THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS1106/14

In the matter between:

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA obo MEMBERS **Applicants**

and

ELEMENT SIX PRODUCTION (PTY) LTD **Respondent**

Heard: **22 February 2016**

Delivered: **07 February 2017**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The Applicants approached the Court to contest the decision of the Respondent to pay a 'token' to some of its employees who had performed additional tasks during the course of a protected strike that took place in July 2014. The Applicants contend that the decision was discriminatory within the meaning of the provisions of sections 5 of the Labour Relations Act (The LRA)[1].

[2] The specific provisions relied upon are;

Section 5. Protection of employees and persons seeking employment

(1) *No person may discriminate against an employee for exercising any right conferred by this Act.*

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[1] Act 66 of 1995

> (2) *Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following-*
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> *(c)* *prejudice an employee or a person seeking employment because of past, present or anticipated –*
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> (i) *……….*
>
> (ii) *……….*
>
> (iii) *participation in the lawful activities of a trade union, federation of trade unions or workplace forum;*
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> (iv) *………*
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> (v) *………*
>
> (vi) *exercise of any right conferred by this Act; or*
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> (vii) *………*

[3] The above dispute arose out of the following common cause facts;

3.1 The Respondent produces abrasive super materials that are used as an input tool for the purposes of drilling, grinding and polishing. Its customers are in various industries including aerospace, oil and gas, and are mainly based in North America. As at 2014, it had employed about 980 employees, with 180 of them falling outside the bargaining unit;

3.2 On 1 July 2014, members of NUMSA, UASA and SAEWA commenced a protected strike at the Respondent's Springs' plant in support of national demands tabled at the MEIBC. The protected strike ended on 28 July 2014, and employees resumed their duties on 29 July 2014;

3.3 The allegations of discrimination arose after a decision taken by the Respondent on 6 August 2014 to pay in accordance with certain criteria, what it considered to be a token of appreciation to those employees who had worked and performed additional tasks during the strike action;

3.4 Payments according to the Respondent were made to employees who (a) worked for at least 10 days during the industrial action; (b) were permanent employees and (c) made a positive contribution to running production during the persistence of the industrial action;

[4] The Respondent's contention is that the above payments did not breach the provisions of section 5 of the LRA, and were not discriminatory on any specified or unspecified ground. It considered the criteria it had applied in making payments as objective and rational, which

was not intended to be discriminatory, and further that the payment did not have any effect on the effectiveness of the strike, nor was it likely to have a detrimental effect on future strikes.

[5] The Respondent disputed that NUMSA members were denied additional payments on the basis of their participation in protected industrial action. It contended that during the industrial action in question, there were several employees who had performed additional tasks as because they were not party to the industrial action, or they were not affected by the wage dispute before the MEIBC; or because they were not members of NUMSA; or that they chose to tender their services during the industrial action;

[6] In order to continue production, it had approached these employees who also included normally office bound employees, and requested them to assist in the production lines. These employees had assisted the Respondent without inducement or incentives of financial gain, and production had continued in order to meet orders.

[7] NUMSA maintained that the additional payments were nevertheless discriminatory, and sought an order that its members who had participated in the strike and did not receive a token of appreciation, be paid an equivalent amount.

The evidence:

[8] The Applicants called a single witness, Mr Tshabalala, who was a full-time shop steward since 2011 to testify in support of their case. He had a service record of 25 years with the Respondent. His evidence is summarised as follows;

8.1 Prior to the strike, the employees had worked overtime during weekends in order for the Respondent to have sufficient stock piles so as to satisfy the demands of its customers during the course of the industrial action. Those employees were remunerated accordingly;

8.2 He was unable to confirm how long the additional stock was anticipated to last, and conceded that it could have been sufficient for about two to three weeks, whereas the industrial action lasted for four weeks. He however contended that as a result of the employees' efforts in preparation for the strike, they were entitled to be paid additional amounts even though they were on strike, as they had helped the Respondent to meet the demands of its customers as a result of the stock piles;

8.3 There were at least two NUMSA members to his knowledge who were paid the token because they had chosen to work during the industrial action. This according to him was not unusual as employees' financial positions and difficulties differed;

8.4 Employees felt that they lost out by going on strike, as they did not get the token and were also not paid for the duration of that strike. The employees were also concerned with the fact that the non-strikers benefitted from the increase in wages attained as a result of the strike action, and the Respondent therefore discriminated against the striking employees by not equally paying them the token;

8.5 The employees were also entitled to the token in that having resumed their duties after the strike action, they had to deal with faulty stock produced during the strike, which needed to be scrapped off.

[9] Under cross-examination, Mr. Tshabalala's version was as follows;

9.1 He conceded that those employees that had worked overtime prior to the strike action to produce stoke piles were duly paid their overtime and shift allowances;

9.2 He could not dispute it when it was put to him that payments were only made to employees who had done their own work during the strike as well as additional work to ensure that production demands were met in accordance with the three requirements set out above, and that those non-striking employees who had not met the criteria were not paid the token;

9.3 He conceded that none of the NUMSA members had indicated to him that as a result of the token not being paid to them that they would in future not heed a call to go on strike, or that the Respondent had induced employees to prevent them from exercising their right to strike. He however contended that the members had simply demanded to be paid the token as well as it was unfair and discriminatory not to do so.

[10] The Respondent similarly only led the evidence of one witness, Mr De Klerk, its General Manager. His testimony is summarised as follows;

10.1 He joined the Respondent in July 2014, but only commenced his duties on 14 July 2014. At the time of the industrial action, there was a high demand for the Respondent's products. The demand has since dropped significantly due to the turmoil in the oil and gas industries;

10.2 The Respondent was aware that there was a national strike looming and accordingly took steps to ensure that it was prepared for it. It was anticipated that the strike would last for two to three weeks. On order to meet the demands of the clients during the looming strike, the Respondent had then increased overtime shifts, for which employees were remunerated;

10.3 It was extremely important for the Respondent not to be in a position where it could not service its clients' orders because that could have resulted in loss of market share, as the clients would have moved to other competitors. A loss of market share in the industry was permanent in addition to which there could be reputational damage to the Respondent;

10.4 The employees who were on strike were between Grade 1 and 5, being those who were typically closely associated with the production process. Initially during the strike, the production process was not operational and non-striking employees were predominantly involved in picking, packing and shipping activities. Some non-striking staff members had volunteered to assist with additional tasks where required on top of their own work. In this fashion the Respondent was able to continue servicing its client's orders;

10.5 As at 21 June 2014, stocks had almost depleted whilst the demand for products continued. The Respondent therefore needed to come up with measures to continue with production in order to meet its clients' demands. A meeting was held with the remaining staff members and volunteers were called upon to sustain production on a shift basis;

10.6 No employees were compelled to perform additional tasks, nor were they induced or offered payment for volunteering to do additional tasks. The volunteers were generally understanding of the Respondent's circumstances, and had presented themselves voluntarily;

10.7 Volunteers came forward to assist the Respondent and were assigned into two shifts either 06H00 to 14H00 or 14H00 to 22H00. These came from the ranks of engineers, junior managers and artisans, and were trained in health and safety matters, and to operate the production line including maintenance. The revised shifts started on 22 June 2014 and continued until the striking employees returned to work on 29 June 2014. As a result of the efforts of these employees, the Respondent was able to meet its client's demand;

10.8 In considering how to show its appreciation, it was taken into account that 'normal day" employees did not receive a shift allowance whilst the NUMSA operators received it when not on strike. The decision to pay the non-striking employees who had volunteered to perform extra duties a token of appreciation was only taken by management after the end of the strike;

10.9 The token was paid strictly in accordance with the criteria decided upon and in some instances, payments were made on a *pro rata* basis depending on the relevant individual's participation. There was no indication given that payments would be made in future should a similar situation arise, nor was there any intention to discriminate against striking members by making these payments.

[11] Under cross-examination, it was put to Mr. De Klerk that employees who had worked overtime in anticipation of the strike had also gone beyond the call of duty, and thus deserved to be paid the bonus. He nevertheless disputed this contention, and testified that the overtime was an opportunity given to employees who were duly remunerated for the work done, and that employees who had worked overtime shifts had done so on their own free will. Accordingly, the increase in production in order to prepare for the strike was not beyond the employee's normal duties.

[12] He further disputed the contention that volunteers could simply have been paid shift allowances instead of the token, and testified that the volunteers, who were from the non-bargaining unit, were not paid shift allowances and overtime as there was no provision for this in their contracts of employment. It was in the light of this consideration that the Respondent had elected to use a different method of paying a token of appreciation.

The arguments:

[13] The parties had filed written heads of argument as agreed at the end of the trial. In both sets of written argument, reference was made to two authorities[2] that had previously dealt with similar issues in this court, and these will be explored in more detail shortly.

[14] The Applicants' principal argument were however as follows;

14.1 Evidence presented on behalf of the Respondent indicated that it was not a normal procedure in the company to pay bonuses of the nature complained of, and that this was only done during the strike in question;

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[2] FAWU & others v Pets Product (Pty) Limited [2007] 7 BLLR 781 (LC) and NUM v Namakwa Sands – A Division of Anglo American Corporations Limited (2008) 29 ILJ 698 (LC)

14.2 To the extent that this type of bonus had never been paid to employees before and would not be paid in future, it was common cause between the parties that discrimination had taken place, and the issue was whether such discrimination was fair;

14.3 In accordance with the provisions of section 10 of the LRA, the onus was upon the Applicants to demonstrate that their rights or protections under the provisions of section 5 were been infringed. Once that onus was discharged, it would then shift to the Respondent to demonstrate that its conduct had not infringed any of the employees' rights or protection. Thus, the Respondent had to show that there no malicious intent in the discrimination complained of;

14.4 In line with *FAWU & others v Pets Products*[3] once it was established that there was discrimination against employees for exercising any right conferred in the LRA, it should be presumed that the discrimination was unfair, until the contrary was established;

14.5 The inference to be drawn from the facts of the case was that discrimination complained of was unfair, more particularly since there were no written terms or conditions of employment in place in the company in respect of the bonuses that were paid to those employees who did not go on strike;

14.6 The Respondent's decision to pay bonuses was shrouded in secrecy as it had refused to disclose payments made on the grounds of confidentiality. It should therefore be concluded that such payments were only made in respect of the specific strike action, to send a message to non-strikers that they should not participate in strike action, and this was unfair in the light of the protected strike action;

[3] At para 20 where it was held that;

'In my view, where a person (such as the respondent employer in this case) discriminates against employees (such as the individual applicants) for exercising their right to strike which is conferred by this Act, then the unfairness of that discrimination is presumed although the contrary may still be established. In this regard, it is analogous to discrimination on one of the grounds specified in the Constitution, the unfairness of which is presumed until the contrary is established (Harksen supra at para 48). In my view, therefore it is not necessary at the section 10(a) stage of the proceedings in this Court, for the party alleging the infringement to prove, for example, that the discriminatory conduct was or is actuated by an illicit reason or by an ulterior motive on the part of the respondent employer. This approach, with due respect to Brassey, avoids the cases of so-called mixed motive which he refers to in his book at page A2:9. This approach also, with due respect to Mr Steenkamp's argument, avoids me having to get into a debate about whether section 5(1) (and (3) for that matter) should be restrictively applied or interpreted. In other words, in my view, once it is established that there was discrimination against an employee for exercising any right conferred by this Act, then it must be presumed that such discrimination was unfair, until the contrary is established'

14.7 Respondent had therefore failed to justify or give reasons why the discrimination was not unfair; had refused to disclose information pertaining to the payments, and had clearly paid the bonuses in circumstances where it had previously told those employees that they would be rewarded if they did not participate in the strike action.

[15] The Respondent's principal arguments are summarised as follows;

15.1 In regards to the question of onus, the Courts in *FAWU* and *NUM v Namakwa Sands* erred in concluding that discrimination against employees for striking was discrimination on a listed ground. This was so in that striking was not listed in section 9 (3) of the Constitution of the Republic[4];

15.2 The correct test to be applied was that which related to discrimination on an unspecified ground, as it is akin to the burden of proof in section 10 of the LRA. Accordingly, the correct test was that as proposed by Brassey[5], i.e., that a contravention of section 5 of the LRA required *'discriminatory conduct that is actuated by an illicit reason'*. Thus, the most proximate cause for the discrimination must be determined to ascertain whether the discrimination was indeed unfair. In accordance with this proposal, if the employer's motive was not to unfairly discriminate, the discriminatory conduct complained of could not be seen to be unfair;

15.3 Furthermore, based on Brassey's proposal and the decision in *FAWU*, if an employer could prove that there was *'rational and objective'* criteria for the payment of the bonus, and that the intention was not to discriminate unfairly, this would prove that the discrimination was not unfair;

15.4 In this case, the Applicants, through the evidence of Mr Tshabalala failed to demonstrate that the Respondent did not use rational and objective criteria, or no evidence was presented to demonstrate that non-striking employees were paid arbitrarily and without reference to any criteria;

15.5 To the extent that the Applicants argued that the Respondent had concealed the payment information, they were entitled to bring an application to compel discovery of such documents that disclosed how payments were made;

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[4] Constitution of the Republic of South Africa, Act 108 of 1996

[5] 'Employment and Labour Law Commentary on the Labour Relations Act' Vol 3

15.6 The Applicants failed to show that the Respondent had the intention to discriminate against the striking employees for illicit reasons and/or to prevent such employees from exercising their right to strike. Furthermore, based on Mr. Tshabalala's concessions, NUMSA members would not be dissuaded from joining future strikes based on the payment of the token of appreciation, and there was no basis to conclude that the Respondent had offered an inducement to prevent striking employees exercising their right to strike.

Evaluation:

[16] The starting point is that the right to strike is a fundamental right enshrined in the Constitution[6] and regulated by the LRA[7]. It is accepted that not all employees may be willing to join a protected strike even if they belong to a trade union that had called for that strike. There is nothing in the LRA or any other statutory provision that prohibits an employer from utilising the services of its non-striking employees to perform work ordinarily performed by striking employees, and rewarding them for going the 'extra mile'.

[17] The provisions of section 187 (1) (a) and (b) of the LRA[8] specifically prohibit the employer from *compelling* non-striking employees to do work normally done by striking employees. Francis J in *NUM v Namakwa Sands* held that these provisions placed an indirect prohibition on an employer to ask non-striking employees to do the work of striking employees during a protected strike[9]. In the same token however, no consequences are

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[6] Section 23 (2) (c) of the Constitution

[7] Chapter IV of the LRA

[8] '**187. Automatically unfair dismissals**

(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is –

(a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;

(b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;

[9] At para 40 held that:

'The respondent was aware of the provisions of section 187(1)(a) and (b) of the LRA that prevents an employer from dismissing employees who are embarked in a protected strike and employees who refuse or indicate an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV unless the work was necessary to prevent an actual danger to life, personal safety or health. This section in my view places an indirect prohibition on an employer to ask non striking employees to do the work of striking employees during a protected strike. The employees who were not on strike were paid to do the work of non striking employees and the reward for doing this were the R300.00 daily allowance and free meals. The respondent clearly knew that it could not force the non striking employees to do the work of their striking colleagues. It therefore came up with this policy that from the evidence led was clearly to incentivise non striking employees to do the work of their striking colleagues. Talmakkies who worked during the protected strike said that when he sometimes worked as a tap floor operator not during strikes he was not paid the R300.00 allowance. This was also confirmed by Appollus. None of the employees who did alternative work outside a strike situation were paid this daily allowance. They were either paid a shift or acting allowance.'

visited upon an employer that has politely asked non-strikers to volunteer to perform work ordinarily performed by striking employees.

[18] The *lacuna* in the LRA has created a conundrum, which unfortunately the drafters and legislators equally failed to address in the recent amendments to the LRA despite the contentious views and positions expressed in both *FAWU & others v Pets Products* and *NUM v Namakwa Sands.* The difficulties that arise when non-striking employees volunteer to perform the functions ordinarily performed by the striking employees are easily identifiable. Whether these difficulties are imagined or real is a question of fact, and in some instances, of law. Some of these difficulties are the following;

18.1 In very rare instances would ordinary (low ranking) non-striking employees volunteer to perform the tasks of striking employees without an expectation of some form of reward;

18.2 Non-striking employees who are asked to perform the tasks of those on strike in addition to their normal tasks can view this as an opportunity to supplement their salaries during the duration of the strike. This can induce them to refrain from joining strike actions, or abandon the strike midstream, or be deterred from taking part in strike actions in future[10].

18.3 Ultimately, the exercise of a right to strike with a view of advancing and addressing employees' legitimate concerns might be rendered ineffective if not nugatory. In the alternative, if in the end, the striking employees' demands are met, the non-striking employees who fall within the bargaining unit, and who had performed the tasks of those on strike in addition to their own, would end up benefitting twice, i.e., an increase in salary as a result of the sacrifices made by their colleagues, and secondly, from an extra income derived from the strike action. This clearly cannot be fair;

18.4 The practice has the effect of weakening the employees' collective bargaining effort, or at most causing discord and disunity amongst members of a union, thus undermining the right to strike and invariably tilting the scales of the power play in favour of the employer;

18.5 The consequences that flow from such disunity may be dire for non-striking employees, given the common knowledge that strikes normally tend to turn violent

[10] See NUM v Namakwa Sands at para 41

whether in, at or near workplaces and beyond. It is not uncommon for strike violence to spiral into communities and employees' places of residence, and employers and the courts would be remiss in not acknowledging these far-reaching consequences;

18.6 When non-striking employees perform the tasks of striking employees, employers can withstand a protracted strike and continue with business as usual as long as the strike continues. Such practices undermine the legitimacy of protected strike actions, and can be used as a strategy by employers to negate and dilute the intended effects of the protected strike action embarked upon by employees;

18.7 The effect of such practices is to side-track employers from addressing legitimate concerns of the striking employees as long as production and business continues as normal during the strike. It can also degrade the status of collective bargaining as a constitutional tool to resolve disputes[11], defeat the purpose of the LRA as identified in its section 1[12], and undermine the rights of employees to freely associate and take part in the lawful activities of their unions;

18.8 The provisions of section 10 of the Basic Conditions of Employment Act[13] equally escaped the attention of the drafters during its recent amendment in regards to these contentious issues. These provisions allow employers to require or permit employees to work overtime, provided there is an agreement. However, these provisions do not address the issue whether such overtime work, *albeit* permitted and consented to, should cover work ordinarily performed by striking employees.

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[11] Section 23 (5) of the Constitution

[12] '**1. Purposes of this Act**

The purpose of this Act1 is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are –

(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation

(c) to provide a framework within which employees and their trade unions, employers and employer's organisations can –

i. collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

ii. formulate industrial policy; and

(d) to promote –

i. orderly collective bargaining;

ii. collective bargaining at sectoral level;

iii. employee participation in decision-making in the workplace; and

iv. the effective resolution of labour disputes.

[13] Act 75 of 1997

[19] The issue of onus has to be considered within the context of the difficulties identified above. Section 10 of the LRA stipulates that an employee who alleges that a right or protection conferred by section 5 has been infringed must prove the facts of the conduct, and the employer who engaged in that conduct must then prove that the conduct complained of did not infringe those provisions.

[20] The parties are at odds in regards to how the test pertaining to onus ought to be applied. The Applicants' approach is that to the extent that they had demonstrated that the Respondent's conduct of paying non-striking employees for performing tasks that would ordinarily have been performed by the striking employees infringed on their rights or protections conferred by section 5, the onus had shifted to the Respondent to demonstrate that it had no malicious intent in discriminating against them.

[21] The Respondent however took a different view to that in *NUM v Namakwa Sands* and *FAWU* in respect of the nature of the onus placed upon it, contending that the correct test is that as proposed by *Brassey.* In this regard, the argument was that in determining whether there was contravention of section 5 (2) (c) (iii) and 5 (2) (c) (iv) of the LRA , it was required of a party to demonstrate *'discriminatory conduct that was actuated by an illicit reason'.* Thus, according to the Respondent, in order to determine whether the payment was unfairly discriminatory, there should be an enquiry into whether *rational and objective* criteria were used in assessing who the beneficiaries of the payment were and whether the Respondent intended to unfairly discriminate against striking workers. This approach was to be used in conjunction with the test set out in section 10.

[22] The question of the onus in this case needs to be understood within the context of the employees' case, which was that they were discriminated against on the basis of their participation in the lawful activities of their *trade union*, and further having exercised their rights to strike. In *Mbana v Shepstone & Wylie*[14] the Constitutional Court held that within the context of employment law, the test for unfair discrimination is comparable to that laid down *Harksen*[15], and reiterated that the first step is to establish whether the respondent's policy

[14] (2015) 36 ILJ 1805 (CC)

[15] Harksen v Lane NO and Others 1998 (1) SA 300 (CC) at para 50 where it was held that;

'At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
(b)(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is

differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. Thus, if the discrimination is based on any of the listed grounds in section 9 of the Constitution, it is presumed to be unfair.

[23] In this case, I have no reason to deviate from the test and approach adopted in *FAWU & others v Pets Products* and *NUM v Namakwa Sands* in regards to the issue of onus, moreso since that approach is in line with the test formulated in *Harksen*. On the facts of this case, I accept that the Applicants have discharged the onus placed on them by demonstrating that there was indeed differentiation which amounted to discrimination, and that and in return, the Respondent has not been able to demonstrate that its conduct did not infringe on the rights of the Applicants as they had contended, nor have it demonstrated that the discrimination was fair. My conclusions are fortified by the following;

23.1 It was common cause that the strike action was protected, and was in pursuance of demands tabled at the MEIBC to which the Respondent was a member. The strike action had ultimately resulted in an agreement being reached at the level of the MEIBC. To the extent that the employees had participated in that strike, they had done so in pursuance of the lawful activities of their trade union, and in the exercise of their rights as conferred in both section 64 of the LRA, and as entrenched in section 23 (2) (a) and (c) of the Constitution;

23.2 In anticipation of the strike, employees had increased productivity, and equally 'went the extra mile', with a view of enabling the Respondent to meet the demands of its customers. It is accepted that the employees were paid their normal overtime pay in this regard, however, like their non-striking colleagues, they also went the extra mile. I did not understand the Respondent's case to be 'extra mile' both sets of employees went to varied in degrees to justify the differentiation;

23.3 As a consequence of the striking employees' extra effort before the strike, the Respondent was able to meet the demands of its customers for at least three weeks. On the Respondent's version, the volunteers performed additional tasks in

discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation….'

the last few days of the strike. Not much turns on the contention that volunteers went the extra mile in performing additional tasks in the first few days of the strike action without inducement or promise of a reward, as they had simply understood the position the Respondent found itself in;

23.4 When the surplus stock started to deplete, the Respondent then called upon the volunteers to work on a revised shift system in order to ensure that production continued. Amongst those volunteers were members of NUMSA who fell within the bargaining unit;

23.5 As a consequence of the shift work performed by the volunteers, this had assisted the Respondent to prevent a total supply failure, a gap in the supply line, and enabled it to meet all its supply obligations;

23.6 Significant with the re-arrangement of the shift system as adopted by the Respondent is that it enabled and induced non-striking employees to volunteer, and it is improbable that employees would have volunteered to work shifts without an expectation of some form of reward;

23.7 On 6 August 2014, and about a week after the strike had ended, the Respondent took a decision to pay what it considered a token to those employees who had not embarked on strike action, and who in its version had ‘gone the extra mile’;

23.8 When NUMSA complained about this differentiation, the Respondent justified it on the basis of ‘fair or objective’ criteria applied in making the payments. Significant with the alleged criteria is that those that qualified must have worked for at least 10 days during the industrial action. If this was the case, this then leads to the question that if there were employees who had volunteered in the early days of the strike, and had done so without inducement or expectation of a reward, why would they be rewarded when it was the Respondent’s case that the shifts were re-arranged only to cater for the last week of the strike when stocks depleted?

23.9 Significantly also, the criteria that those that were paid must have been permanent employees and had made a positive contribution to running production during the persistence of the industrial action cannot by all accounts justify the differentiation, in that the striking employees were equally permanent employees and had equally contributed positively to the running of production in that they had gone the extra mile prior to the strike. Thus even on the test of onus favoured by the Respondent, there was no rational or objective criteria utilized to reward non-striking employees;

23.10 More worrying with these additional payments is that despite the Respondent's contention that it had merely shown 'goodwill and appreciation' towards the non-striking employees, it has refused to disclose to NUMSA how much was paid to those employees, other than contenting that the criteria for payment was objective and fair. The veil of secrecy surrounding these payments, especially since they were purportedly not akin to overtime pay, leads to an inference that they were not merely made as a token;

23.11 Significant also with these payments is that they were made in similar circumstances as in *FAWU*, where there is neither a term or condition of employment prevailing at the Respondent or a practice that employees were to be remunerated for work done over and above the normal contractual entitlements. Such payments in line with the difficulties pointed out in this judgment at paragraph 18 have created doubt as to their bona fides, and notwithstanding Mr. Tshabalala's contentions that as far as he knew that might not be the case, it is not far-fetched to conclude that union members would in future think twice prior to joining strike actions in the future;

23.12 Given the conclusions reached above together with the difficulties as indicated elsewhere in this judgment, it is concluded that the payment of a 'token' made to non-striking employees in this case constituted differentiation, which amounted to discrimination within the confines of section 5 of the LRA. That discrimination was unfair in that the striking employees, contrary to the provisions of section 2 (c) (iii) and (vi) were prejudiced for their participation in the lawful activities of their trade union, and the exercise of their right to strike.

[24] The difficulties in granting the Applicants any form of relief in such circumstances have been identified in both authorities referred to in this judgment. In *FAWU,* it was held that to grant any form of relief would be to condone or compound the illegitimate conduct of the Respondent (i.e., of rewarding non-striking employees for work done during a protected strike). The Court in this regard deemed a declaratory order prohibiting repetition of similar conduct as appropriate. To the extent that the Applicant may have sought payment of the additional payments made to non-striking employees, a further difficulty is that these

amounts are unknown, partly as a result of the Respondent's reluctance to disclose them immediately after NUMSA had raised its concerns, and partly as a result of the Applicants not having done anything to quantify those amounts even after the Respondent had made a discovery in respect of some of them[16]. Other than the difficulties raised in both *FAWU* and *NUM v Namakwa Sands,* it would therefore neither be competent nor appropriate for the court to grant any monetary relief in this case. To that end, and in view of the conclusions reached in respect of the discriminatory conduct complained of, a declaratory order is deemed to be appropriate.

[25] In regards to the issue of costs, the Applicants were represented by a union official in these proceedings, and ordinarily, a cost order would not be competent.

Order:

1. It is declared that the Respondent's conduct in paying certain employees who did not participate in the national strike of 1 July 2014 to 28 July 2014 additional payments was in contravention of sections 5 (1); 5 (2) (c) (iii) and 5(2) (c) (vi) of the LRA.

2. The Respondent is prohibited from engaging in such conduct with effect from the date of this order.

3. There is no order as to costs

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

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APPEARANCES:

On behalf of the Applicant: Ms Prudence Gqoba
(NUMSA National Legal Officer)

On behalf of the Respondent: Mr Johan Olivier of Webber Wentzel Attorneys