



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 1051/2012

In the matter between:

NUMSA obo LAZARUS DALI AND 27 OTHERS

Applicant

and

TWIN STRUCTURES STEEL CONSTRUCTION (PTY) LTD

Respondent

Heard: 11 – 13 and 15 May 2015

Delivered: 28 May 2015

Summary: Applicant alleges unfair dismissal following dismissal for participation in an unprotected strike. Claim of provocation upheld. Dismissal procedurally fair but substantively unfair. Compensation awarded.

JUDGMENT

PRINSLOO, AJ

Introduction

- [1] The Applicant on behalf of 28 members (the employees) approached this Court for relief as they claim that their dismissal was substantively and procedurally unfair.
- [2] The Respondent opposed the matter.

- [3] A brief overview of the facts that are common cause between the parties and those that are in dispute is as follows:

The pleadings and pre-trial minute

- [4] In their statement of case the Applicant claimed that the employees were dismissed for participating in an unprotected strike, whereas they were not on strike but expelled from the Respondent's premises.
- [5] The challenge to the substantive fairness of the employees' dismissal is that the Respondent failed to engage the union and the employees on the issues in respect of which they wanted a response and the Respondent's conduct was a significant contributory factor in the underlying issues they wanted to engage the Respondent on.
- [6] The Applicant's case is that the employees were not on an unprotected strike but were instructed to leave the workplace following their request for answers in respect of their wages and overtime.
- [7] Procedural fairness was challenged on two grounds firstly that NUMSA was excluded from the disciplinary hearings held for the employees, despite an agreement for postponement. This aspect of the challenge to procedural fairness was abandoned and does not require any decision from this Court. Secondly and in the event that the Respondent adopted the approach that the employees were on an unprotected strike it failed to issue a fair and reasonable ultimatum to the employees.
- [8] The Respondent in its statement of defence pleaded that the employees embarked on an unprotected strike and they were requested verbally on a number of occasions to return to work. A written final ultimatum was issued which the employees were aware of, yet in defiance of the final ultimatum the employees left the premises.
- [9] It appears from the pre-trial minute that the following is common cause between the parties:
- [10] The Respondent's core business is the production and installation of steel structures.

- [11] The Respondent is a member of the Metal and Engineering Bargaining Council (MEIBC) where a collective agreement or main agreement (the agreement) was signed in July 2011, after a national strike in the metal and engineering industry. The agreement was valid for 3 years and prescribed minimum wages and wage increases across the board.
- [12] The agreement was binding on the Respondent.
- [13] The Respondent failed to comply with the provisions of the agreement and did not pay the wages as prescribed.
- [14] The employees were paid fortnightly and in July 2012 they were paid on the 6th and 26th and were off duty on 27 July 2012.
- [15] The strike action is disputed. The Applicant's case is that the employees were not participating in an illegal strike but were instead expelled from the Respondent's premises after they made enquiries about their wages. The Respondent's case is that the employees embarked on an unprotected strike when they failed to tender their services on 30 July 2012 and continued to do so on 31 July 2012.
- [16] The relief sought by the Applicant is compensation as the employees do not wish to be reinstated.

The evidence adduced

- [17] The material facts are by and large a matter of common cause. However the evidence adduced disclosed a number of disputes of fact, some material and relevant and some not material to the outcome and the issue to be decided.
- [18] Mr Johann Smit (Smit) testified that he a member of the Respondent.
- [19] The Respondent is a member of the MEIBC and the agreement was binding on the Respondent, however it was not in position to comply with the agreement and to pay the prescribed rates. The Respondent applied for exemption from the 2011/2012 agreement and he has not received an outcome from the MEIBC. Pending the outcome he paid wages much lower than the prescribed minimum wages.

- [20] Smit adduced evidence in respect of his application for exemption, which is not relevant to the issue this Court has to decide. Suffice to say that he applied for exemption and was advised by the MEIBC on 25 March 2011 that his application did not meet the requirements for consideration as the following were outstanding: no consultation with employees, contributions were not paid up to date and there were no financial reports submitted. On 25 October 2011 the Respondent submitted an application for condonation to the MEIBC and Smit testified that up to date he has not received an outcome from the MEIBC in respect of his application. This testimony however does not accord with the Respondent's plea as per paragraphs 10.1, 13.1 and 15.3 of the statement of response wherein the Respondent confirmed that the application for exemption was dismissed.
- [21] It is common cause that a meeting was held between the Respondent and the employees on 10 February 2012. The purpose and outcome of the meeting is however disputed. Smit referred to a document titled 'Minutes of meeting 10/02/2010' but on a proper perusal of the document it appears to be an agenda rather than minutes. Be that as it may it was captured on this document that the employees wanted to know about the exemption rates and that Smit explained the exemption rates. Smit testified that he explained the rates the Respondent paid and that the employees accepted it. He referred to an attendance list signed by the employees who were present at the meeting and another list 'Twin Structures employees attending the exemption rate meeting'. The second list has a handwritten note that purports to set out certain rates. It is written on the list that the rate of 2011 plus 10% in 2011, 9% in 2012 and 8% in 2013 and the Respondent confirmed that these were the rates the Respondent was going to and were able to pay. Smit testified that the employees agreed to the rates set out in this document. According to him the reason they never complained since July 2011 was because they knew that there was an agreement in place.
- [22] The employees on the other hand disputed this version and testified that they indeed attended the meeting but there was no consultation about the rates they were to be paid. The Respondent decided on the rates unilaterally and without consulting them and at the meeting he merely informed them about the rates he was going to pay.

- [23] The document the Respondent wants this Court to accept as proof that the employees agreed to the payment of the rate that applied in 2011 has 38 names on the list, of which six employees attached their signatures. The evidence was that only the ones who signed the document had agreed to the payment of the rates as decided by the Respondent.
- [24] On the evidence before this Court I can hardly accept that the document the Respondent relies on constitutes sufficient proof of the fact that the employees were consulted about the wages payable to them and that they indeed agreed to the lesser wage being paid. I am however prepared to accept that the issue of wages and the rate at which it would be paid was discussed, not agreed, and that this was an issue of interest to the parties.
- [25] It is common cause that the employees would normally arrive at work any time from 06:30 and started to work at 07:00. They were required to wear safety gear and would change their clothes before commencing work.
- [26] It is also common cause that the employees were paid fortnightly and they were paid their wages on 26 July 2012 and that their next working day was Monday 30 July 2012, when the events material to this dispute started.
- [27] Most of the events of 30 July 2012 are common cause. Smit testified that on Monday 30 July 2012 when he arrived at work shortly after 07:00 the employees were standing inside the Respondent's premises in front of the office but they were not dressed in their working clothes and they were not working. The foreman, one Rassie, informed Smit that the employees wanted to see him about their wage increases before they would commence work. Rassie was sent to tell the employees to go back to work but they insisted on seeing Smit before they would work. Smit went to the employees but instead of engaging them, he told them that he was busy and could not attend to them and that they had to go back to work and if they did not want to work, to move outside the premises.
- [28] Smit persisted with his version that he was too busy to engage the employees and to meet with them on 30 July 2012. The employees confirmed this version and added that Smit said that he gave them two minutes to go back to work or leave the premises. It was the employees' testimony that whenever they wanted to discuss issues with Smit, he told them he was busy and did not

have time. I accept that Smit was a busy man who had little or no time to engage his employees.

- [29] Smit explained that the reason why he asked the employees to leave the premises if they were not working was because of the safety risks employees could face if they were not wearing protective clothing and were standing around on the premises. Mr Lazarus Dali (Dali), one of the employees who testified, disputed this version. It was however not disputed when Smit testified and the Applicant's version was not put to Smit.
- [30] Smit denied that the employees were expelled but stated that they were given a choice: either go back to work or leave the premises for their own safety. Although Dali disputed the safety issue, he conceded that the employees were given a choice: either go back to work or leave the premises and they decided to leave the premises.
- [31] I accept that the employees, although present, were not working at 07:00 on 30 July 2012, as they wanted to have a discussion with Smit and were waiting to see him in front of the office. Smit testified that the employees refused to work until they could see him and Dali testified that they reported for duty on 30 July 2012 and gathered to speak to Smit before starting to work, as they wanted an explanation about their wages.
- [32] It was put to Smit that the employees were entitled to withhold their labour if they were not paid in accordance with the main agreement. Smit responded there was an agreement in place to pay less than the wages in the main agreement and that the employees had no appointment with him regarding the issues. This explanation Smit tendered as justification to pay the employees far below the prescribed rate and for his refusal to meet with them to discuss the issues they wanted to raise about their wages.
- [33] Dali testified that if Smit had engaged with them and spoken to them in the morning of 30 July 2012, they would have gone back to work. It was put to Smit that had he addressed the employees on 30 July 2012, they would have gone back to work. Smit disputed that. I do not attach much weight to the fact that Smit disputed that the employees would go back to work had he addressed them as he never made any effort to address them and he is in no position to deny that they would have gone back to work.

- [34] At 07:20 on 30 July 2012 Smit's secretary, one Lillian, arrived at work and Smit sent her to speak to the employees and to tell them to return to work. It is common cause that at this point the employees were standing outside the premises and that Lillian addressed them outside the premises. Lillian reported back that the employees insisted on meeting with Smit before they would start working. Smit sent her back to the employees to tell them that they should give him 48 hours to sort out the issues and that the shop stewards should make an appointment to meet with him. Lillian once again reported back that the employees wanted to see him. It was at this point between 07:30 and 07:35 that Smit put up a written final ultimatum (the ultimatum).
- [35] The ultimatum reads as follows: "Final notice of illegal strike. This is a final notice to return to work at full capacity before 08:00 30/07/2012. Any employee refusing to do so or continue in an unlawful strike will face disciplinary action."
- [36] It is common cause that the employees were present when the ultimatum was put up, that they read it and understood it but failed to heed to it. Instead they left the premises and went to the offices of their trade union.
- [37] Smit testified that after the employees left, he informed NUMSA about their conduct by faxing the ultimatum to the offices of NUMSA.
- [38] It is common cause that the NUMSA local organiser, Mr Elias Mathuthu, responded and that a letter was faxed to the Respondent on 30 July 2012 at around 8:30. In the letter NUMSA stated that although the Respondent alleged that the employees were participating in an unprotected strike, the employees' version was that they were expelled from the premises after they complained about the non-increment of their wages and compulsory overtime.
- [39] I accept that the Respondent was aware what the issues were the employees wanted to discuss with Smit, hence his comment that he should be afforded 48 hours to sort it out without any engagement with the employees to find out what the problem was. The Respondent knew what the issues were. The employees' testimony was that they wanted assurance from Smit that the issues would be attended to as they were of the view that the issues would still remain after 48 hours.

- [40] NUMSA further recorded in the letter that the non-compliance with the agreement was *inter alia* a 'direct ingredient to this situation'.
- [41] NUMSA recorded that the employees were not striking but were provoked when the Respondent ignored the issues they wanted to raise. NUMSA requested an urgent meeting with the Respondent to deal with the issues and proposed a meeting for 1 August 2012 at 12:00 with a list of issues to be discussed. The Respondent was requested to revert back urgently.
- [42] NUMSA also stated that the employees would report back for duty on 31 July 2012 to render their services in line with their contractual obligations. That concluded the events for 30 July 2012.
- [43] Smit testified that on 31 July 2012 he arrived at work at 07:10 and as it was after 07:00 he expected the employees to be working. There are some factual disputes regarding the events of 31 July 2012 but what it common cause is that the employees were present on the Respondent's premises and at the time Smit arrived some employees were dressed, some were in the change room and some were sitting outside the change room. It is also common cause that the change room is not big enough for all the employees to be inside at the same time and they take turns to change their clothes.
- [44] Smit's version was that when he arrived at 07:10 the employees had not commenced work and he could see that they were not in the 'mood' to work. He conceded that some were dressed for work and some were still in the changing room, but insisted that no one was working at 07:00. He confronted the employees with the fact that there was an agreement that they would work on 31 July 2012 and that a meeting was scheduled with NUMSA for the following day. The employees insisted that they wanted to meet with him before commencing work. Smit told the employees that he would not talk to them and he would meet with their union the next day. At around 07:15 Smit told them to go to work or go outside the premises. The employees left the premises and were standing outside. Dali conceded that they were given an option to either work or leave the premises and that the employees who resumed duty were not expelled but were allowed to work. He however denied that they spoke to Smit on 31 July 2012 as he chased them out shortly after he arrived at the workplace.

- [45] Dali explained the reason why the employees were not working at 07:00 on 31 July 2012 was because the gates were opened late. The gates usually opened at 06:00 and employees would arrive at 06:30 to change their clothes and start working at 07:00. On 31 July the gates were only opened at 06:55 and therefore by 07:00 some employees were still in the change room and others waiting to change. Although this explanation might be plausible, the difficulty is that it was not raised in the Applicant's statement of case, it was not captured in the pre-trial minute and it did not form part of the version put to Smit in cross-examination. This explanation is critical to the Applicant's case and it is strange and unfortunate that it never made its way to the pleadings or cross-examination. I cannot accept the explanation tendered only at this late stage in the proceedings.
- [46] Dali testified that on 31 July 2012 they knew and understood the consequences of the ultimatum that was issued on 30 July 2012 and that was the reason why they went back to work on 31 July 2012 to resume duty.
- [47] Between 09:00 and 10:00 on 31 July 2012 the Respondent suspended the employees and issued them with notices to attend disciplinary hearings on 7 August 2012. The employees thereafter left the premises.
- [48] It was put to Dali that no matter what the Respondent told them on 30 and 31 July 2012, they would not return to work as they decided to withhold their labour. Dali disputed this and testified that they wanted to speak to Smit and had he agreed to speak to them even just for five minutes or if he had agreed to schedule a meeting, they would have gone back to work and resumed duty. They perceived Smit's conduct as expelling them from the workplace.
- [49] On 1 August 2012 Mathuthu wrote a letter to the Respondent requesting a postponement of the disciplinary hearings of the NUMSA members, as he was not available to represent them on 7 August 2012 and the postponement was agreed to. In the same letter Mathuthu requested that the Respondent urgently revert to the proposed request for a meeting with the objective of finding an amicable solution.
- [50] Mathuthu testified that the meeting was requested with the view to find a solution and to resolve the issues, hence he requested an urgent meeting. He testified that on 30 July 2012 he proposed 1 August 2012 for a meeting with

the Respondent and he expected the Respondent to either confirm the date and time as proposed or to make a proposal for an alternative date or time. He had no response from the Respondent and therefore he once again on 1 August 2012 requested that the Respondent urgently revert in respect of the request for a meeting. Mathuthu's testimony that the meeting was never confirmed is supported by the letters he wrote and was in any event not disputed.

- [51] Although the Respondent sent correspondence to NUMSA on 1 August 2012, no mention is made of a meeting to take place on 1 August 2012 or any other date. Smit was unable to state who confirmed the meeting with NUMSA and I accept that the meeting was never confirmed and NUMSA was expecting the Respondent to confirm the meeting as proposed or to reschedule the meeting.
- [52] Smit testified that on 1 August 2012 Mr Gerhard Lombaard of his employer's organisation, NOESA, was present at the Respondent's premises for the meeting with NUMSA and they waited for Mathuthu to show up. NUMSA however did not show up and the meeting never happened.
- [53] I do not accept Smit's version that he was waiting to meet with NUMSA on 1 August 2012. Mathuthu wrote two letters requesting the Respondent to revert regarding the proposed meeting, which was never responded to. I accept Mathuthu's version that the Respondent did not confirm the meeting and he was still awaiting a response. I find it strange that a person as busy as Smit would be waiting patiently to meet with NUMSA and when Mathuthu failed to show up, he would not make any enquiries or any attempt to phone NUMSA or Mathuthu to find out if he was still on his way to the meeting or what the position was. The version put forward by Smit is in view of his evidence that he was a very busy man, that he needed 48 hours to resolve the issues and that he was eager to resolve the dispute with NUMSA so improbable that it has to be rejected.
- [54] Between 1 August and 7 August 2012 Smit, who requested 48 hours to sort out the issues and who stated that he was eager to sort out the issues with NUMSA, did nothing to either resolve the issues he was well aware of or to set up a meeting with NUMSA.

- [55] The disciplinary hearings proceeded on 7 August 2012. The employees insisted on proceeding on that date without representation, despite the agreement to a postponement. The employees were subsequently dismissed.
- [56] On the issue of ultimatums it was the Respondent's case that three ultimatums were given on 30 July 2012. Smit gave the first ultimatum early in the morning, Lillian gave the second ultimatum at around 07:20 and the final written ultimatum was given between 07:30 – 07:35. Smit testified that he gave another ultimatum on 31 July 2012. This was however not pleaded and I do not accept that another ultimatum was given on 31 July 2012.
- [57] It is evident from Smit's testimony that the three ultimatums given on 30 July 2012 were given over a period of 30 – 35 minutes. The first ultimatum by Smit gave the employees two minutes to return to work and the final ultimatum gave them 25 – 30 minutes to return to work.
- [58] Smit confirmed that from July 2011 when the agreement came into force until 30 July 2012 he never received any correspondence or complaint from the employees or the union. The first correspondence he received was the letter from Mathuthu on 30 July 2012 requesting a meeting for 1 August 2012. This was undisputed.
- [59] Dali testified that the reason why they never filed a complaint with the MEIBC or filed any grievances via their trade union was because they were scared of Smit and were of the view that he would dismiss or manhandle them should he knew that they were involved. I do not accept this version. On 30 and 31 July 2012 the employees confronted their employer and demanded to speak with Smit and refused to work until he had spoken to them. This is not the conduct of individuals who fear dismissal or manhandling.
- [60] Smit testified that it was crucial to have a full compliment of staff during June and July 2012 as the Respondent was still a growing business and was in the process of securing new business and the potential new client was waiting on delivery. It was critical to deliver on time to secure future business. Smit testified that he was under pressure and he wanted the employees to return to work. The employees insisted on talking to him and he insisted that he could not talk to them. Apart from stating that he was busy no other explanation is given why Smit did not talk to the employees on 30 July 2012. I find it odd that

a person who was under pressure to deliver and who insisted that he wanted the employees back at work, would not make any effort whatsoever to engage them and talk to them, as all indications are that it could have alleviated the situation.

Closing arguments

- [61] In closing argument Mr Geldenhuys on behalf of the Respondent submitted that on 30 July 2012 there was a strike as defined in the Labour Relations Act¹ (the Act), it was unprotected, persisted with on 31 July 2012 and that dismissal was fair.
- [62] In respect of the Applicant's challenge to the ultimatum that was issued on 31 July 2012, Mr Geldenhuys submitted that the timeframe set out in the ultimatum is immaterial but what is required is that the ultimatum should be understood by the employees, the consequences of not adhering to it should be understood and the employees should be given sufficient time to consider it and decide what to do. *In casu* the employees understood the ultimatum and the decision they took was to go to the offices of the union. Had they reported for duty and resumed work on 31 July 2012, the issue would have been resolved. It was also submitted that the employees persisted with their refusal to tender their services until they spoke to Smit and despite what they were told by the Respondent and their trade union, they persisted with their conduct. On 31 July 2012 the employees were given the option to work or to leave and the left in pursuance of their strike.
- [63] On the conduct of the Respondent Mr Geldenhuys submitted that the Respondent could not comply with the main agreement and he tried to get exemption, the Respondent could not be blamed for the events of 30 July 2012, more so in view of the fact that Smit requested 48 hours to sort out the issues.
- [64] Mr Geldenhuys submitted that the employees' dismissals were procedurally and substantively fair.
- [65] Mr Phukubje on behalf of the Applicant conceded that the conduct of the employees on 30 July 2012 might fall within the definition of a strike as set out

¹ Act 66 of 1995.

in the Act. Having conceded that he submitted that this Court has to consider the conduct of the parties. There was a wage agreement setting out the minimum wages and the Respondent did not comply with that agreement. The Respondent applied for exemption with the MEIBC on 21 March 2011 and in a letter of 25 March 2011 the MEIBC rejected the application for exemption, as it was defective. On 25 October 2011 the Respondent made another application for exemption and to date there is no outcome and the Respondent did nothing to follow up on the outcome of the application.

- [66] Mr Phukubje further submitted that there was no agreement on reduced rates to be paid and the Respondent did not engage or consult the employees and the trade union in good faith when he applied for exemption. Whenever the employees tried to engage the Respondent on the issue, Smit always said that he had no time.
- [67] It was submitted that exemption is applied for and obtained annually. The exemption the Respondent applied for was for the period 1 July 2011 – 30 June 2012 and on 1 July 2012 a new period started, for which the Respondent never applied for exemption and he had to pay employees higher wages with effect from July 2012.
- [68] Mr Phukubje submitted that the Respondent was well aware what the issues were and that Smit had no intention of sorting out the issues in 48 hours or at all, he had no intention to speak to the employees or to resolve the issue in any manner whatsoever. On 30 July 2012 the employees were expecting an increase for the new wage period that commenced on 1 July 2012 and when they received the same wages, they wanted to discuss that with their employer. On 30 July 2012 the conduct of the Respondent in issuing the ultimatums were not reasonable. Firstly, it was not reasonable to issue ultimatums when the employees were merely seeking to engage Smit about their wages and secondly the first ultimatum issued by Smit that gave the employees two minutes to report for work was not reasonable. The employees considered the final written ultimatum and went to their union for advice and they were told to report for duty on 31 July 2012.
- [69] On 31 July 2012 when the employees were still changing their clothes, Smit told them to leave the workplace, as they were not working at 07:00. It was submitted that Smit simply assumed that the employees were not going to

work as they had not started work at 07:10. Smit never proposed a meeting with the union and never responded to the proposal from NUMSA to meet, despite a follow up letter from NUMSA on 1 August 2012 requesting a response to the proposal. Smit made no efforts whatsoever to contact the union. The conduct of the employees on the other hand merely sought to engage Smit, who refused to engage.

[70] The employee's conduct was justified and the Respondent was hasty to dismiss.

[71] The employees are seeking compensation, as they do not want to work for the Respondent again. Both representatives submitted that costs should follow the result, as there is no longer an existing relationship between the parties.

The issues this Court has to decide:

[72] The Court is to determine the substantive and procedural fairness of the employees' dismissal.

Was there a strike?

[73] The point of departure would be to determine whether the employees embarked on strike action on 30 July 2012 and whether they persisted with strike action on 31 July 2012.

[74] The Act defines a strike as:

'The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee'.

[75] On 30 July 2012 the employees gathered in front of the office and demanded to speak to Smit about the non-payment of wage increases and compulsory overtime. The evidence was that they were not working and would only start working after they spoke to Smit, as they wanted an explanation as to why they were not paid wage increases.

[76] In my view the conduct of the employees on 30 July 2012 falls within the definition of a strike. Mr Phukubje in argument also conceded this.

[77] There was no compliance with the provisions of section 64 of the Act therefore the strike action was unprotected.

Was the dismissal fair?

Applicable legal principles:

[78] Having found that there was indeed a strike, the next issue to be decided is whether despite the unprotected nature of the strike, the employees' dismissal was substantively and procedurally fair.

[79] The legal principles to be applied in a dispute concerning a dismissal for participation in an unprotected strike are well established. Item 6(1) of the Code of Good Practice contained in Schedule 8 of the Act (the Code) reads as follows:

'Dismissals and industrial action.

(1) Participation in a strike that does not comply with the provisions of chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including—

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

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

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

(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.'

[80] The Labour Appeal Court in *NUMSA v CBI Electric African Cables*² observed that it is clear from the provisions of section 68(5) of the Act that a Court called upon to determine the fairness of a dismissal effected on the ground of participation in an unprotected strike should consider, in addition to Item 6 of the Code, the provisions of Item 7.

² (2014) 1 BLLR 31 (LAC).

[81] Item 7 regulates dismissal for misconduct more generally and as participation in unprotected strike action is misconduct, it should logically apply. Item 7 requires the determination of whether dismissal was an appropriate sanction for contravention of the relevant rule or standard.

[82] The determination of the substantive fairness of a strike related dismissal must therefore take place in two stages. Firstly under Item 6 when the strike related enquiry takes place and secondly under Item 7.

Analysis: procedural fairness:

[83] The Applicant's challenge to procedure in respect of fairness is limited to the ultimatum the Respondent issued.

[84] It is the Applicant's case that the Respondent failed to issue a reasonable ultimatum in accordance with the Code, setting out the time within which they were required to return to work, the implications if they failed to comply with the ultimatum and time to reflect on it and to either accept or reject it.

[85] In the pre-trial minute it was recorded that the Respondent issued a final ultimatum to return to work at 08:00, yet the ultimatum was issued after the employees left the Respondent's premises and it was only faxed to NUMSA at 08:04, wherefore the ultimatum did not provide sufficient time for the employees to consider their options and to return to work.

[86] The employees' evidence however did not accord with this statement and the evidence adduced did not support the complaint in respect of procedural unfairness.

[87] The evidence showed that at 07:20 on 30 July 2012 Smit's secretary, one Lillian, arrived at work and Smit sent her to speak to the employees and to tell them to return to work. It is common cause that at this point the employees were standing outside the premises. Lillian reported back that the employees insisted to meet with him before they would start working. Between 07:30 and 07:35 Smit put up the ultimatum.

[88] The ultimatum reads as follows: "Final notice of illegal strike. This is a final notice to return to work at full capacity before 08:00 30/07/2012. Any

employee refusing to do so or continue in an unlawful strike will face disciplinary action.”

- [89] Despite what was pleaded and recorded in the pre-trial minute, it is common cause that the employees were present when the ultimatum was put up, that Smit specifically drew their attention to it, that they read and understood it and discussed it amongst them but failed to heed to it. Instead the employees left the premises and went to the offices of their trade union.
- [90] Smit testified that after the employees left, he informed NUMSA about their conduct by faxing the ultimatum to the offices of NUMSA. It is common cause that the NUMSA local organiser, Mr Elias Mathuthu, responded and NUMSA *inter alia* requested an urgent meeting with the Respondent to deal with the issues and proposed a meeting for 1 August 2012 at 12:00 with a list of issues to be discussed. The Respondent was requested to revert back urgently.
- [91] NUMSA also stated that the employees would report back for duty on 31 July 2012 to render their services in line with their contractual obligations. That concluded the events for 30 July 2012.
- [92] Dali testified that on 31 July 2012 the employees knew and understood the consequences of the ultimatum that was issued on 30 July 2012 and that was the reason why they went back to work on 31 July 2012 to resume duty.
- [93] The requirement in Item 6 that an employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt, affords the union an opportunity to persuade the strikers to resume duty and secondly provides a safeguard against possible rash action by the employer. When an employer issues an ultimatum, it should meet the requirements of the Code and in particular must ensure that it allows employees sufficient time to reflect on the ultimatum and respond to it.
- [94] It is trite that when the ultimatum has gone unheeded, an employer must initiate further steps to afford the right to be heard, which usually takes the form of a disciplinary enquiry. An ultimatum and disciplinary hearing serve two separate and distinct purposes. The fairness of the disciplinary hearing process is not disputed.

- [95] *In casu* I am satisfied that the ultimatum that was issued stated in clear and unambiguous terms that it was required of the employees to return to work at full capacity before 08:00 on 30 July 2012 and that disciplinary action would follow if they did not comply with the ultimatum. The ultimatum was issued between 07:30 and 07:35, calling the employees to report for work at 08:00. Whether 25 – 30 minutes is sufficient time to reflect is debatable but the evidence showed that in the time allowed the employees were able to read, understand and discuss the ultimatum and after doing that, they decided to go to their union, rather than to heed the ultimatum.
- [96] In my view the ultimatum complied with the provisions of the Code and the employees had sufficient opportunity to reflect on it. They decided to reject it and to go to the offices of their trade union.
- [97] NUMSA was also notified and was afforded an opportunity to persuade the employees to resume duty. NUMSA wrote a letter to the Respondent stating that the employees would return to work on 31 July 2012 and requesting a meeting with the Respondent on the relevant issues with the aim of resolving the dispute.
- [98] It is common cause that the employees, after leaving the workplace and going to the union offices, did not report for duty on 30 July 2012 and an undertaking was given that they would report for duty on 31 July 2012 and the employees understood the meaning and consequences of the ultimatum. No further action was taken against the employees on 30 July 2012.
- [99] Insofar as the Applicant challenged the procedural fairness of the employees' dismissal, I am not convinced that a case was made out.
- [100] The dismissal of the employees was procedurally fair.

Analysis: substantive fairness:

- [101] The substantive fairness of the employees' dismissal is challenged. It is the Applicant's case that the Respondent failed or refused to engage the employees and NUMSA on the issues they wanted to raise. The Respondent ordered the employees back to work without addressing their concerns and when they waited to talk to Smit, they were ordered to leave the premises.

The conduct of the Respondent provoked the employees and was a major contributor to the strike action.

[102] It is further the Applicant's case that the employees were entitled to wage increases on 26 July 2012 and when the increase was not paid, they rightfully demanded an explanation from the Respondent. The sanction of dismissal was inappropriate.

[103] The Respondent disputed this.

[104] The evidence shows that the Respondent paid the employees far below the minimum wages as provided for in the main agreement. The Respondent's case is that he could not afford to pay the minimum wages and he applied for exemption from the MEIBC.

[105] It is common cause that the exemption applied for in respect of 2011 / 2012 has not been granted and according to Smit he is still awaiting an outcome. As already stated the Respondent's statement of response confirmed that the application for exemption was dismissed and Smit was aware of that. In 2015 Smit wanted this Court to believe that he has not obtained an outcome from the MEIBC and was still awaiting an outcome. This is not honest as he knew that the exemption application was dismissed and that is why he was not bothered about the outcome he already knew. In 2011 and 2012, without exemption, Smit unilaterally decided on the rate he would pay his employees. The rate was far below the prescribed minimum wage.

[106] In July 2012 the employees expected to be paid an increase in accordance with the main agreement, but when they received their salary advices it became clear that the Respondent did not pay an increase.

[107] Not surprisingly this caused unhappiness and gave rise to questions. On the morning of the next working day after payday the employees wanted to meet with Smit as they wanted an explanation as to why they were not paid any wage increases.

[108] It is common cause that throughout the demand was to speak to Smit about the wage and overtime issue and that the employees would not start work until they had an opportunity to speak to Smit.

- [109] On 30 July 2012 Smit did not engage the employees and made no attempt to talk to them, apart from telling them to go back to work, which they did not do on 30 July 2012.
- [110] On 31 July 2012 the employees reported for duty and it is common cause that when Smit arrived at the workplace at 07:10, some employees already changed and were dressed in their working gear, some were still inside the change room busy getting dressed while some were outside the change room.
- [111] A number of issues call for decision. Item 6 of the Code provides that the substantive fairness of dismissal must be determined in the light of the facts of the case, including the seriousness of the contravention of the Act, attempts made to comply with the Act and whether or not the strike was in response to unjustified conduct by the employer.
- [112] The distinction between a protected and unprotected strike is not an academic one. It is one that ought to have consequences. The Act establishes dispute resolution procedures that are inexpensive, expeditious and efficient. If the employees felt aggrieved by the fact that they were not paid in accordance with the main agreement, they could surely have lodged grievances, sought the intervention of NUMSA or referred the matter to the MEIBC. During the presentation of the Applicant's case none of the witnesses could give a cogent and satisfactory explanation why the issues the employees wanted to discuss on 30 July 2012 had not been raised previously by the shop stewards, why it was not raised by NUMSA or referred to the MEIBC as it constituted a clear contravention of the main agreement. The explanation that they feared Smit and the possibility of dismissal has been rejected, as their conduct on 30 July 2012 was not consistent with the fear they alleged.
- [113] The employees embarked on an unprotected strike with no attempt to comply with the provisions of the Act and without exercising any of the other remedies available to them.
- [114] Having said that, it is not the end of the enquiry. Item 6 and 7 of the Code requires this Court to consider the conduct of the employer and the appropriateness of the sanction.

Was the strike action justifiable:

- [115] This Court has previously come to the assistance of employees in circumstances where the conduct of the employer provoked them into conduct that amounted to unprotected strike action.
- [116] At one level it might be so that participation in an unprotected strike is never justifiable, since the Act provides avenues for the resolution of disputes, whatever their nature. However, justifiability in relation to an assessment of substantive fairness is a rather different concept. The Code specifically acknowledges that the participation in an unprotected strike is not an act that *per se* justifies dismissal. The relevant enquiry is a multi-factoral one, in which the cause of the strike and the conduct of the employer must be considered.
- [117] I already found that the Respondent was well aware on 30 July 2012 why the employees wanted to see Smit and what they wanted to discuss with him.
- [118] Instead of engaging the employees, Smit merely told them to go back to work and repeatedly said he was busy and did not have time to speak to them. Smit later said he needed 48 hours to sort out the issues, which was nothing but an empty promise not to be believed by the employees.
- [119] In my view the cause of the strike was the Respondent's non-compliance with the main agreement. Although the employees could have employed alternative remedies to address the issue, I find that their conduct on 30 July 2012 was justified and caused by the Respondent's non-adherence to the main agreement and this strongly mitigates the employees' conduct.
- [120] The Respondent's refusal to engage with the employees at all, aggravated the situation. The conduct of Smit is lamentable and inexcusable. He knew what the issues were, he was in a position to resolve the situation on 30 July 2012 by simply engaging the employees, yet he chose to instruct them back to work without addressing their legitimate complaints. Worse is that he used the receptionist and the foreman to convey his instructions. He constantly told them and this Court how busy he is and how little time he has. That is true for most working individuals but cannot be justification for not attending to pertinent and burning issues when called upon to face and address those issues.

- [121] The employees were dismissed for participating in an unprotected strike on 30 July 2012 that continued on 31 July 2012.
- [122] It is common cause that the employees did not tender services on 30 July 2012. On 31 July the employees reported for duty and it is common cause that when Smit arrived at the workplace at 07:10, some employees already changed and some were still changing.. Smit's testimony was that the employees once again requested to talk to him, which request he refused and told them to go back to work or leave the workplace. They left and were suspended from 09:00 on 31 July 2012
- [123] The conduct of the employees on 31 July 2012 is not indicative of a continuation of the unprotected strike. It was common cause that they reported at the workplace and by 07:10 some were already changed and others were still changing. This indicates an intention to work. Smit however decided by 07:10 that they were not in the mood to work and without engaging them, he regarded their conduct as a continuation of the strike.
- [124] The only question remaining is to determine whether the dismissal for participation in unprotected strike action was substantively fair and whether dismissal was an appropriate sanction.
- [125] The fact that the strike was unprotected does not automatically render the dismissal of the striking employees fair. The employer still bears the onus to prove that the dismissal is fair.
- [126] There was no history of unprotected industrial action directed against the Respondent, nor was there any testimony that the disciplinary records of the employees disclosed warnings for misconduct of that nature. There was no evidence that the strike action was planned or organised, it was merely a withdrawal of labour in response to non-payment of wage increases and the Respondent's subsequent refusal to engage.
- [127] On 30 and 31 July 2012 the employees were concerned about the non-payment of wage increases and overtime and their interest was to discuss those issues with the Respondent. The Respondent on the other hand had no interest in discussing the issues with the employees and its main concern was to secure a return to work and full production.

- [128] In my view and with the application of a modicum of common sense, a solution might have been found, but the gap between the interests of the employees and the interests of the Respondent was never bridged with the consequence that the employees lost their jobs and the Respondent lost production.
- [129] On 31 July 2012 Smit arrived at the conclusion that the strike was continuing when the employees were not working at 07:10. That was 10 minutes after the normal starting time. Without engaging them, Smit told them to work or leave. This situation was one that called out for a common sense approach. There was no attempt to find out why they were not working at 07:10, but still in the change room, there was no appreciation for the reality that the employees were still aggrieved about the non-payment of wage increases and there was no leniency towards the employees for not commencing work 10 minutes after normal starting time.
- [130] In my view Smit took a hasty approach when he concluded by 07:10 that the strike was continuing. He took an approach not consistent with his interest to ensure a return to work and an intention to resolve the issues. Shortly thereafter the employees were suspended and charges of misconduct levelled against them.
- [131] NUMSA proposed a meeting to be held on 1 August 2012 and requested the Respondent on two occasions to confirm the meeting. The Respondent never confirmed the meeting and the meeting never took place. The Respondent did nothing further to meet with the union. I reiterate that the conduct of the Respondent was not consistent with or conducive to any earnest attempt to resolve the dispute.
- [132] The Labour Appeal Court³ approved the view that Item 6 is neither exhaustive nor rigid and that other factors including the duration of the strike, the legitimacy of the strikers' demands, the timing of the strike and the conduct of the strikers are all relevant. Therefore I have to consider the provisions of Item 6 and 7 of the Code as well as further relevant factors to determine the fairness of the strike related dismissal.
- [133] Firstly, I have to consider the duration of the strike. It is common cause that the employees commenced strike action on 30 July 2012 at the

³ (2014) 1 BLLR 31 (LAC) at paragraph 30.

commencement of their normal shift and that they returned to work on 31 July 2012 and were suspended at 09:00 on 31 July 2012. The duration of the strike was one day.

[134] I have to consider the harm caused by the strike. No evidence was adduced as to the actual harm caused by the strike and I accept that apart from the obvious loss in production, there was no other harm caused or any damage to property or injury to persons.

[135] The legitimacy of the strikers' demands is another consideration. I already found the demands to be legitimate.

[136] The timing of the strike is of no significance. The employees did not plan to strike at a time that would harm the employer and that was critical to the business operations. The strike happened on the first working day after payday and the cause of the strike was the fact that no wage increases were paid and the employees wanted an explanation. 30 July 2012 was the first opportunity for them to demand such an explanation from their employer.

[137] Another pertinent factor is the conduct of the employees. There was no evidence adduced that the employees did more than to gather in front of the office and wait to see Smit. There was no evidence or suggestion that they were violent or that they damaged property. The conduct of the employees was peaceful and seeking no more than an engagement with the Respondent.

[138] Considering Item 6 and 7 of the Code and the above factors, I am of the view that dismissal was not appropriate in the circumstances.

[139] In conclusion, the Respondent's conduct was the cause of the strike, it failed to engage in any meaningful endeavour to resolve the issues that caused the strike, it had no intention to resolve the issues and its decision to dismiss the employees was precipitate.

[140] It follows that the employees' dismissal was substantively unfair.

Costs

[141] Costs should be considered against the provisions of section 162 of the Act and according to the requirements of the law and fairness.

[142] The requirement of law has been interpreted to mean that the costs would follow the result.

[143] In considering fairness, this Court has held that the conduct of the parties should be taken into account and that *mala fide*, unreasonableness and frivolousness are factors justifying the imposition of a costs order. Another factor to be considered is whether there is an ongoing relationship that would survive after the dispute had been resolved by the Court. If so, a costs order may damage the ongoing relationship.

[144] Both parties submitted that costs should follow the result. There is no ongoing relationship between the parties.

[145] Insofar as the result is concerned, the Applicant was only partially successful in their claim and the Respondent was only partially successful in defending the claim.

[146] In my view the interest of fairness are best served by making no order as to costs.

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

Order

1. The dismissal of the individual applicants is procedurally fair but substantively unfair;
2. Each of the individual applicants is awarded compensation in a sum equivalent to 6 (six) months' salary, to be calculated at the rate of remuneration on date of dismissal;
3. No order as to costs.

Prinsloo AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Phukhubje

Finger Phukhubje Inc Attorneys

For the Respondent: Mr Geldenhuys

Geldenhuys C J at Law Attorneys

LABOUR COURT