[7] At para 29

action until procedures in the PLA were exhausted. Nkosi's had testified to the effect that he or any of the applicants were not aware of the provisions of the PLA until after the employees were made to sign peace agreements on 11 January 2010. He and Beleng were insistent that employees were only inducted on health and safety matters and nothing else.

[57] The PLA was negotiated between employers and recognised unions and was endorsed by Eskom. As per its executive summary, the PLA put in place, the structures, processes and procedures that needed to be followed by all parties on site in order to facilitate sound labour relations practices. It *inter alia*, established disciplinary and grievance procedures as well as for the review and negotiation of site specific terms and conditions defined in it. It established dispute resolution mechanisms and procedures for the resolution of all labour disputes that may arise on the project and also put in place rules relating to procedural and unprocedural strike action.

[58] Clause 8.2 of the PLA provided for induction programmes lasting up to one day to cover salient points such as a detailed outline and understanding of the industrial relations policies, standards, procedures and other important aspects of the agreement. Clause 8.2.4 provides that the Contractor shall be required to provide, at its own cost, a Contractor-specific induction program for each of its employees covering industrial relation, occupational health and safety, and environmental and site rules and regulations applicable to the area where the employees are working.

[59] In the light of the importance of the PLA, which the employees regarded as a 'holy book'[8], it is strange, if not improbable, that the respondent would during the induction of its employees, concentrate only on the health and safety, and environment, to the exclusion of all other things, and more pertinently, labour relations. Even if Nkosi's version that he only got a copy of the PLA on 11 January 2010 is to be believed, it is indeed improbable that he and all the other employees would not have known or heard of the PLA before then. They could not have regarded the PLA in the terms they had ascribed to it unless someone had informed them about it.

[8] A comment made by one of the shop stewards during the disciplinary enquiry held on 16 March 2010 that "PLA is our holy book" (sic) at p240 of the respondent's bundle.

[60] Nkosi further conceded that he had signed an annexure to his contract of employment, which in many instances made reference to the PLA, and in terms of which as per its clause 13, all employees had made certain undertakings including to channel all grievances through the correct procedures, and to comply with the PLA. Nkosi further conceded during cross-examination that employees were told to use relevant procedures if they had issues to raise with management. Taking all these factors into account, it is found that it is improbable that Nkosi and any applicants could not have known of the PLA and its provisions. The applicants had not only completely disregarded its provisions in embarking on the work stoppages, but also those of the Labour Relations Act. No attempt was made in this regard, notwithstanding the further undertakings made on 11 January 2010.

[61] The next issue to determine is whether the work stoppages were in response to any unjustified conduct on the part of the respondent. In this regard, it was argued on behalf of the applicants that they had demonstrated that the issue of the poor quality of meals had been there for some time since 2009, and that action was taken by the respondent only after the meal boycott in February and March 2010. Even if this was the case, to the extent that the employees had laid a grievance in this regard, and countless meetings were held to address the issue, this adds credence to the view that as the matter was on-going and under sustained discussions, this could not serve a provocation to the extent that the whole procedures designed to deal with such matters under the PLA could be completely ignored. To this end, there is no basis for a conclusion to be made that there was provocation that compelled the applicants to ignore the provisions of the PLA and embark on the path that they took.

[62] The crux of this matter is whether the question of food and the manner with which the respondent had responded to it constituted unjustified conduct on its part. In argument, Mr. Watt-Pringle advanced various points in support of the contention that in regard to the issue of food, the applicants had not raised a genuine dispute, nor did they genuinely seek resolution of the food issue. In this regard, it was argued that:

62.1 There was no credible evidence that the food supplied by IPS caused health problems or was indeed unacceptable on any reasonable basis. It was argued that the applicants had failed to explain the reason management and other artisans ate the food supplied by IPS without complaints.

62.2 Wild and unsubstantiated allegations of rotten food, sub-standard kitchens and employees getting food poisoning were not credible.

62.3 The applicants had failed to respond reasonably, or to give any credit to management for the extreme efforts to which management went in order to meet their demands. It was argued that instead, the applicants saw an opportunity to hold to ransom, a management team desperate to keep production going.

62.4 In pursuit of their own agenda to obtain cash or groceries instead of catered meals, the applicants continuously moved the goal posts so as to thwart any attempt by management to reach a lasting compromise.

62.5 The evidence of Maistry and Guilbride that the employment relationship and the relationship of trust between the applicants and the respondent had irretrievably broken down was not disputed, and that Nkosi had instead conceded that this was the case.

62.6 The failure of the applicants to offer any explanation for their conduct either at the disciplinary hearing or at the arbitration hearing.

62.7 The failure of the applicants in these proceedings to show any appreciation for their wrongdoing or express regret.

[63] Nkosi testified that the complaints surrounding food started to surface some time after their employment. At that point, the problem had nothing to do with the quality or quantity of the food, other than that they were given food they were not used to, including ‘unusually large chicken drumsticks’. Having complained, the menu was then changed to accommodate them, including being served with normal sized drumsticks.

[64] The quality of food according to Nkosi deteriorated when the number of employees on site increased in or around July 2009. Nkosi’s contention was that the employees were served rotten food and expired drinks. Notwithstanding the supposedly contentious nature of the food issue, it was again raised as part of the general concerns surrounding the work stoppage of 7 and 8 January 2010. In an endeavour to attend to

the problem, a meeting was arranged between management, employee representatives, and IPS, which was to be followed by an inspection of the catering facilities. The employees however did not attend that meeting or inspection, as they were 'tired' from attending other meetings pertaining to the work stoppage. The attitude of the employees indicated the seriousness with which they regarded the issue of catering. Be that as it may be, management had on its own, had a meeting with IPS and done an inspection. Nothing untoward was found, and it was established that there was no merit in the complaint that IPS did not serve name brand food.

[65] Any evidence of problems with the food came to the fore on 3 February 2010 when the employees produced a sample of raw meat that appeared to be spoilt. Erasmus had immediately acted by confronting IPS in the presence of employee representatives. IPS had conceded that there was indeed a problem, and it had in turn acted against its meat supplier. In this regard, it cannot be said that the respondent had ignored the problem or had acted in a dilatory manner in addressing it.

[66] Notwithstanding the due haste with which the respondent had dealt with the problem, the employees nevertheless embarked on a food boycott with immediate effect. Nkosi's explanation in this regard was simply that the problem had been on-going since 2009. In my view, the incident with the raw and spoilt piece of meat, *albeit* an isolated incident which was immediately attended to, proved to be an excuse for the employees to confront the respondent. This conclusion is reached on the basis that in the past, as is evident with the incidents of 17 October 2009 and 7 and 8 January 2010, the employees were quick to be confrontational and embark on any industrial action even in circumstances that did not warrant such action. It is as if the employees, like recalcitrant bullies, were always looking for a street fight.

[67] The employees had boycotted the meals between 3 and 6 February 2010, during which time, meetings were held to address the issue, the IPS contract was suspended, and the services of other caterers were secured. At a meeting of 5 February 2010, the employees had demanded the termination of IPS contract, which the respondent temporarily acceded to. This was notwithstanding the fact that IPS also provided other forms of service like cleaning in the accommodation site. The employees, self-righteous as they were, were least concerned with the plight of other vulnerable employees, and had insisted on the termination of the contract with IPS.

[68] During the period that IPS was suspended or temporarily terminated, around 6 and 7 February 2010, the respondent's management team had taken upon itself, at great cost, sacrifice and time, to provide and distribute food amongst the employees. The respondent had secured the service of other caterers in the area which were clearly out of their depth in view of the number of employees to be fed. C3 came into the picture and was temporarily engaged. The employees however found fault with it on the basis of one breakfast meal which was clearly small in quantity. There was however nothing wrong with the quality of food. The respondent's management team acknowledged that the quantity was inadequate and went out of its way to supplement the breakfast with pies. Still this was not good enough for the employees because on 4 March 2010, some four days after C3 was officially appointed, the employees had demanded its contract to be terminated.

[69] Amongst other demands made by the employees was that the respondent must buy them groceries and that they would prepare their own meals. This notwithstanding the impracticalities with this approach. When the respondent refused to consider this option, like the bullies they were, the employees threatened retribution in the form of work disruption. Notwithstanding the problems with the grocery option, employees were told to compile a list whilst the respondent's board was to consider their demand. The grocery lists compiled by the employees[9] according to their houses/units range from basics like mealie meal to luxuries such as prawns. In some instances, the grocery list included red wine, and toothpaste. Probably this was meant to be flippant.

[70] The response that the employees got from Guilbride on 5 March 2010 is clearly not what they had expected in view of the respondent's past practice of appeasing them and giving in on their demands. The respondent had decided to re-engage the services of IPS and rejected the grocery list option. In response, and in the presence of Masuku, the employees decided to flex their muscles by stating that they would henceforth only work forty hours per week with no overtime; that they would continue the food boycott and prepare their own meals. The threat was merely to continue with their illegal action from 5 and 6 March 2010. The industrial action continuing into 8,9 and 10 March 2010 was clearly precipitated by the respondent's refusal to yield to the unreasonable demand for groceries to be bought. The focus had

[9] As contained on pages 356 to 419 of the respondent's bundle

now shifted from the food issue to the unreasonable demand for groceries to be bought. As was correctly pointed out on behalf of the respondent, the employees kept on shifting the goal posts as if in a street fight.

[71] The unreasonableness of the applicants' attitude in my view became abundantly clearer with the list of ten 'non-negotiable' demands tabled on 8 March 2010. Despite the respondent having acceded to eight of those demands, the employees were uncompromising nevertheless in respect of the other two, which the respondent could not yield to on the basis of practical considerations and the fact that to give in to them would clearly put the respondent in conflict with the provisions of the PLA. Nkosi and the other employees were aware of this conflict, but his view was that the respondent could go contrary to the provisions of the PLA in order to meet their demands. This sense of self-righteousness was to prove to be the demise of the applicants. In my view, whatever solution the employees were looking for was in respect of a problem which they had created themselves. They were unrelenting in respect of demands which were clearly unreasonable. In the interim, C3 was reinstated as per the employees' demands, despite their previous demands that its contract be terminated.

[72] As already indicated, the employees were always looking for a fight, and ultimately, it was no longer clear what their grievances, if any were, as they kept changing their demands with little regard to the consequences of those demands or their actions. If ever there was any form of provocation, it was instead on the part of the employees. In my view, they were looking for a reason for the respondent to terminate their services, and unfortunately, they got their wish.

[73] Item 3(4) of the Code of Good Practice provides that;

> 'Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable'

There can be no doubt that the applicants' decision to embark on industrial action between 5 and 10 March 2010 was well thought out *albeit* ill-conceived. It is one thing to embark on unprotected industrial action for a few hours and something else to do so on four consecutive days in pursuance of unreasonable demands. The applicants knew the seriousness and impact of their actions on the entire Medupi Project. They knew that disruptions experienced in their contract impacted negatively on other projects. The respondent had more than bend backwards in accommodating them insofar any perceived grievances they may have had with catering. At no stage did the applicants pause to take stock of their actions.

[74] The last industrial action embarked upon was not the employees' first. They had already received final written warnings for similar conduct some five months earlier in October 2009. Attempts by Nkosi, and Beleng to deny the existence of these final written warnings ultimately proved to be futile in the light of the evidence and concessions made by Phillips. Mr. Baloyi on behalf of the applicants, argued that there may have been one or two individuals who had signed acknowledgment of these final warnings, and that not much evidential value should be attached to Phillip's testimony. These arguments cannot be sustainable in view of the fact that it is unlikely that one or two individuals could have embarked on a strike, and furthermore, the concessions made by Phillips went beyond merely refusing to sign acknowledgement of receipt of a copy of the final warning. Phillips had conceded that he and many other employees were called to the office to sign and collect these warnings, and were told that this would affect their project bonus. He and most if not all of the employees had refused to sign for acknowledgement of receipt of those warning. The fact that the employees had refused to sign acknowledgement or accept these warnings does not however imply that they were never issued.

[75] Other than the final warning, the applicants had following another unprotected industrial action on 7 and 8 February 2010, signed peace agreements in terms of which they made certain undertakings. These undertakings however proved to be hollow and meaningless, as within two months, they had embarked on an unprotected strike for four consecutive days. It is my view that viewed as a whole, the applicants' conduct was so serious and of such gravity that it made a continued employment relationship intolerable. This conclusion is reached when regard is also had to their propensity to embark on unprotected industrial action at the drop of a hat, their complete disregard for previous undertakings, warnings, the provisions of the PLA and letters of caution, the respondent's sustained and over the top attempts at meeting the employees' unreasonable need and demands, and the impact the applicants'

conduct had not only on the respondent's operations but also on the entire Medupi Project. Guilbride and Maistry were correct in contending that in these circumstances, it could not have been expected of the respondent to continue to trust the applicants when it was clear that disciplinary measures and undertakings they had made had not yielded the results expected.

[76] In my view, the respondent had reached a point where it had to draw lines in the street fight picked up by the applicants. It had come to a point where it had to confront the bullies head on after all the efforts it had made to appease them had failed. I have no reason to doubt the respondent's contention that the decision to dismiss the applicants was not taken lightly in view of the fact that it was thereafter, required to recruit new artisans in a middle of a vast project. In my view, that decision cannot be faulted in the light of the circumstances already pointed out.

[77] It cannot be doubted that the applicants were well aware of the importance and the enormity of the Medupi Project. In my view, they had in the light of the importance of that project, misjudged their own importance and the vulnerability of the respondent, hence they had embarked on their path of seeking confrontation. At no point during these proceedings had any of their witnesses showed any form of contrition or acknowledged their wrong doing. Instead, the applicants sought to absolve themselves from any wrong-doing and pointed the finger at the respondent for every misfortune that has befallen them. Nkosi went at length in seeking to portray the respondent as being provocative and unresponsive to the catering issue when in fact it was the employees' conduct and unreasonableness that was provocative if not daring. In the end, the bully that started the street fight cannot claim to be a victim when it comes second best in that fight.

[78] On the whole, the catering issue was a farce if not insignificant, and was used by the applicants to pursue their confrontational path and to provoke the respondent. Notwithstanding the insignificance of the catering issue, the respondent had over time like a long suffering victim, shown restraint, and did all that it could to address whatever perceived problems the employees may have had. Nkosi's show of any emotion during these proceedings was in regards to the fact that the he and others remain unemployed and have suffered untold hardship since their dismissal. That emotion was not out of contrition. Given all these considerations, I am satisfied that

the respondent has discharged the onus of proving that the dismissal of the applicants was substantively fair. As this was the first time that the respondent was required to dismiss employees under such circumstances, there is no other incident to measure whether it had acted consistently or not. In any event, this was not an issue raised on behalf of the applicants.

Procedural fairness of the dismissal:

[79] Item 6 (2) of the Code of Good Practice provides that;

> "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."

[80] The above requirement is meant to afford the union an opportunity to persuade the strikers to resume work and secondly, provides a safeguard against possible rash action by the employer. If an employer decides to issue an ultimatum, it should meet the requirements of the Code, and the employer must ensure that it allows employee sufficient time to reflect on the ultimatum and to respond to it[10].

[81] In this case, after the applicants were issued with letters of caution, letters of suspension and notices to attend the disciplinary enquiry, the respondent had also on 11 March 2010, sent letters to the recognized unions, including BCAWU. The unions were informed that the employees had been on illegal industrial action since 6 March 2010 in violation of their signed peace agreement, employment contracts, the LRA and the PLA. The unions were also advised that the employees were also issued with cautionary letters which had had no effect, and that the respondent therefore had no alternative but to proceed to suspend the workers with full pay. The respondent had also indictated that it was in the process of notifying the employees of the date and

[10] NUMSA & others v CBI Electric African Cables at para 35

time to attend a disicplinary hearing. None of the unions respondend to such correspondence.

[82] The applicants' main contention in regards to procedural fairness was that the respondent relied on an adverse finding made by Deale that the employees' refusal to work constituted unlawful work stoppage and that the work stoppage was not provoked by the respondent. It was common cause that the refusal to work the full hours, and not at all on 6 March 2010 constituted illegal strike. Furthermore, a similar finding has been made in this judgment that the illegal strike action was not provoked by the respondent. To this end, there is no merit in the applicants' arguments.

[83] It was further submitted on behalf of the applicants that the dismissal was unfair as it was hopelessly premature since it was not preceded by a proper disciplinary hearing subsequent to the abandonment of the pre-dismissal arbitration hearing before Patelia. Furthermore, it was contended that the respondent had relied on Deale's adverse finding in arriving at a sanction of dismissal, and without giving the applicants an opportunity to plead in mitigation.

[84] The procedural fairness of the dismissal should be viewed in the light of the timeline of events. In this case, Masuku of BCAWU had been engaged in meetings with management sporadically. He had failed to attend a high profile meeting scheduled for 7 March 20110, but had nevertheless attended such a meeting on 8 March 2010. At that last meeting, the employees tabled the ten 'non-negotiable' demands and Masuku was not seen until 11 March 2010 after the letters of caution, suspension and notices of disciplinary enquiry were issued. At that point, Masuku had attempted to make assurances that he would pursuade the employees to return to work, but the respondent would have none of it.

[85] The respondent viewed these letters as serving as ultimatum in that the employees were cautioned that should they continue with their illegal industrial action, it would engage its right to take immediate action. The consequences thereof were said to be severe and could result in their dismissal. Notwithstanding the issuing of these letters, the employees nevertheless left their workstations at 15h30 instead of the normal 17h00. In this regard, it was submitted that the ultimatum was issued on the back of repeated warnings that unprocedural, unlawful industrial action result in dismissal.

The respondent's contention was that there was no evidence that the applicants did not have sufficient time to consider their position as they had been in discussions with management since 4 March 2010, and on a collision course since the meeting of 8 March 2010.

[86] In the light of the applicants' specific contentions in regard to alleged procedural unfairness, even though the letters of caution issued to the employees and those sent to the unions fell short of specifying what exactly was required of the employees and when, and also when if any, action was to be taken if there was no compliance, I am satisfied that these served as proper ultimatum for the purposes of item 6 (2) of the Code of Good Prctice. This conclusion is reached when the timeline of the events is taken into account, the continuous meetings held with the employees between 5 and 10 March 2010, the unreasonable demands made by the employees, the confrontational stance adopted by the employees, the previous final warnings issued in regard to the same circumstances, the employees' failure to abide by the 'peace obligations' as contained in the PLA or undertakings made in January 2010, and most importantly, the clear wording of the letters of caution.

[87] There is furthermore no suggestion that Masuku had other than the approaches he had made to Guilbride, taken any steps in pursuading the employees on 10 or 11 March 2010 to return to work. In view of the respondent's failed attempts at contacting Masuku after the letters of caution were issued and further after letters were sent to the unions, and in view of the stance adopted by the employees, it is unlikely that any further engagement with them would have yielded desired results. As already indicated earlier in the judgment, the applicants chose to dare the respondent, and they cannot complain that they were not given sufficient time to reflect on their actions, when they knew of such consequences as per the final written warnings, the peace undertakings, and the letters of caution. No clearer message could have been sent to drive the point home. Furthermore, given the limited confines of the applicants' arguments in this regard, I did not understand their argument to be that had they been given further sufficient time, they would have reflected on their course of action and relented.

[88] The applicants were further invited to attend disciplinary enquiries on 15 and 16 March 2010, and these had turned into a collective disciplinary enquiry to be held on

16 March 2010 as per the request of Masuku. Masuku however did not attend the disciplinary enquiry. Maistry's testimony was that the disciplinary enquiry had proceeded amidst objections and disruptions. The applicants had not taken the opportunity granted to them to present their case and had instead walked out of the disciplinary enquiry. Even in argument, there was no suggestion that this disciplinary enquiry had not taken place as the only issue raised on behalf of the applicants was that they were not afforded an opportunity to make submissions in mitigation of sanction. To this end, the applicants cannot complain that the disciplinary enquiry was unfair, when they had consciously turned down an opportunity to be heard. In view of the dispute that was referred by BCAWU pertaining to whether an arbitration process rather than a disciplinary enquiry should have been followed, the chiarperson of the disciplinary enquiry held on 16 March 2010 was correct in reserving her findings pending the determination of that dispute.

[89] The Patrick Deale arbitration had taken its course, and with a finding that the applicants should have been subjected to a process of pre-dismissal arbitration in terms of the provisions of the PLA. That process, which the applicant had in any event contended to be the correct one, was put in motion and arrangements were made in that regard. Rather than attending to that process as this was what Masuku and the applicants had always wanted, Masuku instead as per his e-mail of 25 March 2010, sought the chairperson of the enquiry held on 16 March 2010 to make her findings known. It was correctly submitted on behalf of the respondent that the applicants could not be allowed to approbate and reprobate. It is not known whether the applicants were intent on playing games with the respondent, or whether they genuinely did not know what they wanted in view of the quackmire they had created for themselves. Be that as it may, the applicants were granted their wish by the chairperson of the enquiry, who had announced her findings and the dismissal of the applicants on 30 May 2010.

[90] One of the procedural irregularities alleged was that the applicants were not afforded an opportunity to make submissions in regard to mitigation of sanction. Item 3(5) of the Code of Good practice requires *inter alia* that prior to deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct, consider factors such as the employee's circumstances (including length

of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself".

[91] It might be argued in this case that to the extent that the respondent had reverted back to the Greyvenstein disciplinary enquiry when the Patelia pre-dismissal arbitration failed to take place, the applicants should have been afforded an opportunity of pleading in mitigation prior to the findings being announced on 30 March 2010. Ordinarily, in misconduct cases, it would be required of the chairperson of a disciplinary enquiry to first make a finding of 'guilt' on the allegations made against the employee, and for the latter to be afforded an opportunity to make submissions in regard to the sanction to be considered.

[92] The difficulty however in following this 'standard' procedure in disciplinary enquiries arises when an employee as in this case, walks out of the enquiry or refuses to participate in that enquiry at all. Aspects of mitigating and aggravating factors even though ordinarily treated as stand alone matters, are intrinsically linked to the merits of the case. Where the chairperson of the enquiry was presented with the undisputed version of the employer in circumstances where an employee failed to exercise his or her right to be heard, I fail to appreciate how that employee can present his or her mitigating factors in a vacuum. In my view, since the employee waived his or her rights to be heard, it would place an onerous burden on the employer to make a finding on 'guilt' and thereafter call upon that employee to plead in mitigation. There would be no logic in this approach as in my view, the employee has waived his or her rights for all intents and purposes, and that waiver cannot be merely in respect of presenting one's case. The waiver should be construed as being in respect of the disciplinary process as a whole. To this end, the applicants in this case by refusing to take part in the disciplinary enquiry waived their rights to be heard, including the right to plead in mitigation.

[93] Other than the above difficulty, it is my view that even if an opportunity to plead mitigating factors was not granted, an employee is still obliged to demonstrate what those factors are before the court, and for the court to make its own determination that if they were indeed presented at the disciplinary enquiry, the chairperson would have looked at the matter differently, and considered a lesser sanction. This was however not the case in these proceedings, and as already pointed, none of the three of the

applicants' witnesses had at the very least, shown some contrition, let alone demonstrate why they deserved a lesser penalty.

[94] It is further trite that dismissal is not *per se* punishment. It is a rational response to risk management in the affected enterprise. The factors that should be taken into account in considering mitigating factors should be relevant to the risk of further instances of misconduct in the future, and the risk of harm to the enterprise as a whole[11]. In this case, I am satisfied that the respondent has indeed demonstrated that in view of the propensity of the applicants to embark on illegal industrial action on the spur of the moment, the harm posed as a result of this conduct was not only to its enterprise by to the Medupi Project as a whole, and the decision to dismiss the applicants was clearly in response to the operational risks they had posed by their conduct. To this end, I am satisfied that the respondent has demonstrated that the dismissal of the applicants was procedurally fair.

Other preliminary matters:

[95] The respondent had at the commencement of these proceedings raised objections in regard to the mandate of the applicants' attorneys of record. In the middle of trial on 26 August 2013, Mr. Baloyi had presented an amendment to the annexure containing the list of the names of the applicants. Mr. Watt-Pringle in his closing submissions had accepted that those applicants listed in both annexure M1 to the statement of case and on the handwritten list submissted on 26 August 2013 were properly before the court as represented by Mr. Baloyi.

Costs:

[96] Mr. Watt-Pringle submitted that the applicants never had reasonable prospects of success in this matter, and that the respondent was put through great trouble and expense. He had further submitted that there was no on-going relationship between the parties, and that costs, including the costs of two counsel should follow.

[97] In exercising its discretion when it comes to the issue of costs, the court has has to take into account considerations of law and fairness as dictated by the provisions of section 162 of the Labour Relations Act. The aspect of requirement of the law has

[11] The point is made at paragraph 104 in the CCMA Guidelines: Misconduct arbitration

been interpreted by the courts to imply that costs would ordinarily follow the results. In other words a successful party would be entitled to costs[12]. The aspect of consideration of fairness on the other hand implies that the Labour Court, it being a court of equity, would not necessarily order costs against a party saddled with an adverse decision unless there are special or exceptional circumstances justifying the costs order. *Mala fides*, unreasonableness and frivolousness have been found to be factors justifying the imposition of a costs order[13].

[98] In this case, inasmuch as there is a basis for a conclusion to be made on the issue of costs purely on the aspect of law, it is my view that on the other hand, equity dictates that it must be taken into account that the applicants had on their own contributed to the legal costs regarding this matter having been abandoned by BCAWU. Secondly, although it can be said that the applicants' prospects of success appeared remote from the beginning, it is however my view that it cannot be said that the matter before the court was motivated by *mala fides*. In the end, I cannot find any exceptional circumstances that would justify a cost order, more specifically as a majority of the applicants remain unemployed. The court cannot be seen to be encouraging a plethora of frivolous cases. However at the same time, the court cannot be seen to be dissuading employees dismissed *en masse* from approaching it for relief.

Order:

i. The dismissal of the applicants on account of participating in an unprotected industrial action was substantively and procedurally fair.
ii. There is no order as to costs.

Tlhotlhalemaje AJ

Acting Judge of the Labour Court of South Africa

Appearances:

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[12] See City of Cape Town v SAMWU (2008) 7 BLLR 618 (LC).
[13] See Apollo Tyres (Pty) Ltd (formally Dunlop Tyres Internal (Ladysmith (Pty) Ltd) v NUMSA & Others 2009 JOL 24326 (LC)

For the Applicants: Mr. MM Baloyi of Baloyi Attorneys.

For the Respondent: Adv C Watt-Pringle SC with Adv MA Van der Merwe

Instructed by: Fluxmans INC