Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: JS 763/06

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	**First Applicant**
K D KUTU AND 352 OTHERS	**Second to further Applicants**

and

I G TOOLING AND LIGHT ENGINEERING (PTY) LTD	**Respondent**

Heard: 5 to 9 June 2017

Delivered: 15 May 2017

Summary: (Unprotected strike dismissal – unprovoked strike – failure of union to assist despite being kept fully informed of events – intransigent strikers – final ultimatum a dismissal ultimatum – no invitation to make representations before decision to dismiss those who failed to heed final ultimatum – subsequent appeal hearing only partially mitigating absence of initial opportunity to make representations – dismissal substantively fair – unlawful dismissal –

failure to hold an enquiry in breach of contract of employment – even if dismissal might have been in breach of contract of employment – specific performance not appropriate – damages for breach of contract not pleaded as an alternative to declaration of nullity and reinstatement will air)

JUDGMENT

LAGRANGE J

Background and preliminary issues

[1] The 353 individual applicants ('the employees'), who were members of the first applicant ('NUMSA') were dismissed by the respondent ('IGT') on 14 July 2006 for their participation in an unprotected strike, which commenced on 12 July 2006.

[2] There was an extraordinary delay in the matter coming to trial. Despite a draft pre-trial minute being prepared in April 2007, by September 2014 the final pre-trial minute had not yet been finalised. On 5 November 2014, IGT requested NUMSA to agree to the amendment of its statement of defence. In December 2014, Numsa invited IGT to file an application to amend its statement of defence, but instead of doing so, IGT only filed an amended statement of response nearly a year later in November 2015, to which Numsa objected. Only after the objection was filed did IGT file notice of intention to amend, which it only finalised in March 2016. The application to amend the statement of defence was heard on 29 July 2016 and leave to amend the statement of defence was granted, subject to certain limitations as to what could be amended.

[3] A pre-trial minute was eventually concluded on 26 August 2016. Notwithstanding that, there were further efforts to conclude a supplementary pre-trial minute arising from the applicants' contention that the dismissal of the employees was also automatically unfair on account of them being selected on the basis of their union membership which amounted to unfair discrimination. It had been alleged in the original statement of claim that the dismissal or failure to re-employ the employees

had been determined on the basis of their union membership, though they had not expressly included a claim for automatically unfair dismissal.

[4] Although a supplementary minute was never concluded, by the time the matter came to trial, the parties were agreed that the court could determine whether the dismissals for participation in unprotected strike action were either automatically unfair or, alternatively, procedurally and substantively unfair.

[5] On the Friday, preceding the commencement of the trial on the following Monday, the respondent brought an application to amend the pre-trial minute to place the duty to begin on the applicants. The application was dismissed and the parties were directed to hold a pre-trial minute dealing with the issue of discrimination relating to dismissals on account of union membership.

[6] The trial took place on 5 to 9 June 2017 and closing arguments were submitted by the end of July 2017.

[7] IGT commenced leading evidence and called the following witnesses: Mr P Erasmus, former HR manager of the firm (‘ Erasmus’); Mr P Maino, a director and shareholder of the firm (‘ Maino’) and Ms L Harris (‘Harris’), an HR manager at a company known as HR Wheels , which was also part of the CLN group which owned IGT . Numsa called the following witnesses: Mr H Ramashala (‘Ramashala’), a union member; Mr M Robertsons (‘Robertsons’), at the time a regional organiser for Ekhurhuleni; the local organiser, Mr H Tshabalala (‘ Tshabalala’) ; Mr J Tsoaeli (‘Tsoaeli’), a former shop steward, and Mr H Mphahlele (‘Mphahlele’) a union member.

[8] Owing to the lengthy period between the dismissals and the trial, five of the individual applicants had passed away and the parties drew up a list of these applicants together with their details.

[9] The issues to be decided are:

9.1 Whether IGT ought to have held a disciplinary enquiry before dismissing the employees, which the applicants claim the employees were entitled to in terms of the disciplinary code and procedure. They claim it was part of their contracts of employment.

9.2 Whether IGT selectively re-employed or reinstated some employees who had been striking and whether that selection was done on the basis of union membership.

9.3 Whether the dismissals were substantively and procedurally fair.

9.4 Whether the dismissals were unlawful.

<u>Alleged unfairness of the dismissals</u>

[10] The applicants contend the dismissals were unfair for the reasons summarised below.

Procedural fairness

[11] Numsa argues that the appeal hearing conducted by IGT was an insufficient opportunity for dismissed employees to make representations to satisfy the requirements of a procedurally fair dismissal. A related claim is that it was unfair of IGT to dismiss the strikers without first conducting collective or individual disciplinary enquiries, rather than just an appeal process. The employer contends that employees had ample warning that they could be dismissed if they continued with their strike action. Moreover, IGT had contacted Numsa during the strike, but it had declined to intervene and the appeal process provided an adequate opportunity to make representations why their dismissals should be revoked.

Substantive fairness

[12] Numsa alleges there was a long history of IGT tolerating unprotected strike action by negotiating with strikers and agreeing to their demands without taking disciplinary action. Accordingly the union argues that IGT was obliged to have alerted the strikers that on this occasion it was serious when issuing the ultimatums and the threat of dismissal. This was particularly so in the light of the fact that it had previously issued ultimatums and threatened dismissal but had not acting upon those threats even when workers did not heed them. IGT retorts that the misconduct

was serious and strikers simply ignored the ultimatums, which were unambiguous. Further IGT argues, contrary to what Numsa claims, that previous wildcat strike action was not without consequences, because agreements to stamp out wildcat action were concluded, but workers simply did not abide by their obligations under those agreements. Moreover, Numsa made no attempt to comply with the requirements for protected strike action and the strike was completely unprovoked.

[13] Numsa further claimed that after the dismissal of its members a number of other persons who have participated in the unprotected strike were reinstated or re-employed, without any justification for distinguishing their conduct from that of Numsa members who participated in the strike. Further, the applicants claim that this selective treatment was unfairly discriminatory because it was on the basis of union membership. IGT contends that the reason for distinguishing between some employees and others when it came to dismissal for participating in the strike was simply because those who were not dismissed were not on strike whether they were Numsa members or not.

[14] Numsa also pleads that the outcome of the appeal was a foregone conclusion.

[15] In closing argument for the applicants it was also submitted that, strikers did not have enough time to consider and reflect on the ultimatums before they were dismissed. However, this issue was not pleaded by the applicants as one of the reasons why the dismissals were substantively unfair.

<u>Unlawful termination</u>

[16] The applicants contend their dismissals were also unlawful because they were not afforded a disciplinary enquiry before they were dismissed in breach of the disciplinary code and procedure which formed part of their contracts of employment.

<u>Factual narrative.</u>

[17] A considerable part of the factual narrative was common cause. This is summarised together with what emerged from the evidence on material issues. Unless specifically dealt with, events narrated were either common cause in the pre-trial minute or were not effectively disputed in evidence. Most of the events surrounding the strike took place in 2006 and accordingly wherever a date is referred to without mentioning the year the year in question is 2006.

Contextual factors

[18] IGT was a company that specialised in manufacturing and assembling pressed components from sheet metal and was an original equipment manufacturer ('OEM') in the automative engineering industry, making amongst other things undercarriages for Toyota. It falls under the scope of the Metal and Engineering Industry Bargaining Council ('MEIBC'). The requirements of manufacturing for the automated market required continuous production and delays in deliveries especially to clients who operated on a just-in-time ('JIT') basis could result in the production line at an auto-manufacturer coming to a halt, because very limited stock is maintained under a JIT system.

[19] Since 2015, the company had ceased operating the manufacturing plant where the industrial action had taken place. According to Harris, while IGT remained in existence as a corporate entity, the only reason it had not been wound up was because of significant immovable property holdings which had to be sorted out. IGT no longer owned the necessary tools or production machinery to continue operating. Employees were retrenched when the company reached the end of a contract with Toyota to produce High-Lux vehicle components

[20] At all relevant times, the employees and the company were subject to agreements concluded in the centralised collective bargaining forum of the MEIBC.

[21] At the time of the dismissals, IGT employed approximately 400 workers and worked a three shift system. Approximately 150 workers were engaged on the morning shift which started at 07H00 and ended at

15H00. The remainder were divided roughly equally between the afternoon and night shifts which ran from 15H00 to 23H00, and from 23H00 until 07H00 respectively. Approximately 350 of the employees were members of Numsa.

Industrial action in 2006 preceding the July strike

[22] Before the strike which led to the applicants' dismissals in July 2006, there was a history of frequent unprotected strike action at the company. Events prior to 2006 were detailed in a letter sent by IGT to Numsa after the dismissals, and are summarised later when dealing with the letter.

[23] In March 2006, Numsa members were refusing to attend disciplinary enquiries. After a number of unprotected work stoppages IGT and Numsa concluded an agreement on 5 April 2006, which was also signed by shop stewards. In terms of that agreement, the company agreed to waive all pending disciplinary proceedings as at the end of March, and the employees committed themselves to "meticulous compliance" with the disciplinary code and procedure of the company going forward. It was also agreed that employees would immediately discontinue "current unprotected industrial action". Further, it was acknowledged that shop stewards were first and foremost employees of the company and subject to its rules and procedures. Erasmus testified that this clause was intended to deal with the problem of shop stewards abandoning their workstations to deal with union issues without first reporting to a supervisor. Pursuant to the agreement, the parties also committed themselves to develop a "protocol of behaviour" for shop stewards and management.

[24] It was put to Erasmus under cross-examination that this agreement constituted a fresh start regardless of the past history, but he disagreed. Rather, he said it was simply an attempt to build a structured relationship going forward. In his understanding, the intention of stating that the company would enforce the disciplinary code from 1 April 2006 and that employees would be subject to it, was simply to reiterate the application of the disciplinary code even though it ought to have been obvious.

[25] In the second half of April, management produced a detailed draft document which was sent to Robertsons on 19 April, but Erasmus could not recall ever getting a response from Numsa.

[26] At the end of April another agreement was reached with Numsa for workers to take one week of their annual four weeks leave during the shutdown of the Toyota plant, which took place between 21 April and 2 May. On 5 May an unprotected strike took place over a few individuals who had to remain on duty during the shutdown for operational reasons. The matter was ultimately resolved by an agreement that those individuals would take their leave in May. According to Erasmus, the resolution of the strike was largely owing to management's efforts and Numsa did not assist in ending the strike. He did concede that even though the strike had lasted about four hours and despite the previously mentioned agreement in April, no action was taken to discipline those who had participated, because the company was afraid it would lead to further production losses. He denied that management's decision not to take disciplinary action on that occasion was a breach of the agreement similar to the breaches of the agreement it accused Numsa members of committing.

[27] On 21 June, shop stewards submitted a memorandum requesting negotiations on a productivity agreement, complaining that management was unwilling to negotiate this but was nevertheless practising a production monitoring system to maintain productivity standards. The proposal was also linked to a demand for a new grading system, which would have been more costly. The memorandum made it clear that if an agreement was not reached, employees would not comply with production monitoring procedures. IGT responded that these procedures were part of normal operations since 2002 and moreover, were required by their main client, Toyota. IGT's response reminded shop stewards that in 2003 an agreement had been reached after another unprotected strike action in terms of which employees had been paid a once off "spread increase" for the implementation of the production monitoring system. IGT asserted that compliance with the production monitoring regime was part of employees' normal job requirements and it was unwilling in view of the previous agreement to enter into negotiations on a productivity agreement.

Erasmus did concede that the demand for a productivity agreement was not the same issue as grievances relating to the production monitoring system.

[28] On 27 June, IGT sent a letter to Robertsons, which was copied to shop stewards, calling on the union and shop stewards not to support or encourage rumoured strike action over the issues mentioned above. The letter reminded the recipients that they were currently engaged in a process of “relationship by objectives” exercises which would be jeopardised by unprotected strike action. It also warned that if shop stewards supported unprotected action, it could lead to management refusing to engage in negotiations with them in the future because it had no confidence that members would abide by any agreement reached. Robertsons agreed that this was a warning from the company that, it was anticipating industrial action.

[29] In any event, it appears that a meeting took place with union representatives and shop stewards on 3 July at which it was agreed that the existing production monitoring arrangement would continue. However on 5 July IGT again wrote to Robertsons and shop stewards. The letter complained that Numsa members were still not complying with production monitoring arrangements and IGT was anticipating the submission of yet another memorandum from shop stewards that day. The letter ended with the following request: “We require your urgent intervention with respect to the above mentioned issues and look forward to your assistance therein.” Robertsons acknowledged the urgent nature of the request.

[30] Following the request, a meeting about the production management system took place on 5 or 6 July. That resulted in an agreement that the existing production management system, was necessary and would continue. Further, management committed itself to engage with all employees involved in production monitoring to make sure they had a good understanding of the client requirements and the purpose of having the system. This was all recorded in a letter penned by Erasmus on 6 July.

The first memorandum of 5 July

[31] The same day, Numsa members submitted a different handwritten memo to IGT, dated 5 July,. It was preceded by a march of workers led by shop stewards, though workers returned to work after the march. The memo demanded that all employees should be paid the same as employees operating robots at the company. In particular, they demanded an increase of R2-00 an hour. The memorandum also alleged discrimination on the ground that one of the robot operators in question was a contractor and the increase was also racially discriminatory. The memorandum gave management an ultimatum of 48 hours to respond. Ramashala said that workers perceived it as unjust that certain workers were being paid more, but he had no recollection of the contents of the letter of demand presented by shop stewards on 5 July. He was unaware of the memorandum.

[32] The company responded with a detailed letter on 6 July, which was given to shop stewards and was also sent to Robertsons, but he said he was away in Somerset West at the time and only saw it later in his pigeonhole at the union office. Tshabalala said he did not remember this letter nor did he remember responding to it. The more relevant aspects of that letter were that:

32.1 Three robot operator positions had been advertised the previous year and three candidates were successful, two of whom were black and the other white. Later that year one of the black candidates and the white candidate were appointed after successfully completing a probation. The other black candidate’s appointment could not be confirmed owing to medical problems and he was moved to the other plant on the premises on his former conditions of service.

32.2 The white operator was appointed as a contractor, but was simply paid the rate at which the job had been graded, not because he was white.

32.3 IGT complained that shop stewards had been misleading workers on the issue by falsely claiming unfair discrimination, which undermined relationship building initiatives management had embarked on.

32.4 IGT would not engage in collective bargaining on wage increases which had to be conducted at a centralised at the bargaining council.

[33] Ramashala had no recollection of shop stewards reporting management's response to them.

[34] According to Erasmus, an arrangement was made with Robertsons to hold a meeting on 19 July to discuss the issue with the union and shop stewards. An earlier meeting could not be convened because the union was not available before that.

The second memorandum of 11 July

[35] In the afternoon of 11 July, shop stewards responded with another letter of demand reiterating the demand for an across-the-board increase of R2-00. This time no reference was made to racial discrimination, but they still claimed that paying a contract worker a higher rate was contrary to the company policy. No direct mention was made of anything else contained in IGT's original replying letter but the shop stewards demanded a response before 11H00 on 12 July. Robertsons had apparently not seen this second memorandum before he testified. The submission of the second memorandum was also preceded by a lunchtime meeting and a march similar to the first. According to Erasmus, IGT assessed the situation as serious and attempted to contact Robertsons and Tshabalala, without success.

[36] In any event, just before 11H00 on 12 July, IGT issued a letter to shop stewards in which, amongst other things, it raised the following:

36.1 The reasons for the demand had changed.

36.2 The demand had been submitted despite an agreement to meet to discuss the issue on 19 July;

36.3 The grading of jobs was determined by the bargaining council;

36.4 The recruitment process followed in the appointment of the robot operators was open to full-time and contract employees and the 'policy' referred to in the memorandum did not exist.

36.5 Management was concerned that the shop stewards were intent on obtaining an 'illegitimate' increase through power-play which would end badly for both parties.

36.6 Numsa members were advised that if they chose to embark on unprotected strike action on account of management refusing to accede to the demand "they will leave management with no alternative but to follow the procedure in dealing with Unprotected strike action which will probably lead to dismissal."

The last mentioned point had been emphasised because IGT was concerned that unprotected strike action was imminent as the second memorandum suggested that the workforce was intent on pursuing the issue despite the pending meeting agreed to with the union. Erasmus understood the ultimatum in the second memorandum to mean that if the company did not respond by the deadline, industrial action would ensue. It was suggested to Erasmus that, there was no reason why IGT could not engage with workers in respect of this demand in the way that it had in relation to the implementation of the three shift system and the payment of the once off amount. He agreed that the once off amount was not something catered for in the MEIBC agreement, but maintained that it was management's choice whether or not to make such a payment. Erasmus also testified that even if it was correct that a contract worker was receiving the rate for the higher graded job they were performing, there was no justification for complaining about that merely because an employee was not permanent.

[37] Robertsons recalls seeing IGT's letter of 11 July which he obtained from Tshabalala, but had not seen the second letter of demand from the shop stewards before he testified. He became aware of the strike around that time because Tshabalala probably contacted him telephonically. As far as he could recall, it was the first time that Tshabalala had dealt with such an issue because previously Tshabalala had only worked in national strikes.

Robertsons was reluctant to agree that the reason his name was on the correspondence from IGT was because the company believed he was intimately involved in issues at the company. Tshabalala did recall the second letter of demand by the shop stewards and the company's response. It appears that the company's letter of 11 July was faxed to the union office shortly before 11H00 and that this led to Tshabalala sending a letter to IGT late in the afternoon of 12 July agreeing to meet with them on 13 July. Tshabalala said he did not actually arrange the meeting with the IGT management but was responding to the employer's request for intervention. The urgency of the meeting was necessary because IGT's letter of 11 July indicated that workers might embark on unprotected strike action and management warned that this could ultimately lead to dismissal. This was a real possibility in his mind because whenever there was a dispute, employees would go out on strike.

Events of 12 July

[38] As Erasmus anticipated, on 12 July at 11H30 Numsa members on the morning shift embarked on unprotected strike action. Although not all employees participated in the strike, those who remained on duty could not continue with operations. Erasmus said he knew who was not on strike because certain employees came and told him they were not participating in it. According to Ramashala the strike began when shop stewards told workers that a meeting with management planned for that day to discuss the issues did not take place because management never called them to the meeting. This piece of evidence was never canvassed with any of management's witnesses. Ramashala agreed that the shop stewards second letter of demand, like the first, did not specifically mention any meeting but simply required a response, this time within 24 hours. He conceded that it appeared that they had gone out on strike despite it having been agreed by IGT that it would meet with Numsa on 19 July.

[39] When Tsoaeli testified, he stated that when shop stewards submitted the second memorandum on 11 July, management had promised to hold a meeting with them, but no meeting took place because the employer was

"still having visitors" and the next day they reported to workers that the meeting did not take place. He agreed that the memorandum itself did not ask for a meeting but insisted that they had requested one when they met management on 11 July. As with other important aspects of the applicants' version, management's supposed excuse for not meeting them was not canvassed with Erasmus when he testified. Tsoaeli agreed that a meeting had been scheduled for 19 July, but said that employees "realised that would be too late". When asked to explain why it was so urgent to meet before then, Tsoaeli's enigmatic answer was that, workers knew that the employer would change its mind about the issues dealt with in the letter. Even though the demand was for an increase and not because of any immediate problem in the workplace, employees felt the matter was urgent. He even claimed that the second memorandum was issued to secure an earlier meeting with management, but he was not willing to concede that it amounted to an ultimatum failing which the workers would embark on their strike. Nevertheless, he admitted that the second memorandum effectively called for a written response from management and did not ask for a meeting.

[40] Tsoaeli claimed that workers downed tools and told them to meet with the employer, which they tried to do but Erasmus "did not have time" for meeting with them. He agreed that he had seen management's response and understood it. He was also aware of the penultimate paragraph in the letter which stated:

> "Numsa members should note that if they elect to embark on an unprotected strike action as result of management's refusal to accede to the demand to award a R 2 increase across the board, they will leave management with no alternative but to follow the procedure in dealing with strike action which will probably lead to dismissal."

Contrary to testimony of other union witnesses, Tsoaeli said he was concerned what might happen if members went on strike and that they might be dismissed according to the letter. However, when he read it to them they told him that it had happened before but nobody had been dismissed. Under cross-examination he conceded that he was aware that they could be dismissed for participating in an unprotected strike and that he told workers that was the legal position because that was what the union had advised them as shop stewards.

[41] Nevertheless, even though he conceded that a strike would cause the company to lose money, he thought the company was "enjoying" unprotected strikes because of the way it handled them. As he saw it, the company could have resolved the situation by meeting with them and agreeing to the demands. He was unwilling to concede that employees agreeing not to embark on strike action could also be part of the solution. He reluctantly agreed that in the past employees had agreed not to embark on unprotected action at IGT in exchange for achieving their demands.

The first ultimatum

[42] Erasmus said he attempted to engage with shop stewards but they would not present themselves for a meeting and attempts to contact regional union representatives by phone were also unsuccessful. Accordingly, just before 13H30, an urgent written notification was faxed to the union, with a copy of the first ultimatum it intended to issue.

[43] Erasmus testified that the union did not respond to this appeal. As described below, Tshabalala claimed he only saw the correspondence late in the afternoon of 13 July. Erasmus describe the situation at the time as volatile: strikers were aggressively chanting and dancing. Some were making throat-slitting gestures. Whenever any director or manager went out to where they were assembled, the crowd would become more agitated.

[44] Strikers were issued with a written ultimatum requiring them to resume work by 14H00. The contents of the ultimatum read:

> "FIRST ULTIMATUM UNPROTECTED INDUSTRIAL ACTION
>
> YOU ARE HEREBY NOTIFIED THAT THE ACTION YOU HAVE EMBARKED UPON ATsoaeli1 H 30 TODAY, 12 JULY 2006 IS UNPROTECTED IN TERMS OF THE LABOUR RELATIONS ACT, AND SHOULD YOU FAIL TO RETURN TO WORK AT WORK NORMALLY BY NO LATER THAN 14 H00 HOURS TODAY, MANAGEMENT WILL BE

> FORCED TO TAKE ACTION AGAINST YOU WHICH COULD LEAD TO YOUR DISMISSAL. PLEASE BE ADVISED THAT WHILST YOU ARE NOT WORKING, THIS TIME WILL BE UNPAID.
>
> NOTE THAT MANAGEMENT ALREADY ADVISED ITS CLIENTS OF THE UNPROTECTED STRIKE ACTION AND WE WERE INFORMED THAT COMPONENTS WILL BE SOURCED ELSEWHERE WHICH IN TURN COULD LEAD TO PERMANENT JOB LOSSES FOR BY I. G. TOOLING EMPLOYEES.
>
> IN ADDITION TO THE ABOVE, NUMSA MEMBERS MUST REALISE THAT THEY WILL NOT BE ABLE TO REFER TO THE PROTECTION NUMSA WHILST THEY HAVE EMBARKED ON AN UNPROTECTED STRIKE ACTION AS NUMSA DO NOT SUPPORT ACTION OF THIS NATURE."

The initial ultimatum was also issued and specifically addressed to the afternoon and night shifts at 15h00 and 23h00, with respective deadlines for returning to work at 17H00 and 01H300. Erasmus said that the memorandum mentioned that Numsa did not support the strike action because there had been no official communication about the strike from Numsa and Numsa's constitution did not endorse unprotected strike action. He denied that this could be interpreted to mean that workers should not approach the union because it would not support them. He agreed that the first ultimatum did not say strikers would be dismissed but it was an unequivocal warning that they could be. The wording of paragraph 1 of the first ultimatum was similar to the wording of the final paragraph of a third ultimatum issued to strikers on 6 June 2005. In that earlier instance, no action had been taken to dismiss employees. According to Erasmus that was because they had ultimately complied with the ultimatum, which was not disputed.

[45] Erasmus said that he personally placed the ultimatum on the security office window at the main gate and the public address system was used to convey the ultimatum. Workers also grabbed copies of the ultimatum from him, but there was no response to the ultimatum itself. As far as he could recall shop stewards took copies of the ultimatum and communicated it but he could not say if any of the workers actually read it.

The second ultimatum

[46] When the first ultimatum was not heeded, a second ultimatum was issued at 14H00 instructing employees to return to work by the following day, 13 July 2006. It read:

> "SECOND ULTIMATUM UNPROTECTED INDUSTRIAL ACTION
>
> ONCE AGAIN, I WISH TO INFORM YOU THAT YOU HAVE EMBARKED ON AN UNPROTECTED INDUSTRIAL ACTION IN TERMS OF THE LABOUR RELATIONS ACT.
>
> THE FIRST ULTIMATUM ISSUED ATsoaeli2 H00 ON 12 JUNE 2006 FOR RETURN TO WORK BY 14 H00 HAS BEEN IGNORED.
>
> SHOP STEWARDS HAVE BEEN INVITED TO MEET WITH MANAGEMENT TO DISCUSS THE REASON FOR THE UNPROTECTED STRIKE ACTION BUT NUMSA MEMBERS CONTINUED WITH THE UNPROTECTED STRIKE ACTION.
>
> WORKERS ARE REQUIRED TO RETURN TO WORK BY START OF SHIFT TOMORROW (13 JULY 2006). SHOULD STRIKING NUMSA WORKERS NOT RETURNED BY THIS TIME, MANAGEMENT WILL TAKE ACTION, WHICH COULD LEAD TO DISMISSAL. PLEASE BE ADVISED THAT WHILST YOU ARE NOT WORKING, THIS TIME WILL BE UNPAID."

(original emphasis)

Erasmus testified that the same procedure was followed in issuing the second and further ultimatums. As on the first occasion, the activity of the strikers was heightened when he went to hand out the ultimatum, but there was no positive response to the ultimatum itself. Once again, a copy of the ultimatum was sent to Numsa offices without any response being received. Unlike in previous wildcat strikes, Erasmus claimed shop stewards did not come forward of their own initiative to sit down with management and discuss the issue at hand. On this occasion, management had to request them to attend a meeting before they did so. The second ultimatum had emphasised that management would take action in an effort to try to convey the seriousness of the situation to strikers. This also distinguished the ultimatum from one's issued on previous occasions.

[47] It was put to Erasmus that shop stewards were not called to any meeting, as stated in the second ultimatum. Erasmus said there would have been no point in mentioning that in the ultimatum if it had not been the case and that the primary objective of the company at that stage was to try and get workers back to work, which is why they did request a meeting. He also could not understand why two and a half hours was insufficient time to consider the first ultimatum which was very clear.

[48] When the afternoon shift arrived, they simply joined the congregated strikers of the morning shift and did not report for work. Consequently, they were issued with the first ultimatum, with the necessary changes, requiring them to return to work by 17h00. Copies of the ultimatum were issued to workers through the gate, a copy was placed on the security office and the ultimatum was announced through the public address system. Erasmus claimed that he and his assistant continually tried to contact the union. Tshabalala denied ever getting in the message of this nature. When the afternoon shift failed to respond to the first ultimatum, a second was issued in a similar manner requiring them to return to work by the start of the next afternoon shift at 15H00 the following day (13 July). A copy of the ultimatum was also sent to Numsa.

[49] At 16H21 on 12 July, a fax was sent by Tshabalala to Erasmus confirming a meeting for the following day after Tshabalala was due to attend a CCMA meeting. Erasmus did not dispute this letter but questioned why nobody else had been sent by Numsa the following day to replace Tshabalala if he had been detained at the CCMA. Erasmus said it was well known how pressurised manufacturing in the auto sector was and he could not understand how nothing more could be expected of the union in those circumstances. The meeting on 13 June had been arranged with Tshabalala but he never arrived or contacted the company to explain his absence. Although Tshabalala's letter refers to confirming a meeting with IGT, Tshabalala agreed he wrote in response to IGT's letter expressing concern over pending strike action despite the agreement to meet with the

union on 19 July. The letter dated 11 July had been sent to the local office just before 11h00 on 12 July, but Tshabalala claimed he only saw it after 16H00 because he had been attending a course and was out of the office.

[50] Tshabalala agreed that he took the threat in IGT's letter seriously, namely that if workers embarked on strike action, it would follow the procedure for dealing with unprotected strikes which would 'probably lead to dismissal'. He agreed he thought there would be a strike because employees went out on strike whenever there was a dispute. This was why he agreed he would rush to the plant after his CCMA meeting. However he denied that he said he would come to the plant on 13 July because he had seen the first and second letters of ultimatum and the urgent notice from IGT requesting union assistance. He claims he only became aware of these the next day (13 July) but could offer no explanation why he would not have seen these documents when they had all been sent before he arrived at the office on 12 July.

[51] When asked why he did not contact shop stewards before the meeting, he said that the practice was to meet with shop stewards at the plant when there were disputes and it did not come to his mind to contact them beforehand. He then added that he 'would have' phoned the shop stewards to tell them not to strike because the strike would be unprotected.

[52] In his testimony, Robertsons agreed that he met with Tshabalala on 12 July but that they discussed other issues and did not talk about the strike. However, he conceded that if Tshabalala had been aware of the strike he would have mentioned it. Robertsons claimed that if he had been aware of the strike he would have got hold of shop stewards and asked them for information, but he did not recall any contact with shop stewards on that day. He could not recall if Tshabalala had told him he was meeting the company the following day, but he might have. Tshabalala agreed they had a discussion on how to handle the issues in the memorandum and told Robertsons he was going to meet the following day with IGT and would give him feedback. They would then see how they could "move forward". He could not give any clear answer whether they decided on a

course of action during the discussion. Robertsons would not be drawn to comment on the version that had been put to Erasmus, namely that Tshabalala sent the letter that he would meet the company because he was aware of the strike. When Robertsons was asked whether it was strange that Tshabalala would be not have mentioned the strike to him when they met, he explained that this was a matter that he would have discussed with the union legal officer. He and Tshabalala would only discuss "operational issues". His *modus operandi* was that, if he heard of a problem in a particular local branch he would communicate with the local organiser. Once they had a picture of what was going on, they would assess if it was necessary to contact shop stewards. He claimed that he and Tshabalala had a discussion on 12 July on ways of intervening on the various issues raised but did not elaborate on what concrete steps, if any, that they decided on as a result of the discussion. Under re-examination, he did confirm that he was tasked with dealing with issues at IGT at that time.

[53] According to Erasmus, most of the assembled strikers had dispersed by 17H00 or 18H00 on 12 July. Although there were transport arrangements in existence to collect nightshift workers from home or from collection points nightshift workers did not report for work that evening. A copy of a similar ultimatum to the first ultimatum was issued to security officials at the plant in the event that any night shift workers came to the plant but did not report for work. That ultimatum called on nightshift workers to resume work by 01H30 on 13 July. A second ultimatum was drafted to be issued, if they did not comply with the first one calling on them to return to work by 05H00 on 13 July. Neither of these could be issued because the nightshift failed to report for work.

Events of 13 July

[54] Nevertheless, on the morning of 13 July there was a large gathering of workers outside the gate comprising morning shift and nightshift workers. They were chanting and dancing and displaying placards relating to the R 2 demand, or which attacked management. Management's intention that morning was to try and get officials and shop stewards to meet with it in

order to get everyone back to work, but they could not get hold of the officials.

[55] Erasmus testified that a meeting was held with shop stewards on 13 July, but only because management had invited them in writing to a meeting. At the meeting, the shop stewards made clear that the strike would not end unless strikers' demands were agreed to.

[56] At 11H30 a third and final ultimatum addressed to morning shift employees was issued instructing them to return to work by 07H00 on 14 July 2006, failing which they would be summarily dismissed, namely:

> "THIRD AND FINAL ULTIMATUM
>
> UNPROTECTED INDUSTRIAL ACTION APPLICABLE TO ALL NUMSA MEMBERS WORKING ON MORNING SHIFT
>
> IT IS WITH REGRET THAT MANAGEMENT IS NOTED YOU HAVE FAILED TO COMPLY WITH THE FIRST ULTIMATUMS ISSUED ATsoaeli2 H00 ON 12 JULY 2006.
>
> IN THIS ULTIMATUM YOU WERE REQUIRED TO RETURN TO WORK BY 14 H00 ON 12 JULY 2006.
>
> MANAGEMENT HAS ALSO NOTED THAT YOU FAIL TO COMPLY WITH THE SECOND ULTIMATUM ISSUED ATsoaeli4 H00 ON 12 JULY 2006.
>
> IN THIS ULTIMATUM YOU WERE REQUIRED TO RETURN TO WORK BY 07 H00 ON 13 JULY 2006.
>
> FINALLY, WE WISH TO AGAIN INFORM YOU THAT YOU HAVE EMBARKED ON UNPROTECTED INDUSTRIAL ACTION IN TERMS OF THE LABOUR RELATIONS ACT.
>
> YOU ARE THUS HEREWITH GIVEN A FINAL ULTIMATUM TO RETURN TO WORK STATION AND BE WORKING BY 07H00 ON FRIDAY, 14 JULY 2006.
>
> **NOTE THAT IF YOU FAIL TO COMPLY WITH THIS FINAL ULTIMATUM YOU ARE SUMMARILY DISMISSED AS AT 07H00, 14 JULY 2006.**"

(Original emphasis)

The intention of this ultimatum was to make it clear that if the strikers did not return to work they would face dismissal. It also followed up on the second ultimatum which had indicated that management would take action if the second ultimatum was not complied. The final ultimatum was issued in a similar fashion to the previous ones and a copy was sent to the local union office shortly before 14H00. Erasmus claimed that the response of the crowd to the third ultimatum was even more uproarious because all three shifts were present. Erasmus testified that a similar ultimatum was issued in respect of the afternoon shift and night shifts. By that stage, the crowd of strikers consisted of members of all shifts, because workers were no longer reporting at the company at the starting times of different shifts.

[57] Under cross-examination, it was put to Erasmus that the third ultimatum was issued without giving strikers an opportunity to be heard before they were dismissed. He pointed out that at that stage, they still had an opportunity to avoid dismissal simply by complying with the ultimatum, so by implication there was no need to offer employees a hearing. Moreover, the company had attempted to engage with the union and shop stewards but to no avail. He also emphasised that the third ultimatum was clearly different to any other ultimatums issued by the company in previous strikes. This was not disputed.

[58] Ramashala denied that there was any indication that strikers would be dismissed and there was every reason to suppose that nothing would happen to them as in previous strikes. However, he acknowledged that workers knew the strike was unprotected and agreed it amounted to misconduct. Nonetheless they embarked on the strike because that was the prevailing culture at the company. In elaborating on what that culture entailed, he agreed that the company would ask workers not to strike and workers promised not to but nevertheless would take strike action if their demands were not met. Tshabalala also felt the dismissals were unfair because every time there had been misunderstandings with employees in the past, the problem was resolved. In his view, IGT had been too quick to make the decision.

[59] Ramashala agreed under cross-examination that the strikers knew they could be dismissed even though they did not think they would be. He did not think they would be dismissed because ultimatums had been used

previously, which also warned of possible dismissal. Workers also did not worry particularly when the second ultimatum was issued. However he conceded that the third ultimatum, which threatened them with summary dismissal was different to the others but they did not understand it to be different, and shop stewards did not draw their attention to the difference. Ramashala did not remember seeing the first ultimatum and denied that ultimatums were handed to workers through the gate. However, later under cross-examination, he agreed that shop stewards did tell them about the ultimatums though he did not see one himself. Shop stewards did not tell them they would be dismissed if they did not report for duty on Friday. This too was never put to any of management's witnesses and was never part of the applicants' case that they were ignorant of the ultimatums. It was also at odds with Tsoaeli's testimony.

[60] Tsoaeli unequivocally stated that he was aware of all the ultimatums and they had been explained to members, but members did not agree to return to work because they saw the threats of dismissal as empty ones in view of their previous experiences. As a result, they were not even concerned about the final ultimatum warning them of summary dismissal. Tsoaeli agreed that the language of the final ultimatum was clear but simply did not believe they would be dismissed because of the way things have been done previously. He would not concede that there was any difference between the final ultimatum stating that they would be summarily dismissed if they did not heed it and the statement in the company's response of 11 July which said that it would follow the procedures, if workers embarked on unprotected strike action which would 'probably' lead to dismissal. In any event, he said it did not matter what he or the other shop stewards thought about the seriousness of the threat of dismissal because there was nothing they could do if the members wanted to go on strike.

[61] Tsoaeli agreed that in the past, the regional and local organisers would help dealing with issues at the plant. He claimed that he had left a message at the local office for the local organiser to come to the plant because of the strike, but could not remember if it was on Wednesday or Thursday. He claims he did not have access to a cell phone to follow up

after the factory gates were locked. Later he claims that they left two messages at the union office. However, Tshabalala never mentioned receiving any messages from shop stewards at any time during the strike.

[62] Tshabalala claimed that he only became aware of the strike from the employees and from the letters received from IGT, which he only saw when he returned to the office from the CCMA after 16H00 on 13 July because he finished late at the CCMA. One of those letters was written in bold typeface and addressed to him and MR, and was headed "urgent notification". The letter advised them that their members were on an unprotected strike, that a first ultimatum would be issued and that Numsa was requested to make a representative available to attend to the situation. It was sent to the local office shortly before 13H30 the previous day (12 July). In addition, he saw all the other letters and the final ultimatums and was aware of the implications of the final ultimatum. Nonetheless, even though it was an unprotected strike, it was not the first time workers had been on an unprotected strike and on previous occasions employer would threaten to fire people but would not even convene a disciplinary hearing. He conceded that the language in final ultimatum was different from previous ones but insisted that even though it was "serious", in the past, dismissals never occurred.

[63] Tshabalala said that he went to the plant after reading the letters on 13 July, but there was nobody there but he did not make any other attempt to contact anyone at the firm nor did he try to contact shop stewards. Initially, he claimed not to have had their cell phone numbers and implied that the shop stewards had changed frequently. Subsequently, he conceded that shop stewards in question were the same ones since at least September 2005. He then altered his version somewhat to say that he meant to say that he did not have their numbers with him at the time he went to the factory. He accepted that given the fact that a final ultimatum had been issued he ought to have made every effort to contact the shop stewards, but by going to the factory, he was attempting to do that. It had never been put to any of IGT's witnesses that Tshabalala went to the firm late on 13 July. Despite the situation, he did not speak to any of the shop stewards that day.

[64] In the early evening around 19H00, and after the final ultimatum had been issued, Erasmus and Maino testified they were able to contact Robertsons on the phone and held a joint conversation with him using a speakerphone. They discussed ways and means of getting the strikers back to work, but they were told that the union had lost control of the workers who did not want to listen. The union “washed its hands” of them and management “must do what they must do”. Despite making it clear that IGT intended to summarily dismiss the strikers, Robertsons said the union could not intervene because it had lost control of its members. The feedback from Robertsons was that, the strikers had no interest in Numsa. Erasmus denied that Robertsons had merely said that the union did not condone violence. In Robertsons’ recollection of the conversation, this was the first occasion he became aware of the strike, but all he discussed with Erasmus and Maino was about employees being involved in intimidation and violence and he made it clear the union did not condone those types of action and distanced itself from them. He was adamant that Erasmus and Maino made no mention of the ultimatums or the threat of dismissal, even though that was the first opportunity the company had had to talk directly with a union organiser since the strike began.

Events of 14 July

[65] Tshabalala said the following day, 14 July, he went to the firm but there was nobody there because the strikers had been fired. When he was asked why he did not make sure that he was at the company before the ultimatum expired so that he could intervene in the situation in which over 350 workers were facing dismissal, his response was simply that he was covering a very big area and all the members in the area were his responsibility. He claimed that he arrived with Robertsons and Mr Xilongwa, the legal officer, after 09h00 that morning and that they tried to speak to Maino. This was mentioned for the first time under his cross-examination and was never canvassed with Erasmus or Maino during their testimony. On the other hand, somewhat inconsistently, Tshabalala had testified that he did not engage with IGT that day because he was dealing

with the workers who were dismissed and discussed things with Robertsons to arrange a meeting with IGT.

[66] Erasmus testified that on 14 July, a massive group of strikers had congregated and continued with their picketing activities. Around 07H30, a notification of summary dismissal was issued to Numsa members "currently on unprotected strike action", which read:

> "**RE: Notice of Summary Dismissal**
>
> THIS LETTER SERVES TO CONFIRM THAT YOU ARE HEREBY SUMMARILY DISMISSED FROM SERVICES OF IG TOOLING & LIGTshabalala ENGINEERING (PTY) LTD, EFFECTIVE 07H30, 14 JULY 2006.
>
> THE REASON FOR YOUR DISMISSAL IS BASED ON THE FACT THAT YOU FAIL TO COMPLY WITH **3 ULTIMATUMS** REQUESTING YOU TO CEASE UNPROTECTED STRIKE ACTION AND RETURN TO YOUR WORKSTATION, OF WHICH THE LAST ULTIMATUM REQUIRED DUE TO YOUR WORKSTATION WORKING BY NO LATER THAN 07H00, ON 14 JULY 2006.
>
> YOU ARE HERE WAS INFORMED THAT YOU ARE NOT ALLOWED ONTO THE COMPANY PREMISES AS THIS WILL CONSTITUTE TRESPASSING, A CRIMINAL OFFENCE.
>
> ANY OUTSTANDING MONIES DUE TO YOU WILL BE CREDITED DIRECTLY TO YOUR BANKING ACCOUNT.
>
> IN ORDER TO REMAIN FAIR, YOU ARE HERE WAS AFFORDED AN INDIVIDUAL OPPORTUNITY TO APPEAL YOUR SUMMARY DISMISSAL AND IF YOU WISH TO MAKE USE OF THE APPEAL PROCESS, YOU ARE REQUIRED TO COMPLETE THE ATTACHED APPEAL FORM AND RETURN SUCH TO THE SECURITY OFFICE AT PLANT 2, NO LATER THAN 14 H00, 21 JULY 2006…"

(original emphasis)

The pro forma appeal form attached to the notice provided space for employees to state why they felt that they have been unfairly dismissed and why they failed to comply with ultimatums to return to work.

Ramashala also claimed to have had no knowledge of the notice of dismissal. It was only on the following Monday that he received papers showing he had been dismissed

[67] At around 10H00 the same morning, a notice confirming the dismissals was sent to Tshabalala and MR. The notice had been drafted the previous day in anticipation of the negative response of strikers to the final ultimatum and read:

> "**NOTIFICATION OF SUMMARY DISMISSAL**
>
> PLEASE BE ADVISED THAT YOUR MEMBERS REFUSED TO COMPLY WITH THE ULTIMATUMS ISSUED TO THEM REQUIRING THEM TO RETURN TO WORK AFTER THEY HAVE EMBARKED ON AN UNPROTECTED STRIKE.
>
> PLEASE BE ADVISED THAT THE THIRD AND FINAL ULTIMATUM REQUIRED ALL STRIKING EMPLOYEES TO RETURN TO WORK AND BE WORKING BY 07H00, FRIDAY, 14 JULY 2006.
>
> YOUR MEMBERS REFUSED TO COMPLY WITH THIS FINAL ULTIMATUM HAD LEFT MANAGEMENT WAS NO ALTERNATIVE BUT TO SUMMARILY DISMISS ALL STRIKING NUMSA MEMBERS.
>
> IN COMPLIANCE WITH THE ***AUDI ALTEREM PARTEM*** RULE, THE DISMISSED EMPLOYEES ARE GIVEN THE RIGTshabalala TO APPEAL TO THE SANCTION OF SUMMARY DISMISSAL WHICH MUST BE COMPLETED AND SUBMITTED TO THE COMPANY BY NO LATER THAN 14 H00 ON FRIDAY, 21 JULY 2006.
>
> ATTACHED PLEASE FIND THE NOTICE OF DISMISSAL AS WELL AS THE APPEAL FORM…"

(Original emphasis)

The aftermath of the strike

[68] All in all, the company lost part of the morning shift on 12 July and the whole morning shift on 13 July as well as afternoon and evening shifts on those days. No production took place on the morning shift of 14 July. Maino claimed that the company lost approximately R 750,000 on each day of the strike.

[69] According to Erasmus, the company had decided that it was not practically possible to hold disciplinary enquiries before taking the decision to dismiss employees given the fact that workers refused to go back to work and the volatile atmosphere which prevailed at the premises. Management had decided to proceed with dismissals on this occasion because the strike was clearly in breach of the centralised bargaining arrangements and if IGT conceded to the demand, it would unravel those arrangements. It was also clear that, unless management acceded to the demand, the strike would continue and it would have lost clients to its competitors if it had done so. He also emphasised that on previous occasions, the issue giving rise to unprotected industrial action had been resolved, which did not happen in this case. Neither the union nor shop stewards engaged with the company to try and resolve the matter while the strike was in progress. Moreover, this strike was directly related to bargaining issues that would impact on the company's bottom line. Tsoaeli agreed that the strike was about workers wanting more and not about being underpaid. By way of comparison, in respect of the one day strike over the shutdown in May that year, it had only lasted a day, the issue was resolved and it did not relate to a demand affecting the main agreement.

[70] Erasmus testified that it was also not necessary in terms of the disciplinary code to conduct individual disciplinary enquiries because paragraph 2.7 of the code states:

> "**Industrial relations:**
>
> In the event of collective industrial action by employees, shall not be necessary for the company to conduct individual disciplinary enquiries to disciplinary breaches arising out of such collective industrial action."

It was put to Erasmus that this clause did not relieve management of the obligation to hold a mass disciplinary enquiry. While not disputing that implication of the provision or that the code was part of employees contracts of employment in terms of clause 2.4 of the code, Erasmus maintained that it was not possible to hold a disciplinary enquiry in the circumstances and that IGT was entitled to deviate from that requirement as envisaged by item 4 of schedule 8 to the LRA.[1] He was convinced that if they had called workers to a mass disciplinary enquiry, the situation would have flared up, even though he conceded that there was no violence during the strike.

[71] On Monday 17 July 2006 a telephone discussion took place between IGT and Numsa, represented by Erasmus and Robertsons respectively. Maino recalled a meeting on the same day that was convened at the request of a legal representative of the union, who had phoned him on Sunday. Management met with him, Tshabalala and two employee representatives. At that meeting Numsa only wanted to discuss reinstatement and the legal representative conveyed that the workers were sorry and all demands they had made were off the table. Maino consulted with managers, who were divided on the issue that some threatened to walk out if the strikers returned. The union delegation was recalled and advised that IGT could not agree to reinstatement.

[72] This led to a subsequent exchange of correspondence in which Numsa proposed to make various undertakings namely:

> "1) Reinstatement with no retrospective, implying that the no work no pay rule will apply.
>
> 2) That all employees who participated industrial action be given a final warning valid for six (6) months.
>
> 3) We undertake to ensure there will be no unprotected industrial action, now or in the future.
>
> 4) We undertake that there will be compliance with lawful work and related instructions and at hearings to company rules and regulations.
>
> 5) We undertake to train to ensure compliance with contractual obligations.
>
> 6) We undertake to train the elected leadership on all relevant statute, e.g., EEA, BCEA, OHSA, LRA including the collective main-agreement of MEIBC.

---

[1] It would appear this was a reference to item 4(4) of the Schedule which states:

> "In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures."

7) We undertake to embark on a mind-set (cultural change) adjustment process.

Lastly, we undertake to invoke the provisions of our Constitution dealing with discipline including expulsion in situations where there is non-compliance with the above mentioned."

[73] On the same day, Numsa confirmed that it would file a collective appeal on behalf of members.

[74] On 18 July the company applied for an interim order preventing employees from disrupting or obstructing its business which this court granted on 20 July 2006. Erasmus explained that it had been necessary to go to court because the dismissed employees were still gathering outside the premises and preventing the dispatch of components.

[75] On 20 July, management responded to Numsa's request for a collective appeal, saying it did not object to a collective appeal but that it would still consider individual appeal submissions so that every individual could state their case. The letter also requested Numsa to indicate on whose behalf the collective appeal would be made and extended the deadline for written submissions of appeals to 26 July. The collective appeal hearing was set down for 28 July, with a date to be advised for individual appeals.

[76] On the same day Management responded to the union proposals made on 17 July. It did so in a lengthy and detailed letter. In summary, the letter expressed grave doubts about whether any commitment by Numsa members to refrain from embarking on unprotected strike action and generally complying with company rules and instructions could be taken seriously in the light of previous instances where similar agreements were reached but were subsequently disregarded by the members. In particular, the letter mentioned a catalogue of intermittent unprotected strike action and various agreements which were reached following such action, namely:

76.1 After unprotected strike action an agreement was reached on 25 February 2005 in terms of which employees were paid a once off *ex gratia* payment for adopting a three shift system and undertook amongst other things that there would be no work stoppages of any kind for any reason. In parenthesis, it must be mentioned at this point that Ramashala conceded that workers had accepted that there would be no unprotected strikes in exchange for receiving the once off payment. He also accepted that the unprotected work stoppages were disruptive and caused losses to company which it wished to avoid.

76.2 Despite the February 2005 agreement there was a brief unprotected strike in April 2005 and two threats of unprotected strike action in May 2005 as well as three days of unprotected strike action from 2 to 6 June2005 and further unprotected strike on 27 June 2005. In the strike action in early June, the initial grievance concerned having to clock in only when workers were already wearing their PPE. Then there was a strike over an employee's suspension following an assault incident. This was followed by a demand to remove a section leader. Management backed down on the clocking in routine and an agreement was reached on suspension of the section leader and the employee originally suspended. In Ramashala evidence he agreed that these work stoppages were in breach of the undertakings previously made by workers.

76.3 On 5 August shop stewards threatened to embark on strike action regarding the appointment of trainee section leaders. About a month later, this was followed by night shift staff failing to attend scheduled training on three days and demands for the company to pay injured employees compensation. Shop stewards also advised the management that workers would not recognise a newly appointed section leader, Mr Xulu, because of objections they had to his appointment process.

76.4 In view of all these infractions, and breaches of the February agreement, management had called on the union to motivate why workers should receive the *ex gratia* payment which was due to be paid in September. The response from shop stewards was that workers had agreed to the three shift system and on all subsequent occasions they had been provoked by management's actions.

76.5 Management disagreed. Nonetheless after consultation with Numsa on 6 and 8 September 2005, management agreed to reinstate the once off *ex gratia* payment after an acknowledgment by Numsa it was not strictly obliged to. The written agreement incorporating the arrangement included other pertinent conditions, including the following:

> "3) There shall be no work stoppages of any kind for any reason;
>
> …
>
> f) Numsa membership will remain committed to development and training and will be receptive to in-house and externally arranged training programs.
>
> g) Numsa membership will ensure that, in the event of the dispute, legislated dispute resolution procedures are complied with prior to embarking on unprotected [*sic*] industrial action as part of their commitment to the success of the company."

76.6 The agreement in September 2005 did not put an end to unprotected strike action. On 29 September IGT again wrote to Numsa regional and local offices and to shop stewards complaining of a "concerted effort" of shop stewards to undermine management and prevent relationship building initiatives. Tshabalala said that every time there were problems like this he would intervene.

76.7 In February and March 2006, further work stoppages culminated in yet another agreement concluded on 5 April 2006 in terms of which management waived its right to discipline employees in respect of all disciplinary processes pending at the end of March 2006, but the parties agreed that with effect from the beginning of April, management was entitled to apply the disciplinary code and procedure in respect of any employee transgressions. MR testified that he probably signed the agreement because he had been delegated to do so by the regional Secretary. Pertinent provisions of that agreement were:

"5. It is specifically agreed that employees will, with immediate effect, refrain from continuance of the current unprotected industrial action and will be committed to the required minimum standard of efficiency.

6. Employees agreed to waive the ensuance [*sic*] of any pending and/or previously addressed grievances against any employee or member of Management, and Management agrees to be committed to the peaceful resolution of any grievance line with the Company's Grievance Procedure with effect from Saturday, 1 April 2006.

7. Parties agreed that shop stewards of first and foremostly [*sic*] employees of the company and this subject to compliance with company rules and procedures.

8. Parties agreed to engage in negotiation in establishing a "Protocol of Behaviour" applicable to Management and Shop Stewards in order to facilitate communication between the parties. It is agreed that the "Protocol of Behaviour" should be finalised by 30 June 2006."

The unprotected action resulting in the conclusion of this agreement was also referred to in IGT's letter of 20 July 2006, as further evidence of its claim that the pattern of unprotected strike action continued notwithstanding agreements that were made and undertakings being given by Numsa membership, which gave the company little confidence that the pattern would change if workers were reinstated on the terms proposed by Numsa. Ramashala could not recall this agreement in particular but did recall that there are a number of agreements, though he never remembered shop stewards saying they must stop striking.

[77] Under cross-examination, it was suggested to Erasmus that in respect of previous strikes where ultimatums had been issued warning of possible dismissal, no action had been taken against workers. He agreed that on those occasions IGT had not dismissed strikers but the reason for that was that on all those occasions the underlying issue was resolved after discussions with shop stewards or union officials. In the three-day strike in July 2006, shop stewards were reluctant to meet with management and union officials said they could not offer any assistance, so there was not even an opportunity to resolve issues. Further, on the other occasions the matters giving rise to the strike did not have a significant impact on the

company's bottom line, whereas the impact of the demand for R2,00 an hour increase clearly would have.

The appeal

[78] On 24 July, Numsa called upon IGT to agree with it on the joint appointment of a chairperson to hear the appeal. Numsa also emphasised that it was mandated to appeal collectively on behalf of all members and that IGT should ignore individual appeals. The company decided to ignore individual appeals by Numsa members but to consider individual appeals by non-members. IGT confirmed in a letter to Numsa on 26 July that it would reluctantly ignore individual appeals. The following day, Numsa submitted grounds of appeal as follows:

"

- Substantive aspect
- Consistency in the application of discipline
- Selective reinstatement/reemployment of employees who were dismissed for the same reasons but refused to reinstate others
- Breach of the applicant's contract of employment
- The applicant's were not aware they will be dismissed for partaking in an illegal strike
- The punishment was too harsh and severe under the circumstances
- The union was not consulted prior to the dismissals of the applicants to discuss the course of action the company intended to adopt
- Procedural irregularities
- No disciplinary enquiries or hearing were held prior to the dismissals of the applicants."

(*sic*)

[79] One of the individuals who suffered as a result of Numsa's insistence that IGT should ignore all individual appeals by Numsa members was

Mphahlele. He had been booked off ill from 12 July to 17 July and had handed a doctor's note to his supervisor on 17 July. He had also filed an individual appeal on 20 July, on the basis that he was not striking, but did this on his own without communicating with Numsa even though he was a Numsa member. No case had been pleaded on behalf of individuals like Mphahlele, who said under cross-examination that he believed that Numsa would have pursued his appeal.

[80] After the collective appeal decision was handed down on 8 August 2006 Numsa challenged the fairness of the appeal process in a letter. The appeal outcome was never conveyed with written reasons. Numsa's letter was sent on 11 August but was erroneously dated 2 August 2006. The letter reiterated that the union had objected to the appointment of an external presiding officer at the appeal hearing without it being involved in the choice of the officer. Numsa proposed a fresh appeal hearing with a presiding officer appointed by Tokiso. The union complained that the chairperson of the original appeal hearing had ignored the evidence of selective reinstatement and had not distinguish between an enquiry and an appeal. Another reason for asking for a rehearing was that, the company had refused to disclose clocking information for the period 14 to 28 July 2006. A dispute had arisen over the provision of clock records during the strike. IGT was initially unwilling to provide these arguing that they were confidential and Numsa contended that the failure to make them available confirmed its belief that the company had acted selectively in deciding whom to dismiss. By 4 August IGT relented somewhat and agreed to provide clocking records of individual specified by Numsa, but the union insisted on being provided with all clock card records of all employees. Erasmus testified that the clocking record during the strike was not consistent because sometimes owing to the volatile situation outside the premises, workers were released without clocking out.

Evidence on selectivity

[81] Erasmus denied that IGT had been selective in dismissing or re-employing staff. He claimed that, there were certain workers who presented

themselves for work and they were not dismissed, but they were sent home for their own safety or were locked in their department at the plant. He also testified that some Numsa members were not dismissed because they complied with an ultimatum. Likewise, some non-members of Numsa were dismissed for participating in the strike. Numsa submitted a list of 17 employees, whom it claimed had been dismissed and reinstated without any procedure been followed. Of those 17, Erasmus was able to identify sixteen who were Numsa members and were recorded on clocking records as having worked on most, if not all of the days of the strike. A further four Numsa members not mentioned among the 17 were also recorded as working and a number of others were recorded as being absent for other reasons unrelated to the strike. Only one of those listed by Numsa did not appear to be recorded as having worked on any of the days in question, but was recorded as reporting for work on Monday 17 July. He was Mr S Mabuyakhulu. As far as Erasmus could recall he was a welder, who had been sent home for his own safety. Another employee who was recorded as only being absent on 14 July, Mr V Masimong, was a section leader who did not strike but Erasmus did not know the reason he was recorded as being absent on that day. Ramashala initially identified seven individuals on the list as having been present during the strike. Under cross-examination he could not say if all seven were part of the strike after 12th July.

[82] Erasmus disputed the union's claim that they were not notified of the dismissals before they were implemented on the basis that the ultimatums made it very clear what the course of action was and the union made it equally clear that it had no control over the strikers and management must take whatever action thought was necessary. Moreover, management had attempted to get Numsa officials to attend to the strike, without success. Similarly, shop stewards would not meet with the company. The persistent failure of the strikers to adhere to the ultimatums left it with no choice, but to dismiss employees. Employees could not been in any doubt that they would be dismissed if they ignored the ultimatums.

[83] After the appeal decision had been handed down, a request was made by Numsa's Regional Secretary, Mr S Chosane, for a meeting with Maino to

try to find a solution to the dismissals. He intimated that Numsa's president would also attend such a meeting. IGT responded on 18 August that it preferred Numsa to make a written proposal to which it would respond. None was forthcoming and on 23 August Numsa referred an unfair dismissal claim to the bargaining council.

Evaluation

Alleged automatically unfair dismissal

[84] The applicants had claimed that, there were 17 employees identified on a list which they drew up who were on strike, but who were not Numsa members and were either not dismissed or were reinstated. Consequently, they contend that this showed that the company discriminated when sanctioning strikers on the basis of whether or not they were numsa members.

[85] The first difficulty the applicants have is that, on the evidence, at least six of the persons mentioned were Numsa members namely L Kiyane, L Mofokeng, L Malaleka, E Mlambo, E Masondo and S Zwane. Assuming that all 17 of those identified were ultimately retained by IGT after the strike and assuming that they had been on strike right up until the expiry of the final ultimatum, the fact that more than a third of them were Numsa members immediately casts serious doubt on their claim that strikers were not dismissed on the basis of their union affiliation.

[86] Moreover, in order to compare like cases with like, the applicants needed to establish that the individuals in question were on strike and also failed to return to work before the expiry of the final ultimatum. The only evidence led by the applicants in this regard was provided by Mr Ramashala. Although he claimed to recall seven of the persons on the list participating in the strike on the first day (12th July), he could not say whether they were still on strike for the remaining days up to and including the expiry of the final ultimatum. That evidence was insufficient to make out a *prima facie* case of automatically unfair dismissal.

[87] It was suggested that Mphahlele's case was a glaring example of how IGT treated Numsa members harshly. This is an extremely disingenuous and unprincipled argument given that it was Numsa which insisted that IGT should not consider individual appeals. IGT reluctantly acceded to that demand. To now try and rely on IGT's compliance with that undertaking as proof of unfair discrimination towards Numsa members is hypocrisy to say the least. The probabilities are that, if Numsa had been willing to permit, if not support, individual appeals on behalf of non-strikers like Mphahlele, he would have been reinstated. It is most likely that Numsa is responsible for his misfortune.

Were the dismissals unlawful because disciplinary enquiries were not held?

[88] Quite apart from whether or not their dismissals were unfair, the applicants submit that the failure to hold either collective or individual disciplinary enquiries constituted a breach of IGT's disciplinary code and procedure which "formed part of their contracts of employment". Consequently, they argued that their dismissals were unlawful and seek a declaratory order and presumably appropriate consequential relief though an order of specific performance was never stated as a form of relief distinct from the unfair dismissal claim relief of reinstatement. There was certainly no alternative claim of contractual damages. If they sought reinstatement on the basis of a declaration of unlawfulness, they also failed to plead that they tendered their services, which they ought to have (see ***SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle***[2]) I do not think IGT could have been aware that, merely because they alleged their dismissals were in breach of their contracts that they were also demanding specific performance on tender of their services. Be that as it may, I will discuss the merits of the claim as it seems the parties' heads spoke past each other on this issue.

[89] IGT disputed that the code and procedure formed part of employees' contracts of employment and, in the alternative that the code and

[2] [1955] 3 All SA 257 (D) at 261.

procedure did not require a disciplinary hearing in the case of dismissal for participation in industrial action. IGT also relied on clause 2.7 of the code, which is repeated again for convenience:

> "Industrial relations:
>
> In the event of collective industrial action by employees, shall not be necessary for the company to conduct individual disciplinary enquiries to disciplinary breaches arising out of such collective industrial action."

[90] Erasmus was the only witness who was canvassed on this issue. He did not dispute that the code might be construed as part of employees' contracts of employment, but in argument the applicants conceded that the examples of individual contracts of employment did not specifically incorporate the code and sought instead to impute it into their contracts of employment by relying on the agreement concluded in April 2006 in which the parties committed themselves to 'meticulous compliance' with the disciplinary code and procedure. The applicants' reliance on that agreement is completely different from the pleaded version that the employee's contracts of employment included the code, whatever they were referring to when they mentioned the contracts of employment. In this regard, it is trite that if reliance is placed on a contract, it must be stated whether that contract is written or oral. The pleading was generic. It did not state if the contractual term was written or oral and did not attach a copy of the contract embodying the term relied on.

[91] Clause 3.2 of the procedure made it clear that if any disciplinary sanction more serious than a verbal warning was a possible outcome, then a formal enquiry would be convened. That requirement was qualified by clause 2.7, referred to earlier, which stipulated that it would not be necessary for the company to conduct individual inquiries for misconduct arising out of collective industrial action. The only issue that would then be in dispute is whether clause 2.7 necessarily implied that no disciplinary enquiry of any sort needed to be held in cases of strike -related misconduct, or whether it is implicit that joint disciplinary enquiries were necessarily intended.

[92] IGT argued that to conclude that such an obligation existed in the code in the absence of it being stated expressly amounts to an assertion of the

existence of a tacit term that a mass enquiry should be held in circumstances where the misconduct arises from collective industrial action. A tacit term must be pleaded[3] and will only be inferred if it is not only reasonable or desirable but also necessary to give efficacy to the document embodying the agreement.[4] I am inclined to think that had the applicants pleaded such a tacit term, the most reasonable interpretation of that provision, and the only interpretation that would have addressed the enquiry procedure for strike related misconduct on which the code was silent, would be that joint enquiries *were* intended. Had it been intended that no enquiry proceedings for such misconduct would be held there would have been no need to state that 'individual' enquiries would not be held. That qualification would have been superfluous and it would have stated that no enquiries needed to be held.

[93] However, even if the failure to plead a tacit term was overlooked, and if I did conclude that the employer was contractually obliged to hold a joint disciplinary enquiry before terminating the strikers' services and the failure to do so rendered their dismissals unlawful, it is very unlikely that the court would make an order of specific performance as a form of relief, even if it had been properly pleaded. An order of specific performance is a discretionary one and even if the applicants' pleadings could be most generously construed as encompassing a claim for specific performance of their contracts following a failure to accept a tender of their services, it is highly improbable under these circumstances that the court would consider such relief appropriate on common law principles, after so many years have elapsed, especially given the evidence that reinstatement would be impracticable.

[94] In any event, since the applicants ultimately relied on a contractual term which was never properly pleaded having conceded that their written contracts of employment did not incorporate the terms of the code and procedure, the unlawfulness point falls away.

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[3] See *Roos v Engineering Fabricators (Edms) Bpk* [1974] 3 All SA 136 (A) at 140

[4] See *Transnet Ltd v Rubenstein* [2005] 3 All SA 425 (SCA) at 430, para [18]

Procedural unfairness

[95] IGT concedes that it did not hold a disciplinary enquiry before dismissing the strikers but advanced two reasons why that did not mean the dismissals were procedurally unfair. Firstly, it discussed its planned course of action with Robertsons during the telephone conversation late on Thursday, 13 July 2006. Secondly, by immediately granting dismissed employees the right to appeal the decision, any procedural unfairness occasioned by not holding an enquiry prior to the dismissal was remedied by providing an appeal hearing.

[96] IGT's account of the content of the conversation with Robertsons was a matter of dispute. On its own version, the company had contacted him to seek the union's intervention to persuade workers to return to work before the expiry of the deadline which would trigger the dismissal of the strikers the following day. It claimed that Robertsons clearly indicated that the company must do what it considered appropriate because the union was unable to influence the strikers in any way. However, even on its own version, IGT did not use the opportunity to invite Robertsons to make representations why the strikers should not be dismissed nor to ask him to at least convey the opportunity to make such representations to the strikers, even if the union was unable to persuade them to return to work.

[97] IGT also cites two judgements in support of the first reason, namely *Mzeku & Others v Volkswagen SA (Pty) Ltd & Others* [2001] 8 BLLR 857 (LAC) and *NULAW & others v Bader Bop Ltd & others* [2004] 8 BLLR 799 (LC). In both cases the employers were dealing with implacable strikers. In *NULAW* it is clear that in the course of interacting with the shop steward leadership in efforts to end the strike that, the opportunity to make representations why strikers should not be dismissed if they did not heed the ultimatums was unambiguously conveyed to them, viz:

> Management prevailed upon NULAW's leadership to intervene. The union leadership was afforded an opportunity to persuade the workers to return to work. When this did not eventuate, the shop stewards were required to provide reasons why an ultimatum to return to work or be dismissed should not be issued.

The various meetings between management and the shop stewards, including those where the union leadership was present, constituted the audi alteram partem which the company was obliged to afford the strikers. Indeed, this was recorded as common cause in the pre-trial conference minutes as follows:

"During the meetings held, the representatives of the strikers were given a number of opportunities to make representations as to why they should not be dismissed if they did not return to work."

The witnesses for Bader testified that the representatives did not avail themselves of these opportunities. I find this to be the case.[5]

[98] By contrast, in *Mzeku* the LAC took the view that as the union itself had accepted that the strike was indefensible there was nothing more it could have said and in any event nothing prevented it from making representations on why the strikers should not be dismissed, viz:

"[50] There can be no doubt that the union had no representations to advance to the first respondent to justify the conduct of employees who refused to return to work even after all reasonable efforts had been exhausted to get them to return to work. This is not surprising because the union accepted that the strike was illegal and unjustified and itself saw no reason why the strike should be continued with at such great risk to the jobs of thousands of employees in the plant and in the region. In any event, if the union had any further representations to make, it had ample opportunity to make them but failed to do so. The representations it made to the first respondent to avoid the dismissal of the striking employees, were the only representations available to it, namely, to persuade the first respondent to be tolerant of the employees' unlawful and unacceptable conduct for more than two weeks while it made all efforts to get the workers back at work so that they would not be dismissed. In the light of the above the finding by the commissioner that there was no invitation by the first respondent to the union "to explain why" the employees' conduct should be tolerated or why an ultimatum should not be issued and why they should not be dismissed is difficult to understand." [6]

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[5] At 805.

[6] At 873

[99] The LAC also found that in circumstances where the strikers were only prepared to accept the suspended shop stewards as their representatives and not the union but where the shop stewards had also declined an invitation to represent the strikers, the employer was entitled to deal with the union and did not have to engage directly with the informal leadership of the strikers. It should be mentioned that the strike in *Mzeku* was an extraordinary one as the strikers were demanding that the union lift the suspension of the shop stewards and that by the time the dismissals took place:

> "The parties agreed that the first respondent would re-open the plant on 31 January and that, if employees persisted in the strike, the first respondent would take disciplinary action which "will include dismissal". if strikers did not return to work"[7]

[100] Clearly, the circumstances in this matter were not the same as in *NULAW* as there was no express invitation to make representations why dismissals should take place. Also, on IGT's own version and unlike in *Mzeku*, the regional organiser did not expressly agree that it was entitled to dismiss strikers, but simply that the union could not play any role in ending the strike and IGT should do what it considered necessary. It was never contended in evidence that management understood Robertson's stance to amount to waiver by the union of its members' rights to an enquiry before dismissal, but merely that the union could not play any meaningful role in the situation. In *Modise & others v Steve's Spar Blackheath*[8], the LAC also cautioned against lightly inferring a waiver of the right to a hearing.[9]

[101] In the same case, the LAC highlighted the distinction between the purpose of the ultimatums and the purpose of an enquiry:

> [151] An ultimatum is, unlike a disciplinary enquiry, not directed at establishing the existence of an offence and then imposing a sanction. It is, in the first place, a device for getting strikers back to work. It presupposes the unlawfulness of the strike, otherwise it could not be given but it does not

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[7] At 863

[8] [2000] 5 BLLR 496 (LAC)

[9] At 512-3, para [46].

sanction the misconduct of the strikers. It is as much a means of avoiding a dismissal as a prerequisite to effecting one. One is tempted to say that strikers are put in mora. The point is that both under the 1956 regime and under the present one the question of dismissing a striker can only logically arise after non-compliance with an ultimatum.[10]

[102] By the time the discussion took place with Robertsons, the final ultimatum had already been issued and in it management had made its intention clear that dismissals were going to take place if the ultimatum was not complied with. Even if it could be argued that the phone call that evening provided him with an opportunity to make representations, the decision had been taken dismissals would take place if the ultimatum was not complied with. Accordingly, the scope for intervention by that stage was confined to whether the union could intervene to ensure that workers returned before the expiry of the ultimatum. In my view, it would be artificial to interpret that opportunity for intervention as an opportunity to make representations why dismissals should not take place. The issuing of the ultimatum in the form it took clearly did not encourage or suggest that representations of that kind would be entertained with an open mind at that stage. Accordingly, I do not think the company's failure to hold any sort of enquiry or invite representations can be justified on the first reason IGT advanced.

[103] In relation to whether the subsequent automatic right of appeal rectified the absence of an opportunity to make representations, I accept that it has been held that an appeal can sometimes cure the procedural defect of not conducting an original enquiry or procedural failures in the initial inquiry.[11] It is not an inviolable rule and will depend on the circumstances. As the LAC stated in ***Semenya & others v CCMA & others***:

[30] I have referred to the Slagment decision to illustrate the point that in that case the Appellate Division held that the rules of natural justice had been complied with where there had been no hearing before the employees were dismissed but there had been one albeit in the form of an appeal

[10] At 545.

[11] E.g. *Slagment (Pty) Ltd v BCAWU & others* [1994] 12 BLLR 1 (AD) at 13.

> hearing after they had been dismissed. The court found that the appeal hearing had effectively undone whatever unfairness had been occasioned by the absence of a hearing before the dismissal. My reference to the Slagment case should not be construed as in any way an endorsement of the view or proposition that where a person is entitled to a hearing at first instance as well as to an appeal or where he is entitled to two hearings, the holding of a fair appeal hearing when there was a defective first hearing or no first hearing at all, or the holding of one fair hearing instead of two or the holding of a first defective hearing and a second fair hearing satisfies the requirements of the audi alteram partem principle. I say no more than simply that, where a person is entitled to an opportunity to be heard before a decision is taken and he is not given such an opportunity, in certain circumstances an opportunity to be heard can be given after the decision and one of those circumstances is where the employee is offered a disciplinary hearing that is as fair, if not fairer, as the hearing that he or she was entitled to have been afforded before the decision could be taken. I also make the point that, where as in this case the employee is offered a hearing that would be chaired by a chairperson of the employee's choice who would make the relevant decision, then the audi alteram partem rule is complied with and such employee cannot complain about procedural unfairness if he or she rejected the offer or chose not to make use of it.[12]

[104] In *Semenya,* the employee was actually offered a hearing *de novo* before a chairperson of her own choice. In this instance, the chairperson was not an employee of the company, but was also not a consensual appointee. More importantly, the chairperson had to decide an appeal, where employees are trying to overturn an existing decision, rather than answering to a case against them. Moreover, employees had a contractual right to a hearing, even if that right was only to a joint hearing. It is also not a case where there was an initial hearing which was perhaps flawed in certain respects and those flaws could be corrected on appeal. In this case, a major consideration is that, IGT did not have a sound justification for not providing even an attenuated form of *audi* that is acceptable in strike dismissals *before* it took the decision to issue the dismissal ultimatum. In addition, although the LAC in *Steve's Spar* expressly left

[12] [2006] 6 BLLR 521 (LAC) at 530-531.

open the question whether an opportunity to be heard should be offered, in a case such as this where the final ultimatum is not merely issued with the threat of subsequent disciplinary action which could result in dismissal, but is issued with a pre-determined sanction, the imperative for inviting representations before giving effect to it, is even more compelling. In this regard, the following dictum in the case of ***National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables***[13] is also of relevance:

> [36] Contrary to the court a quo's finding, I am not satisfied that the respondent complied with its obligation to provide the employees with an opportunity to be heard before effecting the dismissals after the expiry of the ultimatum. Prior to the pre-dismissal meeting held on 26 June 2007, *it is apparent that the respondent had already taken a decision that the employees who took part in "illegal industrial action" would be dismissed* and that the day shift employees who walked off at between 12pm and 1pm would receive a final written warning. Therefore no amount of persuasion by the Union that the strike had nothing to do with the introduction of the new shift system but with the late and wrong payslips would have convinced the respondent to change its preconceived stance because the respondent believed that "after 30 meetings plus the previous action, the relation [was] irreparable". *There was a duty on the respondent to afford the affected employees an opportunity to be heard before a decision to dismiss them was taken. The respondent's failure to do so rendered its decision to dismiss the affected employees procedurally unfair*. (Mamabolo v Rustenburg Regional Local Council, supra, at 144B–C). For these reasons I hold that the employees' dismissals were procedurally unfair.

(emphasis added)

[105] Further, even if I assume its favour that it was impractical to convene a mass enquiry at the time, it did not even attempt to call for representations before taking the decision to dismiss. It may have been a different matter if that had also been genuinely impractical, but there were no exceptional circumstances which prevented it from asking the union to make

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[13] [2014] 1 BLLR 31 (LAC)

representations by the afternoon before the deadline ran out as to why it should not dismiss the strikers. The right to a hearing prior to dismissal would be severely diluted if the court treated the absence of a hearing as something that would always be cured by offering a subsequent appeal, when there is no good justification for the failure to hold an enquiry in the first place.

[106] Consequently, I am satisfied that the employer has not established that the dismissals were procedurally fair. The fact that an opportunity to make representations after the fact may mitigate that does not detract from the fundamental unfairness of denying the strikers an opportunity to make representations beforehand.

Substantive fairness

[107] In ***National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables***[14] the LAC set out the test for substantive fairness in the dismissals for participation in unprotected strike action:

> [27] Item 6(1) and (2) of the Code deals with the substantive fairness of strike dismissals and provides as follows:
>
> "6. Dismissal 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

[14] [2014] 1 BLLR 31 (LAC)

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."

[28] It is clear from the provisions of section 68(5) that participation in a strike that does not comply with the provisions of Chapter IV (strikes and lock-outs) constitutes misconduct and that a judge who is called upon to determine the fairness of the dismissal effected on the ground of employees' participation in an illegal strike should consider not only item 6 of the Code but also item 7 which provides as follows:

> "7. Guidelines in cases of dismissal for misconduct. –
>
> Any person who is determining whether dismissal for misconduct is unfair should consider –
>
> (a)Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
>
> If a rule or standard was contravened, whether or not –
>
> the rule was a valid or reasonable rule or standard;
>
> (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
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> the rule or standard has been consistently applied by the employer; and
>
> (iii) dismissal was an appropriate sanction for the contravention of the rule or standard."

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

> [30] 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 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 factors set out in item 6 of the Code.

Factors in item 6 (1) of the code

[108] The impact of the unprotected strike was serious. IGT lost at least two days production and incurred losses of R 1.5 million. The strike was also not an isolated incident but just the latest in an ongoing pattern of wildcat strike action over more than a year and it was one of the more serious incidents.

[109] The strike was premeditated and the memoranda allowed management little time to respond. Even when it did, its detailed response was simply ignored. Workers just changed the rationale for the demand slightly and pressed ahead with their demands issuing yet another short term ultimatum. They also paid no heed to the meeting arranged with the union on 19 July to discuss the issues but submitted the second memorandum of demands with a 48 hour deadline.

[110] The strike was unprovoked by management and the cause of the strike was simply to use the upgrading of robot operators as a pretext for demanding a general wage increase. Management's detailed response to the memoranda showed that it did not simply ignore the demands but attempted to engage with them. The union attempted in evidence to suggest the strike had been provoked by management's failure to meet with the shop stewards and that this led to workers downing tools on 12

July. It is possible that, that is what might have been reported to workers by shop stewards, but neither of the memoranda submitted called for a meeting. Both simply called for a response and it was obvious that if the response was not acceding to the workers' demands that they would take action. In any event, it was never pleaded that the strike was provoked by the employer and this proposition was never canvassed with management. Judging from Ramashala's evidence, it was the shop steward leadership which was driving the wage demand, and the memoranda did not emanate from the general workforce. The implacable stance of the shop stewards was still evident nearly nine years after the event, when Tsoaeli was very reluctant to concede under cross-examination that there could have been any other way the strike could have been resolved except if management gave in to the demands.

[111] The subject matter of the demand was something that had to be dealt with at industry level and accordingly could not be the subject matter of a protected strike at company level. Furthermore, the strikers were indifferent to the warnings from IGT that the strike would be unprotected.

[112] The strike proceeded despite it having been agreed with the union that the parties would meet to discuss the issues on a later date arranged at the convenience of the union official concerned, Robertsons.

Factors under item 6 (2) of the code

[113] The company warned the union of the prospect of imminent strike action as soon as it became apparent that was a possibility. Continued to keep the union updated on events from the submission of the memoranda which led to the strike until the final ultimatum. The company also attempted to contact the officials directly but were unsuccessful. They claimed to have had at least one meeting with shop stewards at which the shop stewards simply reiterated the demands in the memoranda. The details of that meeting are hazy. Tsoaeli claimed shop stewards wanted to meet with management but management refused to do so. Once again the details of those requests, such as who was approached and when are extremely vague. What is clear is that, management responded in great detail to the memoranda and did not ignore the representations made.

[114] Apart from agreeing to meet with the company at a later date, the union was largely unresponsive to the employer's increasingly frantic efforts to get officials to intervene. The pace of communications between the union and the company was dictated by when union officials found the time to catch up with their correspondence. It is true that Tshabala announced his intention to come to the company after his CCMA matter on 13 July, but when those proceedings overran their expected duration, he made no attempt to contact the company to reschedule the meeting or even to explain his absence despite the obvious urgency of the situation.

[115] The union officials also made no demonstrable efforts to communicate urgently with the shop stewards, and vice-versa. I am also not convinced that Tsoaeli left messages at the union offices as he claimed. Tshabala made no mention of receiving any messages from the shop stewards. At best, he thought he would have tried to contact them. As often seems to happen during strikes, the use of cell phones as an easy and commonplace method of direct and instant communication did not occur. Ostensibly, this was attributed to a lack of access to a cell phone (Tsoaeli) or telephone numbers (Tshabalala). Tshabala would have the court believe that the only way he could have communicated with shop stewards was by physically going to the company premises on the off chance of meeting them there. Robertsons and Tshabala would also have us believe that they meet at the office late on 12 July and were completely oblivious to the strike and spoke of anything but the strike.

[116] Similarly, Robertsons claimed that all the company wanted to talk to him about the following day was violence during the strike, which he solemnly assured them the union condemned. Given the tenor of the written communications from IGT to the union and its desperate attempts to prevent strike action or bring it to an end, it is wholly implausible that the company would not have requested him to intervene as a matter of urgency, given that the final ultimatum was due to run out the following morning. Those issues were clearly paramount in the mind of management at the time. Because Robertsons' version is so implausible, I am more inclined to believe that indeed the union officials did have little, if any, control over the course of the strike, which was being driven by the

shop steward leadership and the organisers knew that their intervention would be fruitless. Accordingly, in my view, it is quite plausible that Robertsons confirmed the disconnection between the union and its members and the union's inability to do anything when he spoke to management on Thursday evening and left it in management's hands how they should respond to the situation. That inference is reinforced by lack of any serious interest on the part of the shop stewards in engaging with the union officials. The disjuncture between the shop steward leadership and the union officials was starkly illustrated by the submission of the second memorandum despite IGT having agreed to meet the union on 19 July. It is not unknown for plant level union leadership to operate relatively autonomously in relation to the union and that the bond between shop stewards and members can often be stronger than the bond between members and the union officials. The upshot of this was that to all practical intents and purposes, Numsa left management to deal with the strike without the union's assistance.

[117] Turning to the ultimatums issued, they were clear and unambiguous. It was never suggested that workers did not understand them and it was common cause that the shop stewards read them to workers and that copies were available and were distributed amongst the strikers. It was also common cause that they had sufficient time to consider them. It is also common cause that they were ignored even when the final ultimatum was issued, warning them of their dismissal if they did not report for work on 14 July.

[118] In essence, the applicants claim they were entitled to ignore the ultimatums because management had not dismissed them during previous wildcat action. They simply did not believe the threats contained in the ultimata even though they knew that management was entitled to take disciplinary action and could dismiss them. Tsoaeli acknowledged this but claims when he explained this to workers, they dismissed the threat as a hollow one. However, during previous unprotected strike action, it was not disputed that IGT had never previously received a decisive ultimatum like the final one and no plausible reason was advanced, other than their own

belief and willingness to take a chance, why they also treated that as a hollow threat that would not happen.

[119] The witnesses did concede that on those previous occasions with no action had been taken against them and they had succeeded in winning their demands, they had also made commitments not to embark on unprotected action in the future. It is therefore not correct that management simply acceded to strikers’ demands without extracting undertakings. However, those commitments were not honoured by the workforce. The applicant’s attitude was that, because they had previously flouted those undertakings, it was unfair of the employer to now dismiss them for flouting them yet again. However, it is important not to lose sight of the fact that at no stage did management not condemn wildcat action: rather it always sought to hold workers to their undertakings not to embark on wildcat strike action, such as when it threatened to withhold the lump sum payment for agreeing to the new shift system when workers broke the unprotected strike action undertaking in. In September 2005, the company had obtained an absolute commitment not to embark on work stoppages for any reason. As recently as April 2006, the parties signed an agreement committing themselves to meticulous compliance with the disciplinary code and procedure. IGT was constantly trying to improve workplace conduct and get the buy-in of the workforce. It cannot be said it was complacent about these issues.

[120] It is true that in May the company did not take disciplinary action over a four hour stoppage because it did not want to precipitate further action that would exacerbate the losses. However, that stoppage was hardly comparable with the one in July which would have entered its third full day on Friday and where ultimatums and a notice of imminent termination had been issued. In the circumstances, IGT had done all it reasonably could to curtail the strike and get workers to end it voluntary. The strikers completely carried on relentless, and made a choice to ignore even the most starkly worded final ultimatum. They took a reckless gamble knowing that it was not without risk and knowing that IGT was intent on reasserting control over employees conduct in the workplace.

Other considerations

[121] It is clear from the above analysis that, I am persuaded that the rule against unprotected strike action was well known and was flouted by the workforce on a regular basis in a battle of wills with management. Agreements had been concluded that the practice was unacceptable. It was the workforce that contemptuously flouted those agreements. There was no evidence to contradict Erasmus' account that, save for one occasion, management did not have to implement ultimatums on previous occasions because the problem was resolved and strikers returned to work. Repeatedly flouting a rule you had undertaken to comply with and which the employer had never waived but had sought to impose does not mean the rule did not exist or that there was never a risk that serious breaches would be appropriately sanctioned.

[122] Moreover, there was also no previous instance where a final ultimatum had been issued like that issued on 13 July. The strikers gambled in estimating the risk they were running, but they knew there was a real risk and they pursued the strike regardless and in spite of the unequivocal warning in the final ultimatum that decisive action was imminent and depended on how the strikers responded to it.

[123] I have already mentioned in the discussion above some of the factors which made the unprotected strike an unjustified one. The fact that nothing less than compliance with the demands in the memoranda would have brought the strike to an end, and the unwillingness of workers to even wait for the meeting with the union before starting the strike and their heedless disregard of all forms of unambiguous ultimatums made the strikers conduct serious. It should also be mentioned that from the first intimations of imminent strike action management warned of the possible consequences of embarking on it in the response to the memoranda. The company cannot be responsible if the shop stewards as the employees' representatives decided not to share that with their members. They knew they had made commitments not to embark on work stoppages and that the company was trying to ensure an orderly working relationship. They had ample warning of the consequences of persisting.

[124] It was only after the fact of the dismissal that conciliatory proposals were made by the union. However, the company had been attempting to build a constructive relationship for many months and commitments had previously been made by the workforce which were not worth the paper they had been written on. It is understandable that the employer had no faith in any further commitments of that kind and it was not unreasonable for it to believe that it could not trust them in the future to adhere to them particularly when this more conciliatory approach had been completely absent when management was so desperately seeking the union's assistance and the workforce to desist from its obdurate pursuit of the strike, in flagrant breach of previous commitments not to engage in such conduct.

[125] In light of all the above, I am satisfied that the decision to dismiss the strikers and not to reverse the decision subsequently was a reasonable and fair response to their conduct. Accordingly the dismissals were substantively fair

<u>Relief</u>

[126] The only relief I must consider is compensation for procedural unfairness. In the circumstances, I am satisfied that the failure to at least invite representations on why strikers should not be dismissed if they did not comply with the final ultimatum, some compensation for procedural unfairness is warranted. I have taken into account that an automatic right of appeal was afforded to all employees which to some extent mitigated the absence of a hearing before the dismissal, but that could not entirely cure the absence of an opportunity to make representations beforehand.

[127] In the circumstances, an award of six weeks' remuneration as compensation seems appropriate.

<u>Order</u>

[1] The dismissal of second to further applicants was procedurally unfair but substantively fair

[2] The respondent must pay each of the applicants or their estates, as the case may be, who are listed on Annexure “A” hereto an amount of six weeks’ remuneration calculated on the basis of the hourly rates of pay as at the date of their dismissals set out therein, within 30 days of the date of the judgment.

[3] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	T Govender instructed by Ruth Edmonds Inc.
RESPONDENT:	L Frahm-Arp of Fasken Martineau