IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 172/2014

In the matter between:

CHEMICAL, ENERGY, PAPER, PRINTING,
WOOD & ALLIED WORKERS' UNION **Applicant**

BALISO W & OTHERS **Second–further Applicants**

and

POLYOAK PACKAGING (PTY) LTD **Respondent**

Delivered: 24 April 2019

JUDGMENT

TLHOTLHALEMAJE, J

<u>Introduction:</u>

[1] The first applicant (CEPPWAWU), seeks an order declaring the dismissal of its members (The individual applicants[1]) by the respondent to be automatically unfair, alternatively substantively and procedurally unfair. It further seeks an order directing the respondent to retrospectively reinstate the individual

[1] Listed in Annexure 'A1' to the Notice of the Applicants' Amendment

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applicants in its employ, or in the alternative, to make an order of equitable compensation.

[2] The respondent not only opposed the applicants' claim, but also filed a counterclaim in which it seeks payment of R654 317.89 or just and equitable compensation for its proven losses attributable to the unprotected strike embarked upon by the individual applicants.

The common cause facts:

[3] The respondent is a manufacturer of mainly plastic packaging (for the ice cream and beverage industry). Its business falls within the registered scope of the Metal and Engineering Industries Bargaining Council (The MEIBC). In October 2012, the respondent took transfer of the business of Rheem Packaging Solutions (Rheem) as a going concern in accordance with the provisions of section 197 of the Labour Relations Act[2].

[4] A majority of the individual applicants who were employed by Rheem in Jet Park were transferred to the respondent's Germiston Plant in Roodekop in January 2013 when Rheem closed down. Rheem had over the years whilst still in business, obtained an exemption from paying the MEIBC wage rates. Thus, when its former employees were transferred to the respondent, they continued to be paid in terms of the exemptions obtained by Rheem.

[5] Following the conclusion of the MEIBC Main Agreement for 2013/2014 in June 2013, which was to take effect from 1 July 2013, two of CEPPWAWU shop stewards at the respondent approached the MEIBC and lodged a complaint related to alleged underpayment of the prescribed wage rates. The shop stewards returned from the MEIBC with a circular containing the wage rates for the 2013/2014 financial year, and placed it on the respondent's notice board in the 'Green area' next to a document containing the respondent's own wage rates. The respondent subsequently removed the circular.

[2] Act No 66 of 1995

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[6] It was common cause that an Agent from MEIBC made attempts to investigate the matter, but was however not granted access to the respondent's premises. The MEIBC subsequently abandoned any investigations into the complaints after the dismissal of the individual applicants.

[7] On 2 September 2013, the respondent issued a notice relating to *inter alia*, weekend work and relationship between its operations in Dairypack Tubs and Contan. The relevant item for the purposes of this dispute provided that;

> '2. Dairypack Tubs and Contan Relationship.
>
> It is important to note that Dairypack Tubs and Contan have different names and sell different products, and they are part of the same business, Polyoak Packaging.
>
> We would like to officially welcome the Contan employees to the site and encourage all employees to work together and assist one another wherever possible.
>
> We may require current dairypack Tubs employees to work at Contan and current Contan employees to work at Dairypack Tubs.
>
> We do this in the best interests of the business and to ensure we maximise on the skills available.
>
> Please cooperate with your Team Leaders and Managers to make this integration happen'

[8] The significance of this notice will come to light shortly. The applicants' case however was that this notice was not brought to their attention. On 25 October 2014, the respondent informed packers working on the Contan machines who are ex-Rheem employees that some of them would be required to work on the following Monday on Dairypack Tub machines and *vice versa*. This directive was in line with the notice.

[9] A complaint about these arrangements and disparities in wages ensued, with the main shop steward, Mr Molefe having an argument with one of the respondent's product managers, Mr Barry Smith. Molefe was subsequently

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suspended on the grounds of allegations of insolence. It was common cause that Molefe was subsequently dismissed. His dispute as referred to the MEIBC was settled between the parties.

[10] On 26 October 2013, CEPPWAWU referred a dispute to the MEIBC under the provisions of section 64(1)(a) of the LRA[3], alleging unilateral changes to terms and conditions of employment of its members. The complaint was that the respondent had unilaterally moved employees to different sections and forced them to work together on different machines whilst they were paid different rates.

[11] In essence, the individual applicants' case is that it was unacceptable that Contan employees were required to work on Tub machines they had never worked on before, whilst they were paid below the MEIBC rates, and Tub employees earned above the MEIBC rates, in circumstances where no exemption had been obtained to pay them rates below the MEIBC rates after 1 July 2013.

[12] On 28 October 2013, the respondent's HR Executive, Ms Debbie Sinclair, sent correspondence to CEPPWAWU and denied that it had effected any changes to the employees' terms and conditions of employment. The Union was advised that should it pursue any form of industrial action in relation to the referral, the respondent would regard that action as being unprotected. The respondent further reserved its rights to take any appropriate disciplinary action against employees participating in any action, including a dismissal. The Union's written response was that it still viewed the actions of the

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[3] **64. Right to strike and recourse to lock-out**;

(4) Any *employee* who or any *trade union* that refers a *dispute* about a unilateral change to terms and conditions or employment to a *council* or the Commission in terms of subsection (1)*(a)* may, in the referral, and for the period referred to in subsection (1)*(a)* –

(a) require the employer not to implement unilaterally the change to terms and conditions of employment; or

(b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.

(5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of *service* of the referral on the employer.

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respondent as constituting unilateral changes to employees' terms and conditions of employment, and that its members were exercising their remedies under the LRA.

[13] Without conciliation having taken place or the issuance of a strike notice, the employees embarked on a strike on 29 October 2013 before the morning shift commenced. CEPPWAWU was advised of the strike. On the same day at about 09h50, the respondent issued an ultimatum which was also handed to CEPPWAWU's Mr Glen Tshabalala, who had attended to the strike. The ultimatum required the employees to return to work within 25 minutes from the time that they were served with it, and that should they not return to work, disciplinary action would be taken, including a dismissal. A copy of the ultimatum was also sent to CEPPWAWU's offices by email.

[14] A second ultimatum followed at 11h20, advising the employees to return to work by 14h00, failing which they should approach Sinclair by 14h30 to explain why they should not be dismissed for taking part in an unprotected industrial action. The employees however remained outside of the premises for the remainder of the day.

[15] In the morning of 30 October 2013 at 06h30, a third ultimatum was issued to the employees, who were outside of the premises, in which they were advised that it was a final notice and ultimatum for them to return to their workplaces by 10h00 or face a dismissal. Copies of the ultimatum were put up at the security gates and left outside of the premises where the employees had gathered. The respondent further sent a copy to CEPPWAWU by email at 08h51. At 10h00, the employees had still not returned to work, and at 11h00, the respondent had informed them of the cancellation of their contracts of service.

[16] On 5 November 2013, this Court issued a *Rule Nisi* under case number J2485/14, interdicting the employees from *inter alia* unlawfully interfering with the respondent's business operations and from intimidating or causing harm to staff, non-striking employees, contractors or visitors. A final order was obtained on 12 December 2013.

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[17] CEPPWAWU on 8 November 2013 wrote to the respondent and advised that the employees would suspend their strike and return to work on 11 November 2013. The tender was however not accepted in the light of the terminations having been effected on 30 October 2013. A dispute was subsequently referred to the MEIBC on 13 November 2013, and when it could not be resolved on 2 December 2013, a certificate of outcome was issued.

<u>The trial proceedings and the issues for determination:</u>

[18] Midstream the trial proceedings, the applicants had sought an amendment to their statement of case, which application the respondent had opposed. The amendment was granted in terms of a judgment delivered on 4 October 2017. As a result of the amendment, the applicants therefore contended that by not paying MEIBC rates from 1 July 2013, the respondent unilaterally changed the terms and conditions of employment of the employees within the meaning of section 64(4) of the LRA.

[19] The respondent called upon 8 witnesses, *viz* Messrs Johan Pieterse, Martin Bloom, Francois Hendrick van Heerden, Shadrack Stander, and Ms Lynn Savage Reid and Ms Sinclair. The applicants relied on the testimony of a single witness, Mr Shadrack Seleke.

[20] In order not to burden this judgment, I do not intent to give a detailed summary of the witnesses' testimony, and propose to deal with that evidence within the context of my analysis of various issues for consideration before the Court, which are;

a) Whether the strike embarked upon by the individual applicants was protected, and if so, whether their dismissal was automatically unfair;

b) If the strike is found to have been unprotected, whether it was pre-meditated or in response to unjustified conduct by the respondent;

c) Whether the dismissal of the individual applicants were an unfair selective dismissal;

d) Whether or not the ultimatums were fair;

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e) Whether the dismissals were for a fair reasons and effected with a fair procedure;

f) Whether the respondent is entitled to compensation in respect of its counterclaim.

Was the strike protected?

[21] Whether the strike in this case was protected or not would depend on *inter alia*, the nature of the issues or the demands that led to it. Section 23 of the Constitution of the Republic safeguards employees' right to strike without any limitation. The provisions of section 64 of the LRA[4] gives effect to the right to strike, as long as certain conditions and/or procedural requirements set out in that provision are met. Even though the Constitution safeguards the right to strike without limitations, the provisions of section 65 of the LRA nonetheless imposes certain limitations on that right and obligations before the right can be exercised[5].

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[4] **64. Right to strike and recourse to lock-out**

(1) Every *employee* has the right to strike and every employer has recourse to lock-out if -

(a) the *issue in dispute* has been referred to a *council* or to the Commission as required by *this Act*, and

(i) a certificate stating that the *dispute* remains unresolved has been issued; or

(ii) a period of 30 days, or any extension of that period agreed to between the parties to the *dispute*, has elapsed since the referral was received by the *council* or the Commission; and after that -

(b) in the case of a proposed *strike*, at least 48 hours' notice of the commencement of the *strike*, in writing, has been given to the employer, unless –

(i) the *issue in dispute* relates to a *collective agreement* to be concluded in a *council*, in which case, notice must have been given to that *council*; or

(ii) the employer is a member of an *employers' organisation* that is a party to the *dispute*, in which case, notice must have been given to that *employers' organisation*; or

[5] **65. Limitations on right to strike or recourse to lock-out**

(1) No person may take part in a *strike* or a *lock-out* or in any conduct in contemplation or furtherance of a *strike* or a *lock-out* if –

(a) that person is bound by a *collective agreement* that prohibits a *strike* or *lock-out* in respect of the *issue in dispute*.

(b) that person is bound by an agreement that requires the *issue in dispute* to be referred to arbitration;

(c) the *issue in dispute* is one that a party has the right to refer to arbitration or to the Labour Court in terms of *this Act* or any other employment law;

(d) …

(2) …

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[22] The respondent's contention was that the strike embarked upon by the individual applicants was not protected and that the dismissal could not be automatically unfair for the following reasons;

22.1 The dispute referred to the MEIBC by the applicants concerned an alleged unilateral change to work conditions of employment, unilateral restructuring, and a demand to consult before implementing the restructuring. Such issues were matters regulated by the MEIBC Main Agreement.

22.2 Any strike action over matters regulated by the Main Agreement was barred and thus unprotected, and accordingly, there was non-compliance with the provisions of sections 64(1), making the strike unprotected under the provisions of 65 of the LRA.

22.3 The payment of wages at the lesser rate than prescribed in the MEIBC Main Agreement did not amount to a unilateral change to terms and conditions of employment.

[23] The applicants' case is that the strike was protected, as the dispute related to unilateral change to their terms and conditions of employment within the meaning of section 64(4) of the LRA. They further contended that;

23.1 Under the provisions of section 64(4) of the LRA read with section 64(3)(e) and (5) of the LRA, if an employer refused to comply with a requirement in terms of section 64(4) to restore the *status quo* or not to implement a change to terms and conditions of employment unilaterally, the employees concerned may strike without waiting for the outcome of conciliation or giving notice of the commencement of the strike as contemplated in section 64(1) of the LRA.

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(3) Subject to a *collective agreement*, no person may take part in a *strike* or a *lock-out* or in any conduct in contemplation or furtherance of a *strike* or *lock-out* –
(a) if that person is bound by –
(i) any arbitration award or *collective agreement* that regulates the *issue in dispute;* or
(ii) any determination made in terms of section 44 by the *Minister* that regulates the *issue in dispute*; or
(b) any determination made in terms of Chapter Eight of the Basic Conditions of Employment Act and that regulates the *issue in dispute*, during the first year of that determination.

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23.2 The respondent's reliance on section 65(1) of the LRA was misplaced as the issue in dispute did not only refer to the reorganisation that may affect the work of the employees working on the machines, or the underpayment of wages, but that it also involved the unilateral implementation by the respondent on 1 July 2013 of a change to the conditions of employment of employees formally employed by Rheem. This it did by not paying them the MEIBC rates, to which they were contractually entitled until an exemption was obtained. The respondent however had only obtained an exemption on 7 April 2014.

23.3 The fact that the Main Agreement dealt with reorganisation and under-payment of wages, did not imply that a dispute about the unilateral change to terms and conditions of employment was a matter contained in the Main Agreement as contemplated in clause 37 of that Agreement.

23.4 In line with authorities referred to[6], it was submitted that given the circumstances and the facts of this case, section 65(1) did not prohibit strike action pursuant to section 64(4) of the LRA, and that the strike being protected, the dismissals were automatically unfair as contemplated in section 187(1)(a) of the LRA.

The requirement to work at different machines. Did it constitute a unilateral change to terms and conditions of employment?

[24] Central to a determination of this issue is whether the demands leading to the referral of the dispute related to matters covered under the provisions of the Main Agreement or not. In the respondent’s view, the dispute concerned the interpretation, application and enforcement of the agreement rather than a unilateral change to terms and conditions, necessitating that the dispute be referred for arbitration under the provisions of section 24 of the LRA.

[25] The dispute referred to the MEIBC by CEPPWAWU was summarised as;

[6] *Monyela v Bruce Jacobs T/a LV Construction* (1998) 19 ILJ 75 (LC) at 82I – 83B; *Mitusa v Transnet Ltd* [2002] 11 BLLR 1023 (LAC) paras 106 and 107

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'Employer unilaterally moves employees to different sections and forcing employees with different rates to work together – restructure'

[26] The outcome sought was the *restoration of the status quo and for the respondent to consult*. The respondent had always maintained that following the section 197 transfer after Rheem was taken over, and also based on its notice of 2 September 2013, all that it did was to assign employees to positions in keeping with the manning requirements of its operations.

[27] For the purposes of a protected strike in respect of disputes referred under the provisions of section 64(4) of the LRA, it is accepted in this case based on the contents of the referral to the MEIBC that the applicants had required the respondent to restore the status quo. I accept further that the applicants did specifically require the respondent to restore the status quo for the period of the conciliation proceedings, but however that they did not issue a strike notice. It was nonetheless correctly pointed out on their behalf that under the provisions of section 64(3)(e) of the LRA, it was permissible for the employees to strike without observing the statutory conciliation and notice requirements.

[28] A determination of whether a unilateral change to terms and conditions of employment took place involves an assessment of whether what is alleged to have been unilaterally amended is indeed a term and condition of employment or a mere work practice. It further involves a consideration of whether the terms and conditions referred to pertained to any contractual entitlement, and whether or not the alleged unilateral changes (to the extent proven), had any effect on the actual contractual terms and conditions or the essential nature of the employees' duties[7]. This is so in that the distinction has its roots in the principle that employees do not have a vested right to preserve their conditions of employment completely unchanged from the moment they are employed[8].

[29] In further making that distinction, this Court in *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU and Others*[9] (In the course of determining

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[7] See Cheadle et al, Strikes and the Law (LexisNexis 2017) at page 62 - 63

[8] *Ram Transport SA (Pty) Ltd v SATAWU and Another* (2011) 32 ILJ 1722 (LC)

[9] [2011] 3 BLLR 231 (LC) at para 36 - 37

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whether employer's proposed introduction of a new shift schedule constituted a unilateral change), held that:

> '…The question remains whether it [the new shift schedule] amounts to a unilateral change to terms and conditions of employment. If the shift schedules comprise terms of employment, they could only be changed by agreement; and if it were to be changed unilaterally, the unions could embark on a protected strike.
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> In *SA Police Union v National Commissioner of the SA Police Services* [2006] 1 BLLR 42 (LC) this court dealt with a very similar question. In that case, SAPS implemented an 8-hour shift system in the place of the prevailing 12-hour system. The trade union objected on the basis that it was a unilateral change to terms and conditions of employment. Murphy AJ commented as follows after having regard to the relevant collective agreement and contracts of employment:
>
>> 'In short, it was not a term of the contract of employment that employees working 12-hour shifts would always be entitled to do so. Without express, implied or tacit contractual rights to such effect, the employees do not have vested right to preserve their working times unchanged for all times. The alternation of shifts does not result in the employees being required to perform a different job thereby entitling them to claim a material breach or alteration in the supposition of the contract. The change in timing does not amount to a change in the nature of the job. The shift system was accordingly merely a work practice not a term of employment.

[30] The Labour Appeal Court also had an opportunity to consider such a distinction in *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA*[10], where the issue was whether an instruction to employees to operate two machines instead of one constituted a unilateral change to terms and conditions of employment. In that case, the LAC held as follows;

> "The evidence of what constituted the terms of employment of the applicants was vague. Most of the applicants did not sign letters of appointment. They were employed as operators in terms of oral contracts

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[10] [1995] 4 BLLR 11 (LAC)

and were trained on machines upon the commencement of their employment. The more recently employed applicants signed letters of appointment in which it was specified that they were appointed as operators and required to perform any task that might reasonably be expected of them.

On those facts it was not a term of the contracts of employment that the applicants would operate only one machine. A description of the work to be performed as that of "operator" should not, in my view, ". . . be construed inflexibly provided that the fundamental nature of the work to be performed is not altered": *Wallis*, Labour and Employment Law, par 45 p7-19.

I agree with the view expressed by the learned author at p7-23 fn 9 that employees do not have a vested right to preserve their working obligations completely unchanged as from the moment when they first begin work. It is only if changes are so dramatic as to amount to a requirement that the employee undertakes an entirely different job that there is a right to refuse to do the job in the required manner. In *Creswell v Board of Inland Revenue* (1984) 2 All ER 713 (ChD) at 720b-d, Walton J said:

> "I now turn straight away to a consideration of the main point on which counsel for the plaintiffs relied. He put his case in this way, that although it is undoubtedly correct that an employer may, within limits, change the manner in which his employees perform a work which they were employed to do, there may be such a change in the method of performing the task which the employee was recruited to perform proposed by the employer as to amount to a change in the nature of the job. This would mean that the employee was being asked to perform work under a wholly different contract and this cannot be done without his consent . . ."

It is a very fine line from counsel's submissions to the submission that employees have a vested right to preserve their working obligations completely unchanged as from the moment when they first begin work. This cannot surely, by any stretch of the imagination, be correct…"

[31] Following the transfer in terms of section 197 of the LRA, it should be accepted on the evidence of Sinclair, that the ex-employees of Rheem were transferred to the respondent on the same terms and conditions as applicable

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to their employ at Rheem. The evidence of Mr Barend Meintjies, the respondent's Production Manager, pertained mainly to the respondents operations. He took the Court through video evidence in regards to the layout of the respondent's facilities and how the production process unfolded in its Tub3 and Contan facilities/divisions. Tub3 is mainly part of the plant (tub plant) where the respondent manufactures certain products (IML – In-mould-labelling'). Contan (bucket plant) on the other hand referred to where manufacturing of tubs and pails of different sizes took place.

[32] Following the transfer, employees from Rheem were absorbed into the Contan division. Mentjies had further testified that once an employee was employed as a packer in Contan, Tubs or any other division within the respondent, the functions were essentially the same within the Group, even if this required having to work on different machines. His contention was that all that the respondent had done was simply to have ex-Rheem employees work at different machines with a view of imparting diverse skills, and to enable them to adjust to the new environment and working system. A further consideration with the realignments was to integrate all the employees in a manner that suited the respondent's operational requirements.

[33] Central to the complaints of the individual applicants employed as Contan packers was that they were asked to work at different machines (Tubs), in circumstances where they were paid different rates to those enjoyed by employees in Tubs. However, it is my view that it cannot be sufficient as argued on behalf of the individual applicants, that they had found it unacceptable that Contan workers were required to work on Tub machines they had never worked on before, whilst they were paid below the MEIBC rates. At the very least, it was required of the applicants to demonstrate how these changes, which were mere work practices, impacted on their contracts of employment or changed the essential nature of their jobs. Their contracts of employment having been transferred, I did not understand their case to be that the respondent could not readjust its operations to suit its operational needs, which included moving employees around different machines whenever so required.

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[34] Having been employed as packers, the Court was not referred to any provision in their contracts of employment, that demonstrated that they would only work on Contan machines. In fact, their original contracts of employment from Rheem at clause 3 described their job description as being general workers and responsible for all other tasks necessary for the conduct of the employer's business as the employer may direct from time to time. Clause 4 of the same contract provided that 'the employee agreed to obey all lawful and reasonable instructions and to perform all such functions as he is directed to perform which falls within his vocational ability without loss of remuneration for his normal work, regardless of whether or not such work fell within the scope of the post to which the employee is appointed'[11].

[35] Furthermore, the applicants had not demonstrated that they had a vested right to preserve their working obligations completely unchanged as from the moment when they were transferred, nor had they demonstrated that the requirements to work on other machines brought about a dramatic change that constituted undertaking a completely different job or role.

[36] It is trite that this court has a duty to ascertain the true or real issue in dispute. In doing so, the court is obliged to look at the substance of a dispute, and not the form in which it is presented[12]. Having heard the evidence of Meintjies in regards to the respondent's operations and what it was that was required of the employees in regards to those operations, the invariable conclusion to be

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[11] Page 46 of the Consolidated bundle of documents; See also *Vector Logistics v Lencoane and Others* (JA 26/11) [2013] ZALAC 31 (4 October 2013) at para 39, where it was held that;

> 'It is significant to note that all these decisions emphasised the fact that there was no contractual right, based either on the employment contract or collective agreement, providing a right to the employee, expressly, tacitly or impliedly, against unilateral change to working terms and conditions. This means, therefore, that if the contracts of employment or the collective agreements provided otherwise, changing the shift patterns or systems would not be regarded as a mere work practice, but a term of employment irrespective of what effect or difference the unilateral change would have on the employee's work.

[12] See Coin*Security Group (Pty) Ltd v Adams & others* (2000) 21 *ILJ* 925 (LAC) at 930B); See also *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another* 4 (2003) 24 ILJ 305 (CC) at para 52, where it was held;

> 'It is the duty of a court to ascertain the true nature of the dispute between the parties. In ascertaining the real dispute a court must look at the substance of the dispute and not at the form in which it is presented. The label given to a dispute by a party is not necessarily conclusive. The true nature of the dispute must be distilled from the history of the dispute, as reflected in the communications between the parties and between the parties and the Commission for Conciliation, Mediation and Arbitration (CCMA), before and after referral of such dispute. These would include referral documents, the certificate of outcome and all relevant communications. …'

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reached is that in the end, the applicants' complaints, irrespective of the nature of their referral, mainly related to the fact that they were not paid the MEIBC minimum rates as prescribed in the Main Collective Agreement, to which they were contractually entitled to until an exemption was obtained.

[37] The dispute in regards to payment of lesser rates was in effect a different component to their claim of a unilateral change to terms and conditions of employment related to alleged restructuring. Any contention however on behalf of the applicants that the requirement that they should work at different machines constituted a unilateral change to terms and conditions of their employment is rejected as being without merit. This was a classic case of changes in the employer's work practices to suit its operational needs, which had no impact whatsoever on the substance of the employees' contracts of service.

[38] To this end, the requirement that the employees should work at different machines did not qualify as a dispute within the meaning of unilateral changes to terms and conditions of employment, which entitled them to embark on a strike under the provisions of section 64(4) of the LRA.

The non-payment of the MEIBC minimum wage rates:

[39] The primary issue therefore in considering whether the strike was protected is whether the failure to pay the MEIBC rates as from 1 July 2013 constituted a unilateral change to the terms and conditions of the individual applicants. It is trite that by virtue of operation of the provisions of section 23 (3) of the LRA, the provisions of the Main Agreement as applicable invariably altered the employees' terms and conditions of employment.

[40] It has been stated that the provisions of section 64(4) of the LRA are concerned with the preservation of the status quo, pending the outcome the conciliation process prescribed by the Act. To invoke the remedy established under those provisions, it was necessary to establish both an existing term and condition of employment, and the fact of a variation of that term and

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condition by the employer, in circumstances where the employee has not consented to the variation[13].

[41] Seleke had confirmed that the ex-Rheem employees were still paid the rates in terms of the exemption obtained by Rheem right into 1 July 2013 after the conclusion of the new main Agreement. The respondent's contentions was that it had not paid the minimum wage rates after 1 July 2013 as it had applied for exemption in August 2013[14]. The application (to pay 65% - 100% of the scheduled rates to all scheduled employees) was only granted on 7 April 2014.

[42] The fact that Rheem had obtained an exemption over the years was not in dispute. As at the time of the transfer in October 2012, Rheem had obtained that exemption, which ordinarily would have expired on 1 July 2013 as confirmed by the respondent's witness, Johan Pieterse, who was the Chief Executive of the Plastics Converters Association of South Africa, an employers' association to which the respondent was a member. This effectively meant that the historical differences referred to by Sinclair and Pieterse between the wage rates of employees employed at Tubs3 and those in Contan even though the grade of work was the same, would have been resolved by the implementation of the new Main Agreement, at least to some degree.

[43] The respondent's witness, Francois Hendrick van Heerden of Solidarity and also the Chairperson of the Exemption Committee, contended that non-payment of the applicable MEIBC wage rate was permissible within the MEIBC rules and policies, pending the decision on the application for exemption. On van Heerden's evidence, it takes the Committee 45 days to process an application for exemption, which application the Unions have a right to object to. He further justified the non-payment of the applicable rate pending the decision on the application, as the practice was meant to avoid having to recoup the money back from the employees once an application

[13] *Cape Clothing Association v Southern African Clothing And Textile Workers Union and Another* (C1006/2011) [2011] ZALCCT 75 (19 December 2011)

[14] The deadline for exemption applications was 31 July 2013 according to a circular issued by the MEIBC on 3 June 2013 at page 71a of the Consolidated Bundle

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was successful. This practice, was further in view of the fact that exemptions if obtained, are valid for a period of one year, (normally from 1 July), and further that under the provisions of clause 23(2)(f) of the Main Agreement, applications for exemptions involving monetary issues could not be granted retrospectively.

[44] Van Heerden had further conceded under cross-examination that parties to the Main Agreement are bound by its provisions in respect of the wage rates applicable from 1 July. He however contended that if an employer wanted to seek an exemption, it did not have to implement the MEIBC wage rate for a period of 30 days whilst it applied for such an exemption. If the employer did not apply for exemption, it was then compelled to pay the MEIBC rates.

[45] In *Staff Association for the Motor and Related Industries (SAMRI) v Toyota of SA Motors (Pty) Ltd*[15], this Court reiterated that any variation to an employee's salary, irrespective of whether it is increased or decreased, amounts to a change in the basic terms and conditions of employment and cannot be effected unilaterally. In *Vector Logistics*, it was held that;

> "The common law position with regard to change in terms and conditions of employment is that an employer may not unilaterally change the terms and conditions of an employee. Such unilateral change is unlawful and the affected employee has an election to either resile from the contract or to sue for damages in terms of the contract. The Act treats unilateral variations of the terms and conditions of employment as a subject for collective bargaining. However, the employees are not deprived of any remedy other than strike action where the employer has unilaterally changed the employment contract."[16]

[46] Under clause 37 of the MEIBC Main Agreement, the Bargaining Council is the sole forum for negotiating matters contained in the Main Agreement. It is further provided in that clause that during the currency of the Agreement, no matter contained in the agreement may be an issue in dispute for the purpose of a strike or lock-out or any conduct in contemplation of a strike or lock-out.

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[15] (1997) 18 ILJ 374 (LC) at 378

[16] *Vector Logistics* at para 36; See also *Monyela & others v Bruce Jacobs t/a LV Construction* (1998) 19 ILJ 75 (LC) at 82J-83A

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[47] To the extent that wages and rates in the MEIBC industry are matters negotiated and agreed at that level, and further to the extent that an exemption from paying minimum wages or rates agreed to in the Main Agreement is a matter regulated under clause 23 of the Main Agreement[17], it is my view that there is merit in the contention made on behalf of the respondent that the provisions of section 65 (1) and 65 (3) of the LRA should find application.

[48] It is accepted that a dispute about a unilateral change to terms and conditions of employment may be one in respect of which a strike may be competent. However, if those terms and conditions ordinarily falls within the ambit of a collective agreement, and where that agreement makes provision for the resolution of such disputes, any strike action embarked upon by employees in that regard would fall foul of the provisions of section 65 (1) (b) of the LRA.

[49] In this case, and to the extent that the provisions of section 64(4) of the LRA were relied upon, it is not clear what *status quo* the employees could possibly have referred to in the light of the fact that what they sought was the implementation of new rates as prescribed by the MEIBC Main Agreement effective from 1 July 2013. Any *status quo* sought to be restored could only have been in respect of the reduced rates, which was the source of discontent. It follows that any demand for the restoration of the status quo in circumstances where the employees' demands related to the implementation of new rates is a clear contradiction for the purposes of section 64(4) of the LRA.

[50] There can be no doubt therefore that since the main issue pertained to the payment of the applicable MEIBC rates, in terms of the provisions of clause 36 (1) of the MEIBC Main Agreement, disputes surrounding *inter alia* the enforcement of the provisions of agreement were to be dealt with under the provisions of clause 36(2) of the agreement, which set out the dispute

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[17] **23 EXEMPTIONS**

1. *General*
   (a) Any person bound by this Agreement may apply for exemption.
   (b) The authority of the Council is to consider applications for exemptions and grant exemptions.

LABOUR COURT

resolution procedure to be followed. Under the provisions of clause 4.2.2 of the agreement[18], the MEIBC is tasked with the monitoring, enforcement and compliance with the provisions of the main agreement.

[51] What the above effectively means is that to the extent that a complaint was lodged with the MEIBC in July 2013, which related to underpayment of the prescribed wage rates for the 2013/2014, that was the proper route to follow as correctly pointed out by Sinclair. An agent of the MEIBC would then have investigated the matter, and failing any resolution, the agent would then have issued a compliance order. Thereafter the matter would then have been referred for arbitration by the MEIBC, for a determination to be made in that regard[19].

[52] In the light of the above, it follows that the question whether the practice as described by van Heerden in regards to the issue of exemptions was contrary to the express provisions of the Main Agreement or not becomes moot. It is trite that a collective agreement being a product of collective bargaining, cannot by all accounts be subordinate to the MEIBC policies and practices. In any event, those were issues to be determined within the context of a dispute

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[18] **4.2.2 Enforcement of Collective Agreements by the Council**

(1) Despite any other provision the council may monitor and enforce compliance with its collective agreements in terms of this clause or a collective agreement concluded by the parties to the Council.

(2) For the purposes of this clause the collective agreement is deemed to include-

(a) any condition of employment of any service covered by the collective agreement

(b) …

(3) The council may refer any unresolved dispute concerning compliance with any provision of a collective agreement to arbitration by another arbitrator appointed by the Council

(4) …

(5) …

(6) …

(7) …

(8) An arbitrator conducting an arbitration in terms of this clause may make an appropriate award, including-

(a) ordering any person to pay any amount owing in terms of a collective agreement

[19] See *Rukwaya and Others v Kitchen Bar Restaurant* (2018) 39 ILJ 180 (LAC); [2018] 2 BLLR 161 (LAC) at para 18, where it was held that;

> 'A bargaining council is empowered in terms of s33A of the LRA to enforce a collective agreement, which it has concluded. The dispute resolution procedure provided for in clause 28(a) of the collective agreement seeks to do precisely that. It is binding on both the appellants and the respondent, and it provides each of them with a remedy which they are obliged to pursue in the event of non-compliance by the other party.'

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referred under the provisions of clause 36(2) of the Main Agreement or at most, under the provisions of section 24 of the LRA.

[53] Furthermore, and in the light of the above conclusions, nothing turned on the evidence of Mr Gordon Angus (The Executive Director of The south African Engineers and Founders Association, an employer's association in the metal industry) in regards to the interpretation of clause 23(2)(f) of the Main Agreement. That clause specifically provides that applications for exemptions involving monetary issues could not be granted retrospectively, which provisions are repeated in the National Exemptions Policy of the MEIBC. This Court in the light of the provisions of section 24 of the LRA does not concern itself with matters of interpretation or application of collective agreements[20].

[54] Further to the extent that it was put to Sinclair under cross-examination that the respondent was in breach of the employees' contracts of service as at 1 July 2013 by paying lower wage rates than prescribed by the MEIBC in the absence of an exemption, the claim would ordinarily be equated to seeking compliance with the provisions of the Main Agreement, which is a matter that could be pursued through the enforcement and compliance mechanisms of the MEIBC, or through other legal means other than a strike.

[55] In conclusion on this issue, it follows from the above that to the extent that the respondent in this case had not paid the employees the prescribed minimum wage rate prior to obtaining the exemption, and further having done so without the express consent of the employees or any discussions with their union, that conduct fell within the realm of a unilateral change to the terms and conditions of employment, which was however not strikable in the light of the dispute

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[20] See *NUCW v Oranje Mynbou en Vervoer Maatskappy Bpk* [2000] 2 BLLR 196 (LC) at paras 8 –9, where it was held that;

> 'Whether a dispute about the "application" of a collective agreement, referred to in section 24(1) of the Act, would include the enforcement of a collective agreement when it is breached, is a further question which needs to be decided.'
>
> Enforcement of an agreement only becomes an issue when there is some form of non-compliance with that agreement. When a party wishes to enforce the agreement it would be, at least inter alia, because it believes the agreement is applicable to the party who is in breach thereof. Therefore a "dispute about the application of a collective agreement" (section 24(1) of the Act) applies to the situation where there is non-compliance with a collective agreement and one of the parties wishes to enforce its terms. Consequently, the CCMA, and not the Labour Court, should entertain disputes arising from the non-compliance with collective agreements.'

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resolution procedures contained in the Main Agreement, and the limitations imposed by the provisions of section 65(1)(a) and (b) of the LRA.

[56] Accordingly, the strike embarked upon by the employees in pursuit of the demand that the respondent should pay the MEIBC wage rates is found to have been unprotected.

The substantive fairness of the dismissal:

[57] In the light of the conclusions reached that the strike was unprotected, section 68(5) of the LRA[21] provides that participation in such a strike, which is misconduct, may constitute a valid reason for a dismissal. It is trite however, that an unprotected strike did not automatically justify a dismissal as the only appropriate sanction. This is so in that a dismissal is manifestly the sanction of the last resort. To that end, there is a need to examine the arguments of both parties as to the matter and conduct of the strike, to test whether a dismissal was proportional to the misconduct[22].

[58] The substantive fairness of a dismissal for participation in an unprotected strike must be considered within the guidelines set out in Item 6 of the Code of Good Practice: Dismissal in Schedule 8. Item 6(1) of the Code provides that the substantive fairness of the dismissal must be measured against:

(i) the seriousness of the contravention of the LRA;

(ii) the attempts made to comply with the LRA; and

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

[59] The seriousness of the contravention of the provisions of the LRA needs to be assessed against the common cause facts, as already outlined somewhere in

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[21] Section 68(5) of the LRA provides that;

> '(5) Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account'

[22] *Hendor Steel Supplies v National Union of Metalworkers of SA and Others* (2009) 30 ILJ 2376 (LAC) at para 8

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this judgment. To reiterate however, CEPPWAWU shop stewards had initially lodged a complaint with the MEIBC related to non-payment of the minimum wage rate. I appreciate that this complaint has got nothing to do with compliance with the provisions of section 64(1) of the LRA. It is however important to the extent that it demonstrates that an attempt was made to resolve the issues in dispute.

[60] A second important consideration however is that it was common cause that a dispute in terms of section 64(4) of the LRA was indeed referred to the MEIBC, *albeit* the employees or the Union in particular, had not issued a strike notice nor waited for attempts at conciliation.

[61] On the whole, even though the strike was unprotected, and further since the applicants had not waited for conciliation or issued a strike notice, it would be incorrect to conclude that the applicants had not made any attempt to comply with the provisions of the LRA. Ultimately, those attempts in my view makes the contraventions of the LRA less serious.

[62] A further consideration in my view in determining the seriousness of the contravention is that CEPPWAWU's stance on the matter throughout was that the strike was protected. I have no reason to doubt that its belief was *bona fide, albeit* erroneous in the light of the background to dispute and the circumstances of the case. This was evident from the referral of the dispute and stance upon the response of the respondent to the referral, despite being advised of the consequences, and its stance during engagement with the respondent upon the commencement of the strike. To this end, even though the strike was unprotected, there is no basis for any conclusion to be reached that applicants' contravention of the provisions of the LRA was serious, or that they had not made any attempts to comply with the provisions of the LRA.

[63] The next issue for determination is whether the strike was premeditated or provoked. The respondent denied that the strike was in response to unjustified conduct on its part, as it did not effect any unilateral change to the employees' terms and conditions of employment.

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[64] In circumstances where a dispute was referred to the MEIBC, irrespective of whether the referral was ill-advised or not, it should be concluded that a strike consequent upon that referral was premediated.

[65] It was submitted on behalf of the applicants that the strike was in response to unjustified conduct on the part of the respondent as it never properly dealt with the concerns raised by the employees in relation to underpayment, and by further failing to address issues surrounding whether an exemption had been obtained for the purposes of paying less than the MEIBC rates. Furthermore, it was contended that the suspension of Molefe when he made attempts to address the issue with the employees aggravated the already heated situation.

[66] It has been stated that as a concept, provocation requires at least some form of wrongful conduct or *mala fides* or material breach of employment conditions or employment contract by the employer or its representatives (management), and that on the whole, some 'turpitude' on the part of the employer is necessary[23]. Whether the strike was provoked or not has to be determined within the context and history of the dispute itself, as the Court must examine the conduct of both the employer and employees, in relation to the matter and conduct of the strike.

[67] The issue of underpayment and the respondent's application for exemption are intrinsically linked. Significant with the shop stewards' complaint is that it was lodged on 11 July 2013, immediately after the new Main Agreement took effect, and before the respondent had submitted its application for exemption. Surely the employees' grievances were legitimate in the absence of an application for exemption at the time.

[68] That complaint was brought to the attention of the respondent, and on 26 August 2013, Pieterse had responded by stating that an exemption application was filed. The MEIBC's attempts on 14 August 2013 to investigate the matter could not take place because the respondent's HR

[23] *SACTWU & others v Filtafelt (Pty) Ltd* (JS263/15) [2017] ZALCJHB 483 (14 November 2017) at para 43

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Manager, who was based in Cape Town, was unavailable. The Agent could thus not gain access to the premises.[24]. In the meanwhile, Pieterse on 26 August 2013 advised the MEIBC in response to the complaint that an application for exemption was before the Regional Council and would be dealt with at some 'later stage'.

[69] The MEIBC's Sheldon Rondganger on 27 September 2013 sent an email to Pieterse to advise on the way forward. In another email to Pieterse, Rondganger expressed his displeasure at the manner with which Pieterse sought to attend to the complaint and further advised him to comply with clause 28 of the Main Agreement[25]. In a response to MEIBC by Pieterse on 2 October 2013, he again confirmed that an application for exemption was submitted, and invited the Council for further discussions on the matter.

[70] On 24 October 2013 employees had held a meeting in what is referred to as 'Green Area". They had without notice, called Meintjies to that meeting, who had in turn addressed the employees in regards to the complaint related to underpayments. Mentjies had informed the employees that the respondent had submitted an application for exemption. He could not however provide any details or produce any proof that indeed such an application was made. All that Mentjies did was to undertake to enquire with the HR department about the matter.

[71] Sinclair under cross-examination could not shed light on the issue of exemption for the Roodekop operations. In fact her evidence pointed to lapses and non-compliance with the exemption provisions as contained in the Main Agreement. I appreciate that the issues surrounding the validity of the application for exemption are not before this Court. It would however be remiss of the Court to ignore the fact that according to Sinclair, an application

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[24] The MEIBC 'Report' on page 71f of the Consolidated bundle.

[25] '**28 AGENTS**

(1) The Council shall appoint one or more specified persons as agents to assist in giving effect to the terms of this Agreement. For the purposes of enforcing or monitoring compliance with this Agreement, as the case may be, an agent of the Council shall have the right to enter and inspect premises, examine records and question the employer and/or his employees in any manner that he deems appropriate, provided that such rights be exercised only as is reasonably required for the purpose of enforcement of, or monitoring compliance with the Agreement'

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for exemption was made in August 2013 by the respondent from its operations in Aeroton in Cape Town and on behalf of all the respondent's regions. Clause 23(2)(a) of the Main Agreement however provides that *'all applications must be in writing and fully motivated and sent to the Regional Office of the Council for the area in which the applicant is located*'. Sinclair under cross-examination confirmed that the MEIBC heard applications per region.

[72] When it was put to Sinclair that the employees and the shop stewards at Roodekop were not made aware of the application, she conceded that she did not speak to those employees or their union representatives about it, even though she assumed Rogers of the respondent might have done so. She conceded the application form, which was made though the Aeroton operations, did not bear the signature of the Union representatives.

[73] Clearly in the light of the above, the application for exemption was not in compliance with the provisions of clause 23, as first, it was not made specifically for the Roodekop operations contrary to the provisions of clause 23 (2 (a) of the Main Agreement, and second, the application, to the extent that it was not discussed with the Union or employees, or signed by any union, was not in compliance with clause 23(2)(c) of the Main Agreement, as the views of the Union were not sought when it was filed, nor was the Union consulted.

[74] An application for exemption from paying prescribed minimum wages has a huge impact on the livelihood of employees, and it is not a matter to be taken lightly. There was a clear responsibility on the part of the respondent to fully engage and consult with the Union over the matter, and to properly appraise the employees on progress in that regard. Meintjies' response to the employees' enquiries on 24 October 2013 was unhelpful.

[75] It was held in *South African Clothing and Textile workers Union and Others v Filtafelt (Pty) Ltd*[26] that;

[26] At para 41

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> 'In *National Union of Mineworkers and Others v Power Construction (Pty) Ltd* the Court dealt with a situation where the employer relied on a provision in Sectoral Determination 2: Civil Engineering Sector SA, which in effect determined that if employees could not work due to inclement weather, they would not be paid for the day not worked. There was a dispute as whether the employer was entitled not to pay the employees on this basis, and the employees embarked upon unprotected strike action because of this. Of relevance to the matter now at hand, the Court said:
>
> > 'It cannot, in my view, be said that the strike was in response to unjustified conduct by the employer. … the second reason — that they wanted management to deal with the grievance regarding the application of the sectoral determination — is an issue that they should have referred to the bargaining council …'
>
> The point that emerges from this *dictum* is that the individual applicants, if they believed that they were either entitled to the increases as of right, or should be paid the increases despite the pending exemption, had alternative avenues open to them. They could have pursued enforcement proceedings of the collective agreement at the council. Or they could have engaged in the exemption application, opposed it, and then exert pressure through the first applicant's direct membership of the council to expedite the determination thereof. None of this was done. There was simply no necessity for the strike.'

[76] I am fully agree with the above. The proviso however is that there must be certainty and transparency about the application for exemption. The union or at least their employees must have been properly consulted and informed of the application, even if they did not agree with it, and the employer had persisted with it.

[77] In this case, the uncertainty and lack of transparency in regards to the application for exemption in especially regards to the Roodekop operations in my view exacerbated matters, as all that the employees were told was that an application had been made, when they were not afforded any proof at the time or any certainties in that regard.

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[78] The above however cannot be said to be unjustified conduct on the part of the respondent for the purposes of Item 6(1)(c) of the Code. I appreciate as already indicated that the respondent was hardly transparent about its application for exemption. The fact however remains that the shop stewards had already raised complaints about the issue of underpayment. CEPPWAWU, which was clearly familiar with the procedures related to applications for exemptions did not raise a whimper, when advised that an application had been made. To the extent that a complaint for non-compliance with the wage rates was lodged, it was for CEPPWAWU to pursue that complaint in order to get answers from both the MEIBC and the respondent, rather than being steadfast on its stance that there was a unilateral change to terms and conditions of employment. The strike could therefore not have been as a result of the respondent's unlawful conduct, in circumstances where the applicants had commenced a process to address their concerns about non-compliance with the MEIBC rates, and where the enforcement and compliance mechanisms of the MEIBC were available to them to address any perception of unlawfulness or non-compliance.

[79] The submission that the strike was further provoked by the suspension of Molefe is also without merit. It was common cause that on 25 October 2013, Molefe was issued with a notice of suspension. The charges preferred against him in a notice issued to him 12 November 2013 related to various allegations of misconduct, to which the respondent was entitled to act upon in accordance with its prerogative to discipline its employees irrespective of their status in the Union. The mere fact that Molefe may have been a shop steward did not insulate him from any disciplinary action by the respondent where the circumstances called for it. It was further common cause that Molefe was subsequently dismissed on account of those charges.

[80] Any further arguments pertaining to the fact that Molefe was not permitted to be at the premises and to assist in diffusing the strike as he was more familiar with the issues did not take the applicants' case any further, as he was already suspended at the time.

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[81] In regards to the items to be considered under Item 6(1) of the Code of Good Practice, I am satisfied that on the whole, the applicants held a *bona fide* belief that the strike embarked upon was protected. Even though the strike was unprotected, the applicants had made reasonable attempts to comply with the provisions of the LRA, and to the extent that there were contraventions of those provisions, these were not on their own serious. Furthermore, having had regard to the conduct of the parties in relation to the strike, I am satisfied that notwithstanding the respondent's lack of transparency in regards to the application for exemption, that conduct on its own cannot be said to have triggered the strike, as there were enforcement and compliance mechanisms pf the MEIBC, which were at the applicants' disposal to the extent that they sought to challenge the exemptions.

The fairness of the ultimatums:

[82] The question whether the ultimatums were fair or not goes to the procedural fairness of the dismissal. Item 6(2) of the code provides that;

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

[83] The minority judgment *Transport and Allied Workers Union of South Africa obo Ngedle and Others v Unitrans Fuel and Chemical (Pty) Ltd Limited* [27] explained the provisions of Item 6(2) as follows;

> '[53] The procedural fairness of a dismissal effected in terms of item 6 of the Code of Good Practice, which concerns dismissals effected in

[27] *Transport and Allied Workers Union of South Africa obo Ngedle and Others v Unitrans Fuel and Chemical (Pty) Ltd Limited* [2016] ZACC 28; 2016 (11) BCLR 1440 (CC); [2016] 11 BLLR 1059 (CC); (2016) 37 ILJ 2485 (CC) at para 53

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response to unprotected strikes, is determined in light of item 6(2) of the Code. Item 6(2) provides that when effecting a dismissal within its ambit, the employer must first contact the strikers' union "at the earliest possible opportunity to discuss the course of action it intends to adopt"; if this step produces no result, the employer may issue an ultimatum. Item 6(2) can therefore be sub-divided into two requirements: first, that the employer should contact the strikers' union; and, second, that the employer must issue an ultimatum prior to effecting the dismissals.

[55] Therefore, the first purpose of item 6(2) is that at the very earliest opportunity a union official should be allowed to make representations on behalf of striking workers (who are not given an opportunity to make representations individually). In this regard, item 6(2) embraces the *audi alteram partem* principle in the context of a strike dismissal under the provisions of the LRA, compelling an employer to engage with the workers' union. Only once it becomes clear that the union's attempts will prove fruitless or merely seek to extend the strike, the employer may issue an ultimatum.

[56] The second stage entails consideration of whether the ultimatum was fair; and, if so, whether the dismissals effected pursuant to the ultimatum were fair. If the ultimatum was unfair, the second question does not arise, namely whether an unfair ultimatum renders the dismissals procedurally unfair. When assessing the fairness of an ultimatum, the factors to be considered are the background facts giving rise to the ultimatum, the terms thereof and the time allowed for compliance.'

[84] In regards to the first requirement, it was common cause that CEPPWAWU was advised of the strike as soon as it commenced on 29 October 2013. Tshabalala, who had not previously dealt with management of the respondent had attended a meeting scheduled for 08h15 on that date, which was also attended by Mentjies and Sinclair amongst other members of management.

[85] It was common cause that when Tshabalala failed to persuade the employees to return to work, he had excused himself from the meeting as he had another engagement to attend to. To this end, I am satisfied that the Union in accordance with the requirements of Item 6(2) of the Code was timeously

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contacted, and as shall be discussed below, it was made aware of the course of action the respondent intended to adopt.

[86] In regards to ultimatums, the minority judgment in *South African Transport Workers Union obo Ngedle and Others v Unitrans Fuel and Chemical* (Pty) Ltd[28] had summarised the purpose of ultimatums as follows;

> "The time period conferred by an ultimatum must be viewed in the context of whether the ultimatum provided an adequate opportunity for the workers involved to engage with its contents and respond accordingly. This is in line with item 6(2) of the Code encompassing the *audi alteram partem* principle, which extends into the terrain of unprotected strike action. Further, the importance of conferring an adequate period of time for both parties to the dispute to "cool-off" must be emphasised. An adequate cooling-off period ensures that an employer does not act in anger or with undue haste and that in turn the striking workers act rationally having been given the opportunity to reflect."

[87] Sinclair's evidence was that prior to Tshabalala leaving to attend to his other engagements, she had asked him to assist in issuing an ultimatum to the employees. Tshabalala had refused, and rightly so, telling her that it was her job and that of management to communicate the ultimatum to the employees. Tshabalala had signed acknowledgement of a receipt of a copy of the ultimatum before he left. Sinclair had followed up the ultimatum by sending a copy to Ramothata by email.

[88] The first ultimatum[29] issued at 09h50 was elaborate, and advised the employees that they were on an unprotected strike. The employees were instructed to return to their workstations within 25 minutes from the time that the ultimatum was served, and that should they fail to comply with the ultimatum, they would face disciplinary action which may lead to a dismissal. The ultimatum further advised the employees that should they comply, they would be indemnified from normal disciplinary proceedings.

[28] At para 65

[29] Page 364 of the Consolidated Bundle of Documents

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[89] Under cross-examination, Sinclair testified that even though the employees were given 25 minutes within which to return to work, at most, she expected them to do so within the time stipulated. She conceded that there was a disagreement between the union and management as to whether the strike was protected or not.

[90] Sinclair's further testimony as supported by her contemporaneous diary[30] was that Tshabalala left the premises at 10h00. She had also asked the shop steward to distribute the copies of the ultimatum and that they had refused. The employees, who were then gathered at the smoking area when confronted with the copies had also refused to take them. Sinclair had nonetheless read the contents of the ultimatum to them, told them of the seriousness of the matter, and left copies on the floor and left. Sinclair conceded under cross-examination that no action was taken against the employees for not complying with the first ultimatum after the 25 minutes had lapsed, and this gave an impression that the threat was not serious.

[91] In regards to the first ultimatum, I am satisfied that its contents were sufficiently clear as further read to the employees as to what was required of them and the consequences to follow should they fail to comply. The time given however to the employees to comply with the ultimatum was clearly insufficient for them to reflect on their conduct, especially in circumstances where Tshabalala had left the premises after signing acknowledgement of receipt of a copy.

[92] At most, Sinclair conceded that the 25 minutes given to the employees was clearly not sufficient, *albeit* she had hoped that it would make the employees reflect on their actions. She had further conceded that to the extent that the ultimatum was not acted upon, this may have created an impression that the threats in the ultimatum were not being taken seriously by the respondent.

[93] The fact however remains that the ultimatum was issued, and its contents were made clear to the employees, even if a conclusion was reached that it

[30] Pages 51 – 55 of the Consolidated Bundle

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could not reasonably have been expected of the employees to properly reflect on their actions and respond appropriately to it.

[94] At about 11h25, a second ultimatum (Titled *'Final Ultimatum'*) was issued, and again Sinclair had read it to the employees and expressed the severity of the situation. The ultimatum reiterated that the employees must be back at their workstations by 14h00. Sinclair again left copies of the ultimatum on the floor. She also sent an email to Ramothata expressing her concerns that Tshabalala had not returned since he left earlier, and further informed him that a second ultimatum had been issued. Tshabalala's response was that he would be available to consult at 15h15 as he was still busy in arbitration proceedings.

[95] At about between 12h39 and 13h25, Tshabalala was at the premises and had expressed concerns about the ultimatums and the fact that the respondent was *'putting a gun to his head'* in regards to having to negotiate the return to work with employees. He further complained about the timeframes outlined in the ultimatum and stated that he was not being given enough time to consult with the employees. When Ramothata arrived at about 15h30, he again reiterated that the strike remained protected. After Ramothata consulted with the employees, they had dispersed and left the premises. Again, the respondent took no action against the employees after the deadline of 14h00.

[96] The second ultimatum was issued in clear and unequivocal terms to the employees. It was read to them and it can be accepted that they were made aware if its contents and the consequences of non-compliance. The union was made aware of the second ultimatum and despite the time it had stipulated, Tshabalala and Ramothata had an opportunity to consult with the employees, particularly since no action was taken by the respondent after the deadline.

[97] It is further my view that the fact that the respondent had not acted on the ultimatum and that the employees had held their meetings thereafter was an opportunity for them to properly reflect on their actions overnight. This was a clear opportunity for both parties to 'cool off'. Irrespective of the differences of

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opinion as to whether the strike was protected or not, and despite the ultimatum not having been acted upon, there was an opportunity for the employees overnight to reflect on the matter.

[98] On 30 October 2013, Sinclair arrived early at the premises and instructed security officers at the main entrance to only allow access to employees who wanted to render their services. She contended that this step was necessitated by reports of intimidation of staff members the previous day. The employees allegedly intimidated had personally reported the incident to Sinclair.

[99] Sinclair had in the morning at 06h30, issued a final ultimatum[31] which copies were posted at the security offices, advising the employees that they had until 10h00 to report for duty failing which they would be deemed to have repudiated their contracts of employment. As she left the security offices where the ultimatum was posted, she had noticed other employees picking up some of the copies and tearing them up. A copy in this regard was also emailed to Ramothata some two hours later at about 08h50. Sinclair knew that Ramothata was to attend to the premises at 10h00.

[100] At 11h00, a letter was then issued to the employees informing them that the company had accepted the repudiation of their contracts of employment due to their participation in the strike, and had also failed to comply with ultimatums issued on both 29 and 30 October 2013. The employees were advised that their contracts were cancelled, but that they nonetheless had an opportunity to present reasons why those contracts should not be terminated.

[101] During her cross-examination, Sinclair confirmed that letters of cancellation of contracts were issued before Ramothata came, whilst she was made aware that he was on his way. She had telephonically contacted Ramothata, who had assured her that he will be at the premises at 10h00. Her contention was that the respondent was concerned because Ramothata had not arrived at the time he was expected the previous as expected notwithstanding the urgency of the matter. Ramothata only arrived at about 13h00. She further confirmed

[31] Page 166 of the Consolidated Bundle

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that the issue of intimidation at the time was not the reason for the dismissal, and that the main reason for the cancellation of the contracts was that the employees had not heeded the ultimatum by 11h00.

[102] In *Mndebele and Others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)*[32], it was held that:

> 'The Code does not suggest how the ultimatum should be distributed or required that it must be in writing. Furthermore, it states that the issuing of an ultimatum is not an invariable requirement. The purpose of an ultimatum is not to elicit any information or explanations from the employees but to give them an opportunity to reflect on their conduct, digest issues and, if need to be, seek advice before making the decision whether to heed the ultimatum or not. The ultimatum must be issued with the sole purpose of enticing the employees to return to work, and should in clear terms warn the employees of the folly of their conduct and that should they not desist from their conduct they face dismissal. Because an ultimatum is akin to a final warning, the purpose of which is to provide for a cooling-off period before a final decision to dismiss is taken, the *audi rule* must be observed both before the ultimatum is issued and after it has expired. In each instance, the hearing may be collective in nature and need not be formal'

[103] In the end, the three ultimatums issued between 30 and 31 October 2013 served the purpose envisaged by item 6(2) of the Code. It was argued that since Sinclair knew that Ramothatha was on his way, she should have at least waited for him to try and convince the employees once more that they should go back to work.

[104] Ordinarily, and in line with *County Fair Foods (Epping), a division of Astral Operations Ltd v Food and Allied Workers' Union and Others*[33], a dismissal for

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[32] (2016) 37 ILJ 2610 (LAC) at para 27

[33] 2018] 8 BLLR 756 (LAC); (2018) 39 ILJ 1953 (LAC); See also *Modise and Others v Steve's Spar Blackheath* 2000 ILJ 519 (LAC) as follows:

> "... 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 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.'"

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failing to heed an ultimatum would be justified. In this case, I am willing to accept that the time period stipulated in the last ultimatum leading to the dismissals was insufficient. The fact remains however that it was a third ultimatum issued in sequence of the events, and should not be read and treated in isolation. Effectively the applicants had 1½ day within which to reflect on their conduct and to consider the contents and consequences that may flow from the ultimatums.

[105] Even if Sinclair had conceded that the failure to act on the first two ultimatums may had created an impression that the respondent was not serious, that in itself did not give the employees a licence to call her bluff. In fact, they had demonstrated this attitude by picking up the copies of the last ultimatum only to tear them up in pieces in a clear sign of defiance and audaciousness.

[106] Of importance in this case is that the Union did not equally take these ultimatums seriously. Ramothata appeared to have adopted an approach of indifference, and failed to treat the matter with the seriousness and urgency it deserved. On the other hand, the respondent was desperate to end the strike. Thus, even if there might be a semblance of precipitousness on the part of the respondent, that itself cannot lead to a conclusion that the final ultimate was grossly unfair.

[107] A further issue for consideration in this regard is whether having waited for Rabothata would have served any purpose. It is appreciated that maybe, just maybe, he might have persuaded the employees to return to work. But this is doubted for the following reasons;

107.1 It was common cause that upon his arrival at 13h00, a meeting was held between the Union and management.

107.2 In that meeting Ramothata raised several complaints which were not really relevant to the resolution of the strike. He had insisted that the strike was protected. In the end however, Ramothata had then indicated that he needed to consult with the employees. Prior to leaving, he had asked whether employees would be taken back whilst discussions continued. Management’s response was that it was not

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prepared to do so at the time, but would get further mandate on the issue. The meeting ended at 16h00.

107.3 On 31 October 2013, Sinclair sent an email to Ramothata confirming that management was still to take a decision as to whether employees should be taken back.

107.4 At some point in the morning, Sinclair called Ramothata to establish whether any progress had been made about speaking to shop stewards and whether he was doing anything, Ramothata's response was to tell her to *'go to hell'*. That evidence remained uncontradicted and essentially sums up Ramothata's attitude.

107.5 It was common cause that after the cancellation of the contracts, employees had continued to gather outside of the premises. Reports of intimidation of other employees seeking to report for duty were received. There were reports of intimidation and assault on employees received on 31 October 2013, including an assault on a pregnant female employee. Sinclair had closely monitored events and had testified that on 2 November 2013, she had observed employees drinking alcohol, with some wielding an assortment of weapons including axes, sjamboks, sticks and hammers. The conduct of the employees had necessitated the respondent approach this Court for an urgent interdict, which was obtained on 5 November 2013 unopposed. As already indicated, the *rule nisi* obtained was confirmed unopposed.

107.6 It was only after a process of selectively taking back some of the employees had started that on 08 November 2013, that Ramothata or the Union, had sent correspondence to the respondent, recording that the strike was suspended, and that the employees would return to work on 11 November 2013.

107.7 Prior to then, no indication was given that Ramothata or the Union was willing to talk with the aim of ending the strike.

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[108] Given the above facts, the probabilities are that having waited for Rabothata before the last ultimatum was acted upon would not have changed anything, as his approach and that of the employees throughout was that the strike was protected. To reiterate, to the extent that it might be said that the respondent acted in haste, such conduct cannot be construed to be grossly unfair, or entirely vitiate the procedural fairness of the dismissals.

The overall fairness of the dismissal:

[109] Item 7 of the Code, to the extent that participation in an unprotected strike is viewed as misconduct, provides guidelines and a consideration of various factors[34] in determining whether the dismissal was fair. Where an employer seeks to rely on misconduct on the part of employees to justify a dismissal even within the course of a strike, the onus remains on the employer in accordance with the provisions of section 192(2) of the LRA, to demonstrate that that dismissal was the appropriate and fair sanction. In *Chemical Workers Industrial Union v Algorax*[35], it was held that;

> "When either the Labour Court or this court is seized with a dispute about the fairness of a dismissal, it has to determine the fairness of the dismissal objectively. The question whether dismissal was fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering the question. In other words, it cannot say that the employer thinks it is fair, and therefore, it is or should be fair."

[110] The facts subsequent to the cancellation of the contracts of employment are fairly common cause. Of importance is to point out that on 1 November 2013, a bulk SMS was sent to some 41 employees advising them that following the cancellation of their contracts, they would be informed when they would be

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[34] Namely,

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
(b) if a rule or standard was contravened, whether or not –
  (i) the rule was a valid or reasonable rule or standard;
  (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
  (iii) the rule or standard has been consistently applied by the employer; and
  (iv) dismissal with an appropriate sanction for the contravention of the rule or standard.'

[35] (Pty) Ltd (2003) 24 ILJ 1917 (LAC); [2003] 11 BLLR 108 (LAC) at para 69

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afforded an opportunity to submit their mitigating factors as to the reason the cancellation of their contracts should be reconsidered.

[111] As at 4 November 2013, the respondent's Sinclair, Stephanie and Monique had started to process some of the forms submitted with mitigating factors. They made an assessment as to which employees to take back based on video footage of the striking employees together, which was viewed with employees' managers. Witnesses (unidentified) were also spoken to.

[112] The process followed was such that based on the mitigating factors submitted, if an employee participated in the strike, he/she would not be taken back. If mitigating factors pointed to employees having been intimidated into participating in the strike, or where there was evidence that some employees had stayed at home during the strike, or where employees called their managers to report that they were scared, they would be taken back.

[113] On 6 November 2013 employees were informed by SMS to submit their mitigating factors in writing if they so wished. On the same day, SMS were sent to 58 employees whose contracts would not be renewed. On 7 November 2013, some employees were granted access into the premises to hand in copies of their mitigating factors. Bulk SMS were sent to employees to remind them to submit their mitigating factors. Notices were further issued to employees notifying them of an opportunity to submit mitigating factors by 8 November 2013. Other employees had also signed 'Notification of intention to resume work following unprocedural industrial action form', confirming that they had taken part in the strike but that they intended to enter the company premises on 30 October 2013 to resume work.

[114] It was common cause that notwithstanding an undertaking by the respondent on 1 November 2013 that employees would be called in on a date and time to be decided to submit their mitigating factors in person, that process was upon advice, abandoned according to Sinclair.

[115] It is accepted that observance of the principle of *audi alterem partem* when contemplating the dismissal of strikers does not necessitate a formal enquiry, and might, depending on circumstances even be satisfied by giving the

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relevant union an opportunity to make written representations why its members should not be dismissed[36]. However, in circumstances where an employer such as in this case undertook to make certain processes available to the employees to consider why they should not remain dismissed after not heeding an ultimatum, and thereafter changes its tune and elects to adopt a different approach, that in my view cannot be fair.

[116] To the extent that the respondent chose to follow the procedure as described above in reinstating or setting aside the cancellation of some of the employees' contracts of employment, *prima facie*, the approach as outlined above in taking back other employees also appears to have been arbitrary and clearly selective.

[117] The applicants' case was that not all employees who had participated in the strike were not taken back. The evidence of Johannes Seleke was that he had participated in the strike and his manager had simply told him to sign a notice indicating his intention to resume work, and he was taken back despite being actively involved in the strike. He was not a member of CEPPWAWU at the time and following his reinstatement, he was subsequently retrenched.

[118] Sinclair's contention was that she was not privy to the facts surrounding Sekele's reinstatement, but had contended that not every employee who was not at work was dismissed, as others chose to stay at home because of the

[36] *Modise & others v Steve's Spar Blackheath* (2000) 21 ILJ 519 (LAC) at 551-552, para [97], where it was held that:

> 'I have no hesitation in concluding that in our law an employer is obliged to observe the audi Rule when he contemplates dismissing strikers. As is the case with all general Rules, there are exceptions to this general Rule. Some of these have been discussed above. There may be others which I have not mentioned. The form which the observance of the audi Rule must take will depend on the circumstances of each case including whether there are any contractual or statutory provisions which apply in a particular case. In some cases a formal hearing may be called for. In others an informal hearing will do. In some cases it will suffice for the employer to send a letter or memorandum to the strikers or their union or their representatives inviting them to make representations by a given time why they should not be dismissed for participating in an illegal strike. In the latter case the strikers or their union or their representatives can send written representations or they can send representatives to meet the employer and present their case in a meeting. In some cases a collective hearing may be called for whereas in others - probably a few - individual hearings may be needed for certain individuals. However, when all is said and done, the audi Rule will have been observed if it can be said that the strikers or their representatives or their union were given a fair opportunity to state their case. That is the case not only on why they may not be said to be participating in an illegal strike but also why they should not be dismissed for participating in such strike.

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intimidation. She contended that only people that had actively participated in the strike were dismissed, and in particular, for their failure to heed the final ultimatum.

[119] In my view, the incident with Seleke demonstrated one incident of arbitrariness and selectivity. The applicants had not presented evidence to demonstrate which of the other dismissed employees were treated in the same manner as Seleke, and how their non-selection was unfair.

[120] It would be therefore be indefensible for the Court to make a general conclusion based on the evidence of Seleke that the non-selection of the other employees was unfair. To that end, it is concluded that the non-selection of the dismissed employees was not unfair.

Conclusions

[121] In *South African Transport Workers Union obo Ngedle and Others v Unitrans Fuel and Chemical* (Pty) Ltd, Zondo J (as he was) in the majority decision held that;

> 'Dismissal as a sanction for misconduct is a sanction of last resort. It has sometimes been referred to as the "death penalty". This is said in the light of the harsh consequences it may have on an employee who is dismissed. For that reason dismissal is only appropriate as a sanction for dismissal in those cases where the misconduct of which the employee is guilty is one that at least the employer considers to render a continued employment relationship intolerable or unacceptable'[37]

[122] Several factors from which an assessment of the fairness and appropriateness of a sanction of dismissal could be determined were also considered by Zondo J[38]. For the purposes of this dispute, the salient conclusions to be reached on the appropriateness of the sanction in the light of the overall circumstances of this case are the following;

[37] At para 173

[38] At para 172

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122.1 The strike was unprotected, and the applicant had a *bona fide, albeit* misplaced or erroneous belief that it was protected. It is accepted that the applicants had made attempts to comply with the provisions of the LRA, and any contravention of those provisions was not serious, but for the consequences of the strike, and the fact that those were not the procedures to follow in the light of the issues in dispute.

122.2 The strike was however clearly premediated and was not in response to any unjustified conduct on the part of the respondent. The strike was over a period of 1½ day before the final ultimatum was acted upon, resulting in financial prejudice as evident from the counterclaim.

122.3 The respondent complied with the provisions of Item 6 (2) of the Code in regards to the issuance of the three ultimatums, which were by all accounts fair. To the extent that the final ultimatum as acted upon by the respondent was not fair, that unfairness did not vitiate the overall procedural fairness of the dismissal.

122.4 Some employees who had participated in the strike and had not heeded the final ultimatum were taken back, and the selection of employees taken back or not evinced a level of arbitrariness. No case however was made as to which of the individual applicants' non-selection was unfair other than general submissions.

122.5 Despite having undertaken to afford the dismissed employees an opportunity to have their mitigating factors considered in person, the respondent for reasons that remained unexplained chose to abandon that fair process, and instead chose to arbitrarily decide on those mitigating factors from the written submissions. This led to a position where as matters stand in these proceedings, it is not known on what basis the employees' mitigating factors were rejected. At most, given the totality and the circumstances of the events that led to the strike, the individual applicants deserved to have been heard to the extent that the respondent had opened that avenue.

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122.6 As evident from the interdict obtained, the 'strike' after the dismissal was violent, and the evidence of Sinclair in regards to having witnessed some of the employees wielding an assortment of weapons was uncontradicted.

[123] In the light of the above factors and conclusions, and further having had regard to the overall circumstances of this case, and the conduct of both the respondent and the applicants 'as to the matter and conduct of the strike', the dismissal of the individual applicants following their participation in the unprotected strike was substantively fair and proportional to their misconduct.

[124] In regards to procedural fairness, and further taking into account the conclusions in regards to the final ultimatum and the failure to afford the employees an opportunity to present their mitigating factors in person as the respondent had initially intended, it is found that the dismissals fell short of procedural fairness.

Remedy:

[125] Given the limited procedural flaws already pointed out, it follows that the only remedy available to the individual applicants is that of compensation. Any amount of compensation to be awarded for a dismissal that is only procedurally unfair is the subject of a discretion to be exercised by the Court. Section 194(1) of the LRA requires that any award of compensation must be just and equitable taking into account all relevant facts and circumstances, but which may not be more than the equivalent of 12 months calculated at the employees' rate of remuneration on the date of dismissal.

[126] In this case, the major procedural flaw related to the respondent's failure to invite the individual applicants to present their mitigating factors in person contrary to its earlier undertaking to do so. I accept that this does not imply that the written submissions in that regard were not considered. At the same time however, once an employer elects to adopt a particular procedure to decide the fate of the employees and however fails to carry that procedure through for reasons that are not clear, this in my view ought to warrant some compensation. In my view, compensation in the amount of two months' salary

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to each of the individual applicants ought to be considered as just and equitable.

The counterclaim:

[127] To the extent that a strike was unprotected, this Court is enjoined under the provisions of section 68(1)(b) of the LRA[39] to order the payment of just and equitable compensation for any loss attributable to the *strike*. The court had had occasion to determine similar claims [40]. In *Rustenburg Platinum*, it was held in regards to the requirements in section 68(1)(b) of the LRA that;

> 'It is manifest that in relation to a strike, three requirements must be satisfied before the question, whether compensation as contemplated in sub-section 1(b) is to be awarded, and if so, in what amount, arise for determination. In the first instance, it must be established that the strike does not comply with the provisions of Chapter IV of the Act. Secondly, the party invoking the remedy must establish that it has sustained loss in consequence of the strike. Thirdly, it must be demonstrated that the party sought to be fixed with liability participated in the strike or committed acts in contemplation or in furtherance thereof. This much is evident from the provisions of sub-section 1(a) which, in its delineation of the nature of the acts which might legitimately form the subject matter of an interdict or

[39] **68 Strike or lock-out not in compliance with this Act.—**

(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction-

(a) …

(b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct, having regard to

(i) whether

(a)(a) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;

(b)(b) the *strike* or *lock-out* or conduct was premeditated*;*

(c)(c) the *strike* or *lock-out* or conduct was in response to unjustified conduct by another party to the *dispute*; and

(d)(d) there was compliance with an order granted in terms of paragraph *(a);*

(i) the interests of orderly collective bargaining;

(ii) the duration of the *strike* or *lock-out* or conduct; and

(iii) the financial position of the employer, *trade union* or *employees* respectively

[40] *Mangaung Local Municipality v SAMWU* [2000] JOL 10582 (LC); In *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* [2002] 1 BLLR 84 (LC); *Buscor (Pty) Ltd v Transport and Allied Workers Union of South Africa and Others, Transport and Allied Workers Union of South Africa and Others v Buscor (Pty) Ltd* (J 2316/10, J1604/10) [2013] ZALCJHB 277 (24 October 2013)

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> restraint, identifies who might be held accountable therefor. The Legislature plainly intended to embrace the same class in relation to the Court's competence to award compensation.'[41]

[128] The purpose of the provisions of section 68(1)(b) of the LRA is not punitive, but it is meant to compensate the employer for losses actually suffered, which places the onus on the employer to prove the extent of the loss attributable to the unprotected strike or conduct in furtherance of the strike. In *Algoa Bus Company v SATAWU & others*[42], this Court held that these provisions require that compensation for unlawful strikes to be "just and equitable". This Court has not readily accepted that a union would always and automatically be held liable for the actions of its members. That much came from *PTAWU obo Khoza Bongani & 1054 others v New Kleinfontein Goldmine[43],* where the Court held that;

> 'While unions cannot escape liability simply because it would be onerous financially, it is important that compensation claims are not used as a device to cripple a union's ability to operate or to deal it a terminal blow. While I am reluctant to allow the union to escape the consequences of pursuing the unprotected strike, I am also concerned that the issue of liability for compensation under section 68(1)(b) was only raised with it after the event, at a stage when PTAWU could not have done anything to minimise its exposure to such liability. Had it been made aware of the potential liability faced at an earlier stage that might well have concentrated the minds of the union leadership to consider more seriously the wisdom of persisting with the strike action.'[44]

[129] It has been concluded in this case that even though the strike was unprotected, there were attempts to comply with the provisions of the LRA, and that the contraventions of the LRA were not serious. It has further been accepted that the strike was premeditated and was not as a result of any unlawful conduct on the part of the respondent. It has however also been accepted that the Union genuinely believed that the strike was protected. The

[41] *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* at 89.
[42] [2010] 2 BLLR 149 (LC)
[43] (2016) 37 ILJ 1728 (LC)
[44] At para 74

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strike as also indicated took place over 1½ day, and it has been accepted that the respondent suffered financial loss.

[130] It is however my view that a claim under section 68(1)(b) of the LRA cannot always be successful even if the actual losses attributable to a strike are proven. A strict approach ought to be adopted in determining whether such claims should be successful, taking into account the effect and impact on the employees' constitutionally guaranteed right to strike.

[131] The circumstances of this case are such that the demands leading to the strike were legitimate (*albeit* not strikable), and flowed from the MEIBC Main Agreement. The strike was not just a mere knee-jerk reaction, and as already pointed out, it related to underpayment contrary to the provisions of the Main Agreement, which affected the employees' livelihood. In circumstances where the respondent had not come out clearly as to the basis of the underpayments at least until the strike had commenced, it would be iniquitous for an order of damages to be made against them or their union, particularly since they have now been dismissed.

[132] It is further my view that in claiming damages, at the very least, and given the fact that the claim arises out of an employment relationship, there should be an obligation on the employer to demonstrate that at least it made attempts to mitigate its loses. This can be through a direct and unequivocal warning to the Union before the strike commences or immediately thereafter that such damages would be sought if the unprotected strikes proceeds or is not ended; or through immediate steps to interdict the strike.

[133] In this case the interdict was not sought immediately upon the strike having commenced. It was obtained long after the dismissal and was merely in relation to the conduct of the dismissed employees. To this end, there is no basis for the claim to be successful.

<u>Costs:</u>

[134] An order of costs is awarded upon a consideration of the requirements of law and fairness. The applicants are partially successful with their claim, and I did

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not understand the respondent's case to be that its relationship with CEPPWAWU has irretrievably broken down as a consequence of the strike. Accordingly, no order as to costs ought to be made.

Order

1. The dismissal of the individual applicants for their participation in an unprotected strike was substantively fair but procedurally unfair.

2. The respondent is ordered to pay to each of the individual applicants listed in Annexure 'A1' to the Notice of the Applicants' Amendment, compensation in the amount of two months' salary calculated at their rate of pay as at their date of dismissal.

3. There is no order as to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: JG van der Riet SC, instructed by Cheadle Thompson & Haysom Incorporated

For the Respondent: G Pretorius SC, instructed by Anton Bakker Attorneys

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