



IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Not Reportable

CASE NO: D212/14

In the matter between:

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA (NUMSA)

First Applicant

ABEDNEGO MCHUNU & 80 OTHERS

Second and Further Applicants

and

TRANSVAAL PRESSED NUTS BOLTS

AND RIVETS (PTY) LTD

Respondent

Heard: 15 December 2016

Delivered: 31 January 2017

Summary: unfairly dismissal claim - for participation in an unprotected strike - applicants admit that work stoppages took place, which were not in accordance with Section 64 of the LRA and that ultimatums were issued – strike was in response to unjustified conduct by the employer except for second applicant whose dismissal was fair – limited back-pay ordered with reinstatement.

JUDGMENT

Cele J

Introduction

- [1] In this claim the Applicants contend that the Second and further Applicants, hereafter referred to also as employees, were unfairly dismissed by the Respondent for participation in an unprotected strike. The Applicants admit that work stoppages took place, which were not in accordance with Section 64 of the Labour Relations Act¹ and that ultimatums were issued, but they contend that the sanction of dismissal was inappropriate and unfair. They seek reinstatement in the employ of the Respondent with full retrospective effect, alternatively, compensation and costs of suit. The Respondent opposed the claim on the simple basis that dismissal was the appropriate and fair sanction for the admitted misconduct in this case.

Factual Background

- [2] The pleadings and the trial commenced with quite a number of facts placed in dispute between the parties. At the end of the trial, a number of such facts admittedly became common cause or remained undisputed. My gratitude goes to representatives of the parties for furnishing me with a summary of the facts that was consistent with the transcribed record. I adopted that factual outline.
- [3] The Respondent operates a manufacturing plant in Ladysmith where the second to further applicants were employed in the production of bolts, nuts, and rivets. There were about 170 employees. The Respondent had its head office in Alberton, which is its administrative centre, but all manufacturing was done in Ladysmith. From 2012 through to May 2013 Sergio Mr Sergio Cerrai was the Director in charge of

¹ Act Number 66 of 1995, hereafter referred to as the LRA.

production with his co-director Mr Paulos Cerrai. Mr Sergio Cerrai's father and his uncle were the founders of the Respondent which was run by the next generation, being Mr Sergio Cerrai's brothers, sister, himself and also his cousin, Mr Paulos Cerrai, who recently retired.

- [4] Mr Cerrai initially handled most labour relations. However, as he felt that his responsibilities were increased, and as the labour law to him became more complicated, the Respondent employed an employer's organisation called Full Range Employer's Organization ("FREO"), to assist it as regards labour matters. The person at FREO who Mr Cerrai would deal with was Mr Stefan van der Westhuizen. He was to deal with the workforce and report back to Mr Cerrai. The First Applicant is a union operating in the workplace of the Respondent, with the second and further Applicants having been its members. There was also another union called NUWASA. Over the years the ongoing relationship between the employer and Numsa was rocky and in other times it was good. Employees complained, inter alia, about bad language that was allegedly used by management in the factory and about the manner in which disciplinary processes were handled. There were unprocedural strikes taking place in 2012 which did not last that long but led to some dissatisfaction with the way in which the processes were not being followed.
- [5] On 4 April 2012 a racial slur was allegedly directed toward one of the employees by Andre Van Wyk who is said to have referred to such employee as a "*stupid baboon*". News of the insult spread through the factory that day and the following morning employees refused to work in response to Mr van Wyk's insult. The union organiser, Mr Hlatshwayo, attended at the Respondent's premises and persuaded the employees to return to work on the basis that he would take the matter up with Mr Cerrai. In the subsequent meeting held by Messrs Hlatshwayo and Cerrai, Mr Cerrai complained about the fact that he was being approached instead of

the complaint being given to Mr van Der Westhuizen. Much of the further conduct of the meeting was devoted toward explaining to Mr Cerrai that the workers complaints and HR issues in general were not being adequately dealt with by, Mr van Der Westhuizen. Part of the minutes of that day read:

“...enough is enough with having Stephan representing you because he is not honestly representing you because in any meetings that have been taking place he does not come back he promises that he will come back”.

[6] On 12 April 2012 the Respondent instructed its attorneys to send a letter to the local office of the First Applicant:

- complaining about the work stoppage on 5 April 2012;
- accusing Hlatshwayo of being complicit in the work stoppage;
- demanding a written explanation for the reasons for the work stoppage despite the fact that the Respondent was, according to the Applicants well aware of the reasons;
- demanding a written undertaking that no recurrence would occur, failing which legal action would be instituted;
- informing the First Applicant that the Respondent would not entertain any further meetings with the First Applicant of the shop stewards without prior, written request, setting out in detail the matters to be discussed; and

- despite the representations made to Mr Cerrai on 5 April, instructing that such request should be sent directly to Mr van der Westhuizen.

- [7] On 8 May 2013 there was an unprotected strike at the workplace and the workforce, who had previously not really exhibited a strong violent streak, on this occasion, was quite aggressive. Within the first little period of this strike they were toy-toying, singing and dancing as a collective. The group rushed down and assaulted one of the Senior Managers, Mr Ian Thurlow, employed as an Industrial Engineer, to set up systems to improve productivity in the work place, to save money and to make the company more productive. He reports directly to the directors, more particularly Mr Sergio Cerrai. Mr Thurlow did not deal much with the general work force and had no altercations with any member of work force. He joined the Health and Safety Committee in an advisory capacity and had a good relationship with the employee representatives on that committee.
- [8] The siren went off as usual at 7 am on 8 May 2016. Mr Thurlow was at his desk in his office when someone came into his office and made “a broad statement” that the work force had not come out of the change room. Mr Thurlow walked across Section A to the first opening in Section H and saw a number of people standing around. The workforce was singing in the change room. He then met Mr Bongani Mchunu, a Numsa shop steward, at the entrance to Section H. Mr Mchunu mentioned to Mr Thurlow that the workers were very unhappy because they had not received feedback to “some or other grievance”. Mr Thurlow had not been directly involved in relation to the grievances. However, the sealed letter containing the grievances had been handed to his office a few weeks prior. The letter had been taken straight up to senior management and he had no idea what was in the letter. He mentioned to Mr Mchunu that the present industrial action was “unfortunate” because the employees were not following normal procedure – whereas, if the employees had come to the senior managers earlier, management might have been able to “do something” or at least make representations to the senior directors.

- [9] Somewhat later in the morning Mr Thurlow was in his office with Mr Mike Swan when Mr Andre van Wyk came in to update what was going on with the workforce. He informed them that Mr Thurlow was going to be “targeted”. Mr Thurlow had it in his mind that he “was going to be blamed for delaying a grievance or something like that”. At about 8h30 Mr Thurlow became concerned about an intern working by herself on the other side of the factory. This was a young woman of 17 or 18 years of age who had just left school. Mr Thurlow knew her father. He decided that he would find her and bring her back to the office block. He could hear the striking employees toy-toying but could not see them from his office. He got to the door of Section H and looked for the work force. They were at the top of the road near the office block. He then thought that he would have ample time to get across the road to the other factory. He walked diagonally across the road with his back to the striking employees.
- [10] As he got into the factory he heard the sound of fast running feet behind him. He was then four or five metres into the factory. As he turned around he got tackled from behind the neck and pulled onto the floor. He received a blow to the face. He did not fight back but remained on the ground and protected his head. As he lay on the ground there “was punching, kicking, moving, tugging and so on”. All of a sudden it stopped and there were two people helping him to stand up. They found his glasses and helped him to the clinic where he received first aid before being taken to La Verna Hospital. His nose was fractured and he suffered cuts and abrasions. His jacket was soaked in blood as a result of the assault. He identified the photographs showing his injuries in the bundle of documents.
- [11] Mr Thurlow agreed that he was sympathetic with the African workers in respect of the bad language that was being used in the factory and he confirmed that, as a matter of principle, he was against bad language. He did not, however, concede that the problem was worse at Respondent’s workplace than at other places where he had worked, saying “factory language is factory language”. He also agreed that

he had advised the employees to lodge a grievance and, for that reason, the envelope had been handed to him. He testified that his advice to the employees was that they had to stick to the LRA. As regards the assault on him it was faintly suggested that Mr Thurlow might have made a gesture to the striking employees with his middle finger. He strongly disputed the insinuation.

[12] Mr Cerrai was not present in Ladysmith on 8 May 2013 but was travelling to Respondent's head office in Alberton. Soon after 11:00am he received three to four telephone calls from Ladysmith, including calls from his co-director, Mr Paulos Cerrai, and the factory managers. He was informed that Numsa aligned employees had not come into the factory to work after 7:00am. He telephoned Mr Stefan van der Westhuizen and asked him to attend to the factory. Later he asked Mr van der Westhuizen to prepare an ultimatum to get the workers back to work. Thereafter he was informed, telephonically, about the assault on Mr Ian Thurlow and that the situation at the factory was "quite tense". He then gave the instruction that the factory should be closed so that no one else would get hurt. He then abandoned the rest of the meetings that were to be held in Alberton and travelled back to Ladysmith. He arrived back in Ladysmith late on Wednesday 8 May 2013 and was back at the factory on Thursday morning 9 May 2013.

[13] The factory had remained closed but meetings were arranged with Numsa and their shop stewards to discuss the violence. These meetings took place on 9 and 10 May 2013 at the offices of FREO. At the first meeting, Mr Duke Louw, Respondent's attorney, was present as were Messrs Stefan van der Westhuizen and Cerrai. Numsa was represented by its local organiser, Mr Phumlani Hlatswayo, and three shop stewards – including Mr Mchunu. At this meeting, Mr Cerrai made it clear that the factory was to be shut to protect the property and people. Respondent wanted assurances that there would be no further violence once the factory opened. Mr Cerrai explained that the assault on Mr Thurlow had to be viewed in a serious light. If Respondent could not guarantee the safety of a senior manager, such as Mr

Thurlow, it would become extremely difficult to apply discipline and to expect junior managers to apply their authority.

- [14] The Numsa representatives were told that Mr Phillip Zungu had been identified as one of the assailants and that he would be suspended. They were assured that their grievance letter would be investigated as would the assault on Mr Thurlow and that the investigation would be done as speedily as possible. The union representatives did not take too kindly to the idea of Mr Zungu being suspended. That then became a sticking point. Towards the end of the meeting Mr Hlatswayo undertook to guarantee that there would be no further violence. However, when the Numsa delegation was leaving, Mr Mchunu commented that it may not be possible to give any guarantee regarding violence while Mr Zungu remained on suspension. Once the Numsa delegation had left the room, Respondent's management considered their options and decided to accept Mr Hlatswayo's undertaking of no violence.
- [15] On the next day, 10 May 2013, most of the employees came back to work, but the Numsa employees did not come back into the factory. The shop stewards requested an opportunity to report back to their members and this was granted to them. At about 7:30am, the shop stewards reported that their members were prepared to come back to work, provided that Mr Zungu accompanied them. Mr Cerrai did not agree to this proviso and the second meeting was arranged to be held at the offices of FREO. As a concession it was agreed that Mr Zungu could come into the work place, provided that he was accompanied by the three shop stewards who would be responsible for him. The employees were given an ultimatum accompanied with an assurance that the Respondent would investigate the matter. The ultimatum was given on Friday 10 May 2013 and required the employees to return to work by Monday 12 May 2013. A formal written ultimatum was typed out and given to Mr Hlatswayo. There was a further meeting on 10 May 2013. At this meeting Mr Hlatswayo requested more time in order to get legal advice from Durban and he requested that the ultimatum be extended to the

morning of Tuesday 13 May 2013 at 7:00 am. Mr Hlatswayo was given the extension but requested to reply by 12 noon on Monday. He asked that the extension be kept confidential. He would then prevail upon the employees to comply with the initial ultimatum, which he eventually succeeding in doing. Consequently, all Numsa employees came back to work on the Monday morning. Mr Zungu remained on suspension and the factory came back into operation.

- [16] The Respondent then commissioned an investigation into the events pertaining to the assault. This was performed by a Mr Derrick Kerr who is a service provider to SOFESA. The investigation took three days and on the afternoon of the third day Mr Kerr recommended that Mr Zungu, who was identified as one of Mr Thurlow's assailants, be disciplined. Mention was also made of Mr Mchunu who had also been identified on the video as having played a specific role in the assault. Steps were then taken to discipline Mr Mchunu. A letter dated 23 May 2013, was addressed to Mr Mchunu and served on him on 24 May 2013 to inform him that there would be a full disciplinary enquiry into his transgression namely that:

"During the unprotected strike on 8 May 2013 he incited violence by pointing in the direction of Ian Thurlow and shouting "nango" thereby precipitating the assault on Ian Thurlow."

- [17] Mr Mchunu was not suspended, but the enquiry was scheduled to take place at 09h30 on 31 May 2013. There is a live dispute on whether the Respondent notified Numsa of the proposed disciplinary hearing against Mr Mchunu as he was a senior shop steward. According to the Respondent such notification was done by means of a letter dated 24 May 2013. According to the Applicants, no such notification was issued and such failure was responsible for the strike of 27 May 2013.

- [18] Just after 12h30, the factory manager, Mr Eros Jannon, reported to Mr Cerrai that the Numsa members had not come into the factory and that they were sitting in the

change rooms. They had, therefore, not returned to work after their lunch break. Two shop stewards, Messrs Hadebe and Ngwenya came and saw Mr Cerrai in his office to inform him that the employees wanted the disciplinary action against their shop steward to be withdrawn. The employees were then issued with a verbal ultimatum to return to work by 13h00 but they did not comply with that ultimatum. However Mr Hlatwayo arrived at 13h00 for the scheduled meeting which was then used to discuss the illegal strike that had just occurred. A second ultimatum was issued requesting the employees to return to work by 14h00. The parties did not, at that stage, discuss the proposed disciplinary action against Mr Mchunu.

- [19] By 14h00 the employees had still not returned to work. Mr Cerrai then went to the change rooms to call the shop stewards. He communicated his intentions by tapping his watch, opening and shutting the fingers of his right hand, to signify talking and gesturing outside with his thumb. The shop stewards understood and arrived for the meeting shortly after. A third ultimatum was issued for the employees to return to work by 15h15 on that day. By 15h15 the employees had still not reported for work. They were then issued with a letter informing them that the Respondent would take disciplinary action. The letter was faxed to the union shortly before the work shut-off on Monday. By 16h15 everyone had disbursed.
- [20] On 28 May 2013, a Tuesday, Numsa members came into the factory premises at 7h00 but did not return to their work stations. Mr Cerrai was in his office and a member of the SAPS was there who had been sent to keep an eye on the situation. Mr van der Westhuizen arrived shortly after 7h00 and met Mr Cerrai to discuss options on how to proceed. There was commotion and the members of Numsa came out of the change rooms, started singing, chanting and toy-toying on the main road of the factory.
- [21] It was then decided, after consulting the co-directors in Alberton, to dismiss all the employees, subject to each employee's right to pursue an appeal against his or her

dismissal. Dismissal letters were handed to the shop stewards and faxed to the union. Employees were informed of their right to lodge an appeal on an individual basis within four days. The employees appealed as a collective represented by the union. Respondent was represented in the appeal by Mr van der Westhuizen and the employees were represented by Mr Hlatswayo. The appeal was heard by Mr AS Mengel. It confirmed the dismissal. An unfair dismissal dispute arose which was unsuccessfully referred to conciliation and thereafter to this Court. Most of the employees involved in the strike had long service records and specialised skills gained over years of employment with the company. More than 40% of the employees had in excess of fifteen years of service, with some as much as 30 to 35 years.

The issue

[22] While it was admitted that at the Respondent's workplace, work stoppages by second and further Applicants took place, which were not in accordance with Section 64 of the LRA and that ultimatums were issued, it is to be determined whether the sanction of dismissal was in the circumstances appropriate and fair. A series of events leading up to 28 May 2013 have thus become relevant to the inquiry. A large bulk of evidence has become common cause. The remaining disputed evidence shall now be summarized. In this regard Court has to consider evidence relevant, inter alia, to:

- 1) the seriousness of the contravention of the Act;
- 2) attempts made to comply with the LRA and
- 3) whether or not the strike was in response to unjustified conduct by the Respondent, as the employer.

Respondent's version

- [23] Mr Ricardo Cerrai (Ricardo to avoid confusion with Mr Sergio Cerrai) who was the son of Mr Sergio Cerrai was employed by Respondent as a fitter and turner apprentice. On 8 May 2013 he was at work from 7:00 am. He was asked to take a video of the strike activities from the vantage of the offices. He took the video from his personal cellular telephone. He took two videos on the day. The first video was played in court and he confirmed this to be the video that he took. He identified Mr Phillip Zungu on the video whom he said, was, at the time, a welder employed by Respondent. He also identified Mr Bongani Mchunu. He identified the direction, in which the employees he said were led by Mr Zungu are shown on the video to be running towards, as being "from the main gate in towards the factory". Some of the striking employees were entering the building through an entrance on the side. Ricardo identified this as being the entrance into the factory by the furnace and stores.
- [24] Ricardo testified that he could see and hear that just before the crowd began to run someone shouted the words "Nango! Nango!" He identified the person, on the video as being Mr Bongani Mchunu. He said that the video and cellular telephone had not been tampered with. He downloaded the video from the cellular telephone onto a computer and then copied the original clip from the computer onto a memory stick. The cellular telephone was put into a safe and is available for inspection. He identified the voices heard on the video, that is, the voices of the persons who were with him in the offices, as being those of Messrs van der Westhuizen and Leanne Rostow (Mr Sergio Cerrai's personal assistant). The latter was in telephonic contact with the stores. Her voice is heard on the video asking what happened and acknowledging a report that Mr Ian Thurlow had been assaulted and had been taken to stores which is closer to the clinic. Ricardo also said that he took a video recording on 28 May 2013, commencing at 08:07.

- [25] Mr Peter Lansdale testified that is employed by Respondent as a Production and Logistics Co-ordinator and that he has been so employed since 2002. On 8 May 2013 he reported for work at 7:00am. About three quarters of the work force were not at their work stations. UWASA aligned employees was not on strike and only the NUMSA employees were in the change rooms. He met up with Mr Andre van Wyk and both met the shops stewards, Messrs Mchunu and Ngwenya. At this stage Mr Mchunu told them that Mr Thurlow was “going to be f.. up”. Mr Lansdale told Mr Mchunu to “choose his words carefully”. Mr Mchunu then answered that Mr Thurlow was going to be “targeted”. Mr Lansdale went to look for Mr Mike Swan but could not find him. Mr van Wyk found him and reported to him what they had heard about Mr Thurlow.
- [26] Mr Lansdale witnessed the assault on Mr Thurlow. He saw Thurlow lying curled up “in a baby position” with his hands behind his head and Mr Zungu holding him down onto the grounds with his left hand. Mr Lansdale brought it to the end by “shoulder-charging” Mr Zungu off Mr Ian Thurlow. After the assault, Mr Mchunu asked the rest of the striking employees to get outside of the factory. Mr Lansdale “followed Mr Zungu with his eyes” to ensure that he left. He said that he believed that Mr Thurlow was resented by the workforce because he came to implement new strategies that required stream lining and cumbersome paper work.

Applicants' version

- [27] Mr Mchunu testified that he was first employed by Respondent in 2002 as an Operator. He became a Numsa shop steward around 2005 and a Chairperson of the shop stewards from 2009. He said that he has undergone shop steward training and that he knows how disputes are processed in matters of mutual interest. He stated that he was the Deputy Chair of the shop steward's council for the Ladysmith district and that he held this position since 2012. He knew that disputes were required to be referred to the Bargaining Council before employees could go on a

protected strike. He was also aware that it amounted to misconduct to go on an unprotected strike, this being misconduct for which employees were liable to be dismissed. He accepted that, as a shop steward, he was in a position to explain this to Numsa members.

[28] Regarding the work stoppage on 5 April 2012 he said that the employees were angered by an incident where one of the employees, Mr Thembelani Ngwenya, had been called “a baboon” by Mr van Wyk. Mr Mchunu had approached and reported the incident to Mr Mike Swan and Mr van Wyk had then offered an apology. Nonetheless the employees were very angry in that they were being insulted and nothing was being done about it. Employees were also dissatisfied as regards various other issues such as promotion and the perception that Whites and Indians were receiving preferential treatment and that procedures were not followed before warnings were issued. Mr Mchunu spoke to the managers about the employees’ unhappiness and, when he spoke to Mr Thurlow, he was advised to record the complaints in writing. As at 10 April 2013, the employees were still unhappy that the issues have not been addressed. They expected Mr van der Westhuizen to get back to them within a week but he did not. They spoke to other managers including Messrs Swan, Eros Jannon and Lansdale. The matter was also reported to Ms Leanne Ristow. However she was unable, at the time, to locate Mr van der Westhuizen.

[29] On 8 May 2013, Mr Mchunu arrived at work, Messrs Swan and Paulos Cerrai came to the window where he was working and asked why the employees were not at their stations. Mr Mchunu then called the other two shop stewards and they went to speak to the employees. They were told that the employees wanted answers regarding the grievances that had been lodged and that they wanted to be addressed by Mr van der Westhuizen. There was conversation with management but he could not recall whether Mr Thurlow was a part of this. Mr Mchunu testified that there was only one such discussion. He disputed that there was a separate

exchange between himself, Messrs Lansdale and Mr van Wyk during which he could have said that Mr Thurlow would be targeted or “f... up”. He was not aware of any unhappiness in the work force as regards Mr Thurlow.

- [30] According to Mr Mchunu the shop stewards then left the employees and discussed the matter as shop stewards “to find solutions”. They stood in a position where they knew that Mr van der Westhuizen was going to walk past. They then heard a commotion and saw that the employees were now outside the change rooms, singing and demonstrating. They approached them and went to join them.
- [31] As regards the charge on Mr Thurlow, Mr Mchunu testified that he did not hear the word “nango!” and that he did not shout such words. According to Mchunu, the noise level in the crowd was high. He heard a commotion behind him from the direction that he was not facing and he heard noise from a different side a distance from where he was standing. Employees were scattered around so he heard noise from that direction. Then he realised that all the employees that he was standing with were running towards that direction. Because he was standing close to the door, he went into the building and did not follow those employees. When he went in there, there was a space of about twenty metres, but a long space next to the furnace. There he saw Messrs Zungu, Thurlow and Lansdale lying down.
- [32] He was then requested by Mr Lansdale to tell the employees to vacate the premises so that it could be closed off. Thereafter the police arrived. After 13 May 2013, he had no further interaction regarding the events of 8 May 2013, except for one conversation that he had with the investigator Mr Kerr, during which Mr Kerr wrote down his statement. Then, on 24 May 2013, he received the letter informing him about disciplinary action to be taken against him. He had not received any prior indication that he might be disciplined in relation to the events of 8 May 2013. He reported the matter to the union, to the other shop stewards and to the employees. On 27 May 2013, Numsa employees went on strike after their lunch break. They

wanted feedback from Me van der Westhuizen about their grievances and they also wanted the charges against the shop stewards to be dropped.

- [33] At about 15h30, after the final ultimatum had expired, the employees were handed letters from Mr van der Westhuizen indicating that they were to be disciplined. On 28 May 2013, the employees arrived at work and waited in the changing rooms for their disciplinary hearings. They waited for about an hour and then the employees walked out of the changing rooms singing. The shop stewards then saw Mr Cerrai at the offices and were handed dismissal letters. Numsa employees then left the workplace.
- [34] Mr Phumlani Hlatswayo testified that he was a Numsa official dealing with the Ladysmith area since 2011. He said that it was his function to advise the employees, inform them of the law and the consequences of not following correct procedures. He said that the union did not support unprotected wildcat strikes. He said that the strike in April 2012 concerned the baboon insult. The situation was hostile and the employees were furious. Other grievances at that stage included the fact that employees were not getting feedback from Mr van der Westhuizen, that employment equity was not properly applied and that the company favoured White and Indian employees. When he heard about the grievance letter dated 2 April 2013 he was pleased that the shop stewards were attempting to resolve the matters internally. He was not involved in the events of 8 May 2013, but became involved on 9 May 2013 when he attended the meeting with management. Because the situation was volatile he had requested the company to put on hold their intentions of suspending Mr Zungu and first to appoint an external investigator.
- [35] At the meeting Mr Hlatswayo attempted to persuade the Respondent that the focus should not only be on the strike but also on what was causing the strike. After receiving the ultimatum and an extension thereof, he requested the shop stewards to convey the message to the employees that they must come back to work on

Monday. He also requested one of the shop stewards to arrange a meeting with Mr Zungu where Mr Zungu was told that in view of the difficult situation, he was to encourage any employee who contacted him to return to work and inform them that his (Mr Zungu's) issue would be dealt with by the union

[36] Mr Hlatswayo was not involved in the matter between 13 and 24 May 2013. On 24 May 2013, Mr Mchunu was handed a disciplinary notice. Mr Hlatswayo was in Durban at the time but was telephoned late in the day by Mr Mchunu who told him that he was also going to be charged. Mr Hlatswayo arranged for a letter to be sent to Respondent requesting a meeting for the following Monday. A meeting was arranged for 27 May 2013 at 13h00. When Mr Hlatswayo arrived at Respondent's premises he was met by Mr van der Westhuizen at the gate who informed him that the Numsa members were on strike.

[37] At the subsequent meeting, he was informed of the two ultimatums and realised that Mr Cerrai was only interested in getting the employees back at work. He was not going to entertain discussions pertaining to the employees' concerns. Mr Hlatswayo was, however, given an opportunity to speak to the employees. He and the shop stewards then had a discussion with the employees. They requested them to terminate the strike because the situation was no longer safe. They would, thereafter, discuss the issues with the employer. While they were having these discussions and replying to the employees' questions, Mr Cerrai came in. His entrance was perceived to be rude and disruptive as he gestured about time shortage. A further meeting was held with management. Mr Hlatswayo then saw that it was going to be very difficult to convince the employees to terminate the strike by 15h10 or 15h15 because, even prior to the interruption by Mr Cerrai, there had been many unanswered questions.

[38] He still went back to the employees and pleaded with them to go back to work. However, the situation had become worse, since the employees were angered by

Mr Cerrai's interruption. Hlatwayo had to plead with the workers for fear of worsening the situation. He then went back to his office to draft a request for an extension so that he could have proof of this request. He also wanted to get help from his seniors. He said that although he intended this letter to go through on the 27 May 2013 it was not electronically transmitted and only went through on the 28 May 2013.

- [39] He testified that he explained to the employees that there are lawful mechanisms available for resolving disputes. As he put it: "from our teaching and instructions" the employees "reached a situation" where they were aware of the possible consequences of their actions. After the employees were dismissed they were all squeezed into the board room and Mr Hlatwayo could then see that they wanted to return to work, however by then, the "doors were already closed".

Evaluation

- [40] The Code of Good Practice² deals with dismissals based on unprotected strikes and it provides that participation in a strike that does not comply with the provisions of Chapter IV is misconduct. Commenting on the provisions of the Code the Labour Appeal Court in *National Union of Metal Workers of SA and Others v CBI Electric African Cables*³ said:

"In his work, Grogan expresses the view that item 6 of the Code is not, and does not purport to be, exhaustive or rigid but merely identifies in general terms some factors that should be taken into account in evaluating the fairness of a strike dismissal. He therefore opines that in determining substantive fairness regard should also be had to other factors including the duration of the strike, the harm caused by the strike, the legitimacy of the strikers' demands, the timing of the strike, the conduct of the

² Schedule 8 of the LRA.

³ (2014) 35 ILJ 642 (LAC) at para 30.

strikers and the parity principle. I agree with this view as the consideration of the further factors ensures that the enquiry that is conducted to determine the fairness of the strike related dismissal is much broader and is not confined to the consideration of the factors set out in item 6 of the code.”

[41] In terms of the Code, 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;
- ❖ 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;
- ❖ Allow the employees sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it.

However, if the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.

[42] The participation in the unprotected strike on 27 May 2013 by the second and further applicants was certainly misconduct. The employees refused to return to work after their lunch break. It was not cleared when their lunch break would end. They had already worked at least half of the day. The halting of production was therefore limited to the remaining hours of the day. From 12h30, when Mr Eros Jannon, reported to Mr Cerrai that the Numsa members had not come back to work from their lunch till 13h00, the Respondent had already issued the first ultimatum. Employees were to return to work by 13h00. They were given just about half an hour or less to consider their position. The second ultimatum gave them another

hour, up to 14h00. The third and final ultimatum gave them one hour and ten minutes, up to 15h10. In all it was up to two hours and forty minutes.

- [43] The Respondent was obliged to allow the employees sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. It gave employees very limited time. The respondent justified the short time given to the employees by reference to the ultimatums given on previous occasions. The Respondent assumed that all that was discussed would be about a return to work to the exclusion of the very issues for which the strike was about. That was an incorrect assumption on the Respondent. One sees this attitude throughout the minutes held with Mr Cerrai. Not once did he bother to ascertain the cause of the problem. He used the union officials and shop stewards to get workers back at work with no hint at all to get to the bottom of the problem. It was common cause that there were serious challenges which cried out for a listening ear. Mr van Wyk was reportedly used to indulging in insults and getting away with it. No such ear was seen be listening to serious affronts. Transparency in resolving work problems was called for here.
- [44] The Respondent did not at the earliest opportunity contact a trade union official to discuss the course of action it intends to adopt. The first ultimatum was issued without contact being first made with the Numsa. No explanation was ever forthcoming for that failure. The arrival of the union official, Mr Hlatshwayo at the workplace, to meet with Mr van der Westhuizen was rather opportunistic, as he came for a completely different meeting and not upon invite of the Respondent to discuss the course of action it intended to adopt. He came there to discuss Mr Mchunu's pending disciplinary action. He had to be given sufficient time just to understand what the issues were, to formulate his strategy on the way forward and then to convince strikers that the route they took was not worth the risk. Mr Cerrai merely assumed that Mr Hlatshwayo had to immediately stop the strike with no tangible plan on how the concerns raised would be resolved on the face of

management who were perceived to be non-committal on problem resolution. Issues of promotions are known to be problematic in the workplace and need to be seen to be attended to in time.

- [45] An indebt investigation was to have been undertaken after Mr Thurlow had been assaulted. It had to look into who the culprits were and to establish the reason for dissatisfaction in the workforce. All it did was to establish the identities of the culprits and not the root cause of the problem. The manner in which the Respondent ran its affairs left an impression that the Respondent was a company that was very sensitive towards its senior management while it did not care at all about its junior employees. There was talk that if junior employees took seniors on in affront usages, juniors were reminded of the whereabouts of the gate.
- [46] The assault perpetrated on Mr Thurlow was a very serious act of misconduct. Those involved had to be found, subjected to disciplinary measures of the company and if found guilty, no doubt, they had to face dismissal. The withholding of labour by the employees while they used themselves as shields to protect Mr Mchunu from discipline was unreasonable and improper in the circumstances. Having viewed the video recording in this matter, I did see and hear Mr Mchunu pronouncing: "Nango! Nango!". His denial of these utterances made him an untruthful witness. The Respondent had a right to subject him to its disciplinary measures, provided it acted fairly. It did not lie in the employees having to ascertain that fairness. The LRA has established institutions whose function is to do just that. However, the same disciplinary approach should have been adopted after an employee was called a stupid baboon, knowing the history this Country has just come out of. This Court has consistently refused to endorse the fairness of dismissals in respect of strikes which have been prompted by objectionable behaviour by employers.⁴

⁴ See *SACTWU v Mediterranean Textile Mills (Pty) Ltd* (2010) 31 ILJ 2694 LC
NUMSA v Pro Roof Cape (Pty) Ltd (2005) 26 ILJ 1705 LC.

[47] Mr Hlatshwayo deserves to be commended for the sterling work he did on 9 May 2013. He averted what was an explosive situation from materializing. Had the Respondent given him time and space on 27 May 2013, he probably could have diffused the situation with no loss of jobs. The strike of the third and further Applicants on 27 May 2013 was in response to unjustified conduct by the Respondent. The behaviour of the second Applicant on 8 May 2013, in pointing out Mr Thurlow, leading up to him being assaulted, exonerated the Respondent from its unjustified conduct on 27 May 2013.

[48] I accordingly find that:

48.1 The dismissal of the second Applicant by the Respondent in this case was substantively and also procedurally fair.

48.2 The dismissal of the third and further Applicants by the Respondent in this matter was substantively unfair.

[49] As a consequence:

49.1 The Respondent is ordered to re-instate the third and further Applicants to their employment with effect from the date of dismissal but with limited back-pay of twelve (12) months. This payment is to be made within twenty (20) days from the date of this order.

49.2 The Respondent is ordered to pay the costs of this matter for the third and further Applicants. No costs order is made against the second Applicant.

Cele J.

Judge of the Labour Court of South Africa.

APPEARANCES:

FOR THE APPLICANT: Adv.P Schumann

Instructed by: Brett Purdon Attorneys

FOR THE RESPONDENT: Adv. M Pillemer SC and Adv.D Crampton

Instructed by: Maree & Pace, Mpulo